International Centre for Settlement of Investment Disputes
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CERTIFICATE

Plama Consortium Limited

v.

Republic of Bulgaria

(ICSID Case No. ARB/03/24)

I hereby certify that the attached is a true copy of the Award of the Arbitral Tribunal, dated August 27, 2008.

Nassib G. Ziadé
Acting Secretary-General

Washington, D.C., August 27, 2008

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
WASHINGTON, D.C.

IN THE PROCEEDINGS BETWEEN

PLAMA CONSORTIUM LIMITED
(CLAIMANT)

and

REPUBLIC of BULGARIA
(RESPONDENT)

(ICSID Case No. ARB/03/24)

AWARD

Members of the Tribunal
Carl F. Salans, President
Professor Albert Jan van den Berg, Arbitrator
V.V. Veeder, Arbitrator

Administrative Assistant to the Tribunal
Ms. Anne Secomb

Representing Claimant
Mr. Frank H. Penski
Ms. Abigail Reardon
Nixon Peabody LLP
Mr. Ciril Pelovski
Denev & Oysolov Law Office

Representing Respondent
Mr. Ivan Kondov
Head of the Judicial Protection of the Ministry of Finance of the Republic of Bulgaria
Mr. Paul D. Friedland
Ms. Carolyn B. Lamm
Ms. Abby Cohen Smutny
Mr. Jonathan C. Hamilton
Mr. Francis A. Vasquez, Jr.
White & Case LLP
Mr. Lazar Tomov
Tomov & Tomov

Date of dispatch to the Parties: [*August 27, 2008*]

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I. INTRODUCTION

1. The present arbitration arises under the Energy Charter Treaty ("ECT" or the "Treaty"), a multilateral convention whose purpose, according to Article 2 thereof, is to establish a legal framework in order to promote long-term cooperation in the energy sector. In Article 10 of Part III of the ECT, Contracting States undertake the obligation to encourage and create stable, equitable, favorable and transparent conditions for Investments of Investors (as those terms are defined in the ECT -- see Annex) of other Contracting States.

2. The conditions include a commitment to accord at all times to Investments of Investors of other Contracting States "fair and equitable treatment," "the most constant protection and security" and treatment no less favorable than that required by international law. The Contracting Parties further undertake not to impair in any way by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of Investments and to observe any obligations they have entered into with an Investor or an Investment of an Investor of another Contracting State. Article 13 prohibits expropriation "or measures having effect equivalent to [...] expropriation," except in certain circumstances and subject to certain conditions. By Article 17 of the ECT, which is also found in Part III, Contracting States reserve the right to deny the advantages of Part III to a legal entity if citizens or nationals of a third State own or control that entity and if that entity has no substantial business activities in the area of the Contracting Party in which it is organized.[1] Part V of the ECT provides for dispute resolution, and its Article 26 permits, *inter alia*, Investors to resort to arbitration pursuant to the ICSID Convention concerning alleged breaches by a Contracting State of an obligation under Part III.

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[1] Bulgaria denied the protections of the ECT to Claimant, prospectively, from 18 February 2003. See paragraph 21 below and the discussion in the Decision on Jurisdiction, pp. 50 *et seq.*

3. Because they are referred to in the Parties' submissions and in this Award, the texts of the relevant provisions of the ECT are set forth in the Annex to this Award.

II. PROCEDURE

A. Registration of the Request for Arbitration

4. On 6 January 2003, the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") received a request for arbitration dated 24 December 2002 ("Request for Arbitration") from Plama Consortium Limited ("PCL" or "Claimant"), a Cypriot company, with its address at 4 Tenarou Street, Ayios Dometios, Nicosia, Cyprus, against the Republic of Bulgaria ("Bulgaria" or "Respondent"). The two parties together are referred to as "the Parties." The Request for Arbitration invoked the ICSID arbitration provisions of the ECT and the most favored nation ("MFN") provision of a bilateral investment treaty ("BIT") concluded in 1987 between the Government of the Republic of Cyprus and the Government of the People's Republic of Bulgaria ("the BIT"), which allegedly imported into the BIT the ICSID arbitration provisions of other BITs concluded by Bulgaria, in particular the Bulgaria – Finland BIT.

5. The Centre, on 14 January 2003, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ("ICSID Institution Rules"), acknowledged receipt of the Request for Arbitration and, on the same day, transmitted a copy to Bulgaria and to the Bulgarian Embassy in Washington, D.C., USA.

6. There ensued exchanges of correspondence between the Parties and the Acting Secretary-General of ICSID concerning the jurisdiction of ICSID over the Request for Arbitration and its registerability under Article 36(3) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("the ICSID Convention") and ICSID Institution Rules 6 and 7.

7. On 17 April 2003, Claimant filed a Supplement to Request for Arbitration dated 6 April 2003. The Centre acknowledged receipt of the Supplement to

Request for Arbitration on 17 April 2003 and, on the same day, transmitted a copy to Bulgaria and to the Bulgarian Embassy in Washington, D.C.

8. Upon requests from both Parties, the Centre deferred registration. A further postponement of registration was sought by Respondent on 12 August 2003 but was opposed by Claimant.

9. The Request for Arbitration, as supplemented, was registered by the Centre on 19 August 2003, pursuant to Article 36(3) of the ICSID Convention and, on the same day, the Acting Secretary-General, in accordance with ICSID Institution Rule 7, notified the Parties of the registration and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

10. By letter of 12 June 2003, Emmanuel Gaillard and John Savage of the law firm Shearman & Sterling LLP[2] informed the Centre that they had been retained to represent Claimant, replacing Christian Nordtømme in these proceedings. Claimant further advised that it was also represented by Ciril Pelovski of the law firm Denev & Oysolov. On 20 August 2003, Respondent informed the Centre that it had retained as Counsel in the proceedings Paul D. Friedland, Carolyn B. Lamm and Abby Cohen Smutny of the law firm White & Case LLP. By a letter of 25 March 2004, Respondent further indicated having retained Lazar Tomov of the law firm Tomov & Tomov.

B. Constitution of the Arbitral Tribunal and Commencement of the Proceedings

11. Following the registration of the Request for Arbitration by the Centre, the Parties agreed on a three-member arbitral tribunal (the "Arbitral Tribunal" or the "Tribunal"). The Parties agreed that each of them would appoint an arbitrator and that the third arbitrator, who would be the President of the Tribunal, would be appointed by agreement of the Parties. The Parties agreed that the Centre would appoint the President of the Arbitral Tribunal should they fail to agree on the presiding arbitrator.

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[2] Subsequently, Shearman & Sterling was succeeded as Counsel to Claimant by Virginie Colaiuta and, thereafter, by the law firm Nixon Peabody LLP, *see infra*, paragraphs 38 and 45.

16. At that first session of the Arbitral Tribunal held in Paris on 25 March 2004, the Parties reiterated their agreement on the points communicated to the Tribunal in their joint letter of 19 March 2004, and the remainder of the procedural issues on the agenda for the session were discussed and agreed. All the conclusions were reflected in the written minutes of the session, signed by the President and the Secretary of the Arbitral Tribunal and provided to the Parties, as well as all members of the Tribunal. It was agreed that Respondent's objections to jurisdiction would be treated as a preliminary question. A schedule for the filing of memorials and for the holding of a hearing on jurisdiction in Paris on 20 and 21 September 2004 was agreed.

17. Pursuant to the agreed schedule, Respondent filed a Memorial on Jurisdiction on 26 May 2004. In support of its Memorial, Respondent submitted written statements of MM. Rudolph Dolzer, Charles Kerins, Sean McWeeney, Elias A. Neocleous, Timothy O'Neill, Christo Tepavitcharov and Thomas W. Wälde, accompanied by a further copy of Mr. Jean Christophe Vautrin's first declaration.[4] Claimant submitted a Counter-Memorial on Jurisdiction dated 25 June 2004, supported by Mr. Jean Christophe Vautrin's second declaration and a declaration from Mr. Jacques Python. This was followed, on 26 July 2004, by a Reply on Jurisdiction from Respondent, accompanied by statements from MM. Stanislav Ananiev, Alexander D. Boshkov, Elias A. Neocleous, Plamen Oresharski, Todor Marinov Palazov, Tencho Ivanov Tenev, Nikolay Vassilev and Milen Veltchev. Claimant's Rejoinder on Jurisdiction, dated 26 August 2004, supported by Mr. Jean Christophe Vautrin's third declaration, was received by the Centre on 30 August 2004.

18. On 26 July 2004, Respondent submitted to the Arbitral Tribunal a request for the production of documents by Claimant. By letter dated 6 August 2004, Claimant opposed that request. After considering the views of the Parties, the Arbitral Tribunal, on 11 August 2004, issued Procedural Order No. 1 directing Claimant to produce all documents falling within the categories listed in the

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[4] Mr. Vautrin's first declaration had been submitted earlier by Claimant's Counsel at the Tribunal's first session of 25 March 2004.

Order, no later than with the filing of its Rejoinder on Jurisdiction. Claimant filed certain documents with its Rejoinder of 26 August 2004. Further to a request for extension made on 17 August 2004, which was accepted by Respondent, Claimant submitted to Respondent, under cover of a letter dated 6 September 2004, other documents pursuant to the Tribunal's Order. Claimant produced an additional set of documents by letter dated 13 September 2004.

19. An oral hearing on the preliminary question of jurisdiction was held in Paris on 20 and 21 September 2004. Counsel for both Parties addressed the Tribunal. One witness, Mr. Jean-Christophe Vautrin, testified orally for Claimant.

20. On 22 October 2004, Respondent filed a Post-Hearing Submission on Jurisdiction, to which Claimant responded by its Post-Hearing Response on Jurisdiction of 19 November 2004. On 3 December 2004, Respondent filed a Post-Hearing Reply on Jurisdiction.

21. On 8 February 2005, the Arbitral Tribunal rendered its Decision on Jurisdiction. In the operative part, it ruled as follows:

> *A. As to the jurisdictional issues with respect to the ECT:*
>
> *(1) Under Article 26 ECT and the ICSID Convention, the Tribunal has jurisdiction to decide on the merits the Claimant's claims against the Respondent for alleged breaches of Part III of the ECT.*
>
> *(2) Article 17(1) ECT has no relevance to the Tribunal's jurisdiction to determine the Claimant's claims against the Respondent under Part III of the ECT.*
>
> *B. As to the merits of the Respondent's case under Article 17(1) ECT:*
>
> *(1) Article 17(1) requires the Contracting State to exercise its right of denial and such exercise operates with prospective effect only, as it did in this case from the Respondent's exercise by letter of 18 February 2003.*

(2) The second limb of Article 17(1) regarding "no substantial business activities" is met to the Tribunal's satisfaction in favor of the Respondent; and

(3) The Tribunal declines for the time being to decide the first limb of Article 17(1) regarding the Claimant's "ownership" and "control."

C. The most favored nation provision of the Bulgaria-Cyprus BIT, read with other BITs to which Bulgaria is a Contracting Party (in particular the Bulgaria-Finland BIT), cannot be interpreted as providing the Respondent's consent to submit the dispute with the Claimant under the Bulgaria-Cyprus BIT to ICSID arbitration or entitling the Claimant to rely in the present case on dispute settlement provisions contained in these other BITs.

D. The Tribunal rejects the Respondent's application to suspend the proceedings pending the final outcome of the litigation concerning Dolsamex and Mr. O'Neill.

E The arbitration will now move to the second phase, that is, an examination of the parties' claims on the merits.

F. A decision on costs is deferred to the second phase of the arbitration on the merits.

This decision is incorporated by reference into the present award (collectively the "Award").

22. The Parties then agreed on a procedural timetable for the merits phase, which was reflected in Procedural Order No. 2 dated 31 March 2005. On the same date, the Centre sent to the Parties new certified copies of the Decision on Jurisdiction correcting a clerical error at paragraph 55 of the Decision.

23. On 29 July 2005, Claimant filed a Request for Urgent Provisional Measures in accordance with ICSID Arbitration Rule 39, seeking urgent recommendations of provisional measures pursuant to Article 47 of the ICSID Convention. Claimant sought an order recommending that, *inter alia*, (1) Respondent

immediately discontinue and/or cause to be discontinued all pending proceedings and refrain from bringing or participating in any future proceedings before the Bulgarian courts and Bulgarian authorities relating in any way to this ICSID arbitration; and (2) Respondent take no action that might aggravate or further extend the dispute.

24. On 19 August 2005, Respondent filed its Opposition to Claimant's Request for Urgent Provisional Measures, contending that the relief sought by Claimant was unnecessary because Claimant had failed to demonstrate that its rights in this ICSID arbitration would be irreparably harmed without the measures it sought.

25. This was followed by Claimant's Response to Respondent's Opposition to Claimant's Request for Urgent Provisional Measures dated 25 August 2005, and Respondent's Rejoinder to Claimant's Request for Urgent Provisional Measures dated 31 August 2005. A procedural meeting by telephone conference with the Parties' Counsel followed on 1 September 2005, during which the Arbitral Tribunal put various questions to Counsel and discussed the procedure and timetable for rendering the order on provisional measures.

26. On 6 September 2005, the Arbitral Tribunal issued an Order rejecting Claimant's Request for Urgent Provisional Measures in its entirety and reserving its decision on the costs resulting from the foregoing procedure to a later stage of the arbitration.

27. Following Claimant's request of 30 September 2005, the Arbitral Tribunal granted to Claimant a four-week extension of time to submit its Memorial on the Merits and issued, on 6 October 2005, Procedural Order No. 3, which modified the procedural calendar set forth in Procedural Order No. 2 for the filing of submissions on the merits.

28. Accordingly, Claimant filed its Memorial on the Merits on 28 October 2005, supported by the fourth written declaration of Mr. Jean Christophe Vautrin as well as written declarations by Mr. Vladimir Lazarov and Mr. Dimitar Stefanov and expert reports by MM. Robert Duchesne, Nikolay Todorov Dikov and Lyubomir Denev. On 22 December 2005, Claimant sent English translations of some of the exhibits to its Memorial on the Merits and asked

the members of the Arbitral Tribunal to incorporate into their respective copies of the Memorial corrections of some clerical errors therein.

29. On 7 February 2006, Respondent asked Claimant to produce certain documents by 28 February 2006. Although not within the time frame requested by Respondent, Claimant did submit numerous responsive documents but objected to some of Respondent's requests.

30. By e-mail and facsimile of 21 April 2006, Respondent requested an order from the Arbitral Tribunal calling upon Claimant to produce, by 5 May 2006, various documents set forth in its request of 7 February 2006 which Claimant had failed to produce.

31. After further correspondence on this subject between the Parties and considering their respective positions, the Tribunal issued Procedural Order No. 4 on 27 April 2006, directing Claimant to produce to Respondent additional documents.

32. By letter dated 22 May 2006, Respondent requested a modification of the procedural timetable, to which Claimant agreed. On 26 May 2006, the Arbitral Tribunal issued Procedural Order No. 5 to modify, as per the Parties' agreement, certain dates for the filing of submissions in the merits phase set forth in Procedural Order No. 3.

33. Following the execution by the Parties of a confidentiality agreement, Claimant further produced, on 16 June 2006, two confidential documents.

34. On 28 July 2006, Respondent filed its Counter-Memorial on the Merits supported by statements from MM. Kaloyan Vassilev Bonev, Milcho Dimitrov Boyadzhiev, Doncho Brainov, Hristo Dimitrov, Chavdar Georgiev Georgiev, Georgi Ivanov Georgiev, Roumen Georgiev Hristov, Bojko Iliev, Krassimir Vutev Katev, Nikolay Kavardzhikliev, Lyubka Kostova, Nikola Djipov Nikolov, Nikolai Marinov Nikolov, Lyudmil Zhivkov Parvanov, Ognyan Viktorov Petkov, Aksinia Stoyanova Slavcheva, Lilia Nikolova Smokova, Tencho Ivanov Tenev, Tsvetan Tsekov, Maria Lyubenova Tsekova, Nikolay Vassilev and Svetoslav Yordanov and accompanied by legal opinions of Mr. Teodor Antonov Chipev and Professor Metody Markov as well as reports

by Gaffney, Cline & Associates, Navigant Consulting, Inc. and Transacta OOD.

35. By letter dated 10 September 2006, Claimant notified the Tribunal and Respondent that Shearman & Sterling was no longer acting as Claimant's legal Counsel in this arbitration and requested an extension of three months for filing its Reply and such further adjustments to the procedural calendar as would consequently be required.

36. In a letter of 14 September 2006, Respondent objected to this request but urged the Arbitral Tribunal, if it should, nevertheless, grant Claimant's request, to do so only on the condition that Claimant post security in the form of a bond in the amount of no less than USD 2,000,000 against an award of costs in Respondent's favor.

37. On 20 September 2006, the Arbitral Tribunal issued Procedural Order No. 6 in which it (1) agreed in principle to grant a maximum three-month extension of time to Claimant for the filing of its Reply from the date of Claimant's request, (2) urged Claimant to act with the utmost diligence in appointing new Counsel, (3) stated that it would decide the consequent modification of the procedural calendar after discussion with the Parties' Counsel, including Claimant's new Counsel, in a conference call during which the Tribunal would also hear the Parties' arguments regarding Respondent's request that Claimant be ordered to post security for costs, and (4) invited Claimant to submit, by 6 October 2006, any comments it wished to make concerning Respondent's request for security for costs.

38. On 18 December 2006, Claimant informed ICSID that it had appointed new Counsel to represent it in the person of Virginie A. Colaiuta, 25 Boulevard de l'Amiral Bruix, 75782 Paris Cedex 16, France.[5]

39. There ensued correspondence between the Parties and the Arbitral Tribunal in which, among other matters, Respondent requested an increase in the amount of the security for costs that Claimant be ordered to post to USD 9,000,000

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[5] Ms. Colaiuta's address was subsequently changed to 9 rue de Picardie, 75003 Paris, France.

and, in addition, requested that any further proceedings in this arbitration be limited to the oral hearing, contending that Claimant had foregone its right to file any additional written submissions by failing to file its Reply by the deadline fixed in Procedural Order No. 6.

40. It proved difficult to find an early common date for the procedural meeting by conference call envisaged in Procedural Order No. 6. Consequently, the Tribunal organized a meeting in person with the Parties in Paris on 16 February 2007 to discuss Respondent's requests to limit the written phase of these proceedings and to order Claimant to post a bond as security for costs, as well as to fix a time schedule for the future conduct of the arbitration.

41. After hearing presentations by the Parties' Counsel on Respondent's request to limit the proceedings, the Tribunal decided not to grant that request. It communicated that decision to the Parties in writing by Procedural Order No. 8, dated 21 February 2007. The Tribunal next heard the Parties' arguments regarding security for costs. The Parties and the Tribunal then discussed the further steps in these proceedings, the result of which was agreement on a procedural calendar, communicated to the Parties in Procedural Order No. 7 on 21 February 2007. Following the meeting, the Arbitral Tribunal issued Procedural Order No. 9 on 28 February 2007, denying Respondent's request for security for costs. ICSID issued summary minutes of the meeting.

42. Pursuant to Procedural Order No. 7, Claimant made requests to Respondent for the production of documents. With respect to those requests regarding which the Parties could not agree, the Arbitral Tribunal issued Procedural Order No. 10 deciding upon the various document production requests at issue. In an accompanying letter, the Tribunal denied Claimant's request for additional time to file its Reply.

43. By Procedural Order No. 11, the Arbitral Tribunal extended Claimant's time to file its Reply by a few days.

44. Claimant filed its Reply to Respondent's Counter-Memorial on 11 April 2007, together with a second expert report by Mr. Duchesne.

45. In a letter of 25 May 2007, Ms. Colaiuta informed the Arbitral Tribunal that she was withdrawing as Counsel to Claimant. The Tribunal was subsequently

advised that the law firm Nixon Peabody LLP, of 437 Madison Avenue, NY, NY, USA had been appointed by Claimant as its new Counsel.

46. Respondent submitted a Rejoinder on the Merits, dated 27 July 2007, accompanied by written statements of MM. Ivan Iskrov, Alexander Rakov, Nikloay Vassilev and Svetoslav Yordanov, as well as a legal opinion of Mr. Teodor Antonov Chipev, an expert report of Ms. Villy Dashinova-Stefanova, a supplemental expert report of Gaffney, Cline & Associates, a supplemental legal opinion of Professor Metody Markov and a second expert report of Navigant Consulting, Inc.

47. A procedural meeting by telephone conference with the Parties and the Arbitral Tribunal took place on 22 October 2007 for the purpose of preparing the hearing scheduled for January – February 2008 and to address certain other procedural matters. Prior to that conference, the Tribunal circulated to the Parties an agenda and requested the Parties to consult each other with a view to agreeing on a common approach to the agenda's items. The Parties submitted a joint letter dated 18 October 2007 responding to the Arbitral Tribunal's request. Following the telephone conference, ICSID issued summary minutes of the discussion, and the Arbitral Tribunal issued Procedural Order N° 12, dated 30 October 2007, containing its decisions and instructions regarding the matters discussed.

48. On 12 November 2007, Respondent addressed a letter to the Arbitral Tribunal objecting to certain decisions in Procedural Order N° 12. Claimant submitted its comments regarding Respondent's objections in a letter dated 13 November 2007. The Tribunal rendered its decision regarding Respondent's objections on 14 November 2007, which was communicated by ICSID to the Parties.

49. On 8 January 2008, Respondent addressed a letter to the Arbitral Tribunal objecting to the use of a specific exhibit by Claimant in the impending oral hearing. Claimant offered its comments to Respondent's objection by letter of 10 January 2008. The Tribunal rendered its decision regarding Respondent's objections on 11 January 2008, which was communicated by ICSID to the Parties.

50. A hearing on the merits was held at the seat of the Centre in Washington D.C. from 28 January 2008 to 1 February 2008. Counsel for both Parties addressed the Arbitral Tribunal. One witness, Mr. Jean-Christophe Vautrin, and one expert, Mr. Robert Duchesne, appeared for Claimant. Five witnesses, Ms. Aksinia Stoyanova Slavcheva, Minister Nikolay Vassilev, Mr. Svetoslav Yordanov, Mr. Ognyan Viktorov Petkov and Mr. Nikola Djipov Nikolov appeared for Respondent, as well as two experts, Ms. Zoë Reeve of Gaffney, Cline & Associates and Mr. Brent Kaczmarek of Navigant Consulting, Inc. All witnesses and experts were cross-examined by opposing Counsel and re-examined by Counsel for the Party presenting them. ICSID issued summary minutes of the hearing on 13 February 2008.

51. On 20 March 2008, both Parties made written Post-Hearing Submissions.

52. Final oral argument was made by Counsel for the two Parties at a hearing in Washington, D.C. at the seat of the Centre on 14 April 2008.

53. Following the hearing for oral argument, both Parties filed their claims for costs in written submissions dated 21 May 2008. Each Party filed written comments regarding the cost submission of the other on 4 June 2008.

54. The Arbitral Tribunal pronounced the proceedings closed on 9 June 2008 according to ICSID Arbitration Rule 38(1).

III. SUMMARY OF THE DISPUTE

55. The following is a summary of the dispute in the present case. Additional facts appear in Chapters IV and V, "Discussion of the Issues," *infra*. The facts set forth in this Award are those which the Tribunal determines to be most relevant to its decisions on the Parties' respective cases.

A. The Refinery's Acquisition

56. Prior to its privatisation in 1996, Plama AD, which later changed its name to Nova Plama AD ("Nova Plama"), was a Bulgarian 100% State-owned joint stock company which owned an oil refinery ("the Refinery") in Bulgaria. On 5 September 1996, Bulgaria privatized Nova Plama and sold 75% of its shares to EuroEnergy Holding OOD ("EEH") (the "'1996' or 'First' Privatization

Agreement", Claimant's Exhibit ("C's Exh.") 177). In October 1997, EEH increased Nova Plama's capital, after which EEH held 96.78% of the company's outstanding and issued share capital.

57. A year later, Claimant – then known as Trammel Investment Limited – purchased from EEH all of EEH's 49,837,849 shares of Nova Plama, which represented that 96.78% shareholding. The share purchase agreement, which was subject to the consent of the Bulgarian Privatization Agency, was concluded on 18 September 1998 (C's Exh. 128). The agreement was amended on 18 December 1998 (C's Exh. 182).

58. Negotiation for the purchase of Nova Plama shares started at the end of 1997 when Mr. Jean-Christophe Vautrin, who was then working at André & Cie ("André"), a Swiss multinational company involved in trading, project and trade financing, energy and transportation, was contacted by Mr. Boni Bonev of Banque Internationale pour le Commerce et le Developpement ("BICD"). Mr. Bonev mentioned that PriceWaterhouseCoopers ("PWC") had approached the BICD on behalf of EEH, which was seeking to obtain trade financing facilities for the Refinery (see Claimant's Counter-Memorial on Jurisdiction, para. 49; Respondent's Counter-Memorial on the Merits, para. 15).

59. At around the same time, Mr. Vautrin was also approached by the Central Wechsel und Creditbank, which expressed its willingness to facilitate financing for the Refinery, provided, *inter alia*, that it received a counter-guarantee from various partners, including a lubricant oil specialist. Consequently, Mr. Vautrin contacted Mr. Harald Svindseth from Norwegian Oil Trading AS ("NOT"), a company that specialised in the distribution and fabrication of lubricants in emerging markets (see Claimant's Counter-Memorial on Jurisdiction, para. 49).

60. While André and NOT were not willing to provide financing to EEH because they doubted its trustworthiness, they expressed an interest in acquiring EEH's shares in Nova Plama. Although negotiations broke down in February 1998, they resumed later that year (see Claimant's Counter-Memorial on Jurisdiction, para. 52; Respondent's Counter-Memorial on the Merits, para. 17). As a result, on 18 August 1998, NOT and André entered into a

Memorandum of Agreement with the Privatization Agency (also referred to as the "Memorandum of Understanding"), which was subsequently amended on 21 September 1998 (Respondent's Exhibits ("R's Exhs.") 664, 671), by which the Privatization Agency, in accordance with Article 22 of the First Privatization Agreement, gave consent for the sale and transfer of all shares of Nova Plama to a company presented by NOT and André, provided the satisfaction of a number of conditions stated therein was assured.

61. These conditions, as amended on 21 September 1998, included *inter alia*, (i) evidence of financial resources to resume the operation of the Refinery; (ii) an agreement with the trade unions of Nova Plama; (iii) an agreement with the main creditors of Nova Plama; and (iv) an agreement with the Privatization Agency to "*take over any and all purchaser rights*" in accordance with the First Privatization Agreement (R's Exhs. 664, 671).

62. On 5 October 1998, Claimant submitted a letter from the Central Wechsel und Creditbank stating that a USD 8 million facility "*for start up and operation of Plama refinery is being organised with the guarantee of André & Cie S.A and Norwegian Oil Trading a.s.*" (R's Exh. 672). On 11 October 1998, PCL signed an agreement with Nova Plama's employees (R's Exh. 673); and, on 26 October 1998, PCL and various creditors of Nova Plama entered into a Debt Settlement Agreement (R's Exh. 675).

63. Finally, on 17 November 1998, Claimant and the Bulgarian Privatization Agency entered into an agreement ("the Second Privatization Agreement," R's Exh. 676) specifying, *inter alia*, the obligations taken over by Claimant under the First Privatization Agreement and indicating that the date of entry into force would be the date of transfer of Nova Plama shares from EEH to PCL .

64. By letter dated 23 November 1998, the Privatization Agency informed EEH and PCL that the conditions stipulated by the Memorandum of Agreement had been met and that, consequently, the Privatization Agency gave its final consent to the transfer of shares (R's Exh. 677). Following approval by the Privatization Agency, the transfer of shares took place on 18 December 1998.

65. Following a Bulgarian court decision in 2004 invalidating the 1997 capital increase, Nova Plama's registered share capital reverted to the original number

of shares, so that Claimant then owned 75% of Nova Plama's shares (C's Exh. 183, note 14).

B. The Refinery's Operation and the Bankruptcy

66. The Refinery's key industrial asset was a lubricants manufacturing unit which had processed base-oils produced by the Refinery into a wide range of industrial and consumer lubricants which were used as raw materials for lubricants at the Refinery or by third party blenders. Nova Plama also had its own power plant, with a capacity for sales of excess electric power to the local grid.

67. Nova Plama ceased operations in 1996, while it was still State-owned, due to poor economic conditions and, during EEH's ownership, production was never resumed (Hearing Transcript ("H. Tr."), Day 1, 28 January 2008, p. 28 at lines 20 *et seq*, p. 85 at lines 14 *et seq.*). On 10 June 1998, Bulgaria's State Fund for Reconstruction and Development initiated insolvency proceedings against Nova Plama (C's Exh. 167). It was while the insolvency proceedings were underway that EEH agreed, with the consent of the relevant Bulgarian authorities, to sell its shares in Nova Plama to Claimant and that the Second Privatization Agreement was concluded.

68. The Refinery re-commenced operations in January 1999, shortly after its acquisition by Claimant, but shut down again in early April 1999 (Claimant's Memorial on the Merits, paras. 37 and 156; H. Tr., Day 1, 28 January 2008, pp. 50 *et seq*. and 202 *et seq.*; R's Exh. 376; Respondent's Counter-Memorial on the Merits, paras. 46 *et seq.*). Claimant and Nova Plama submitted to the Pleven District Court a Recovery Plan dated 5 May 1999, which had been negotiated with Nova Plama's creditors and other interested parties (including the Bulgarian Government). The Court approved this Recovery Plan and terminated Nova Plama's bankruptcy proceedings by decision of 8 July 1999 (R's Exh. 409). In August 1999, Nova Plama's operations resumed, but only until December 1999, when the Refinery was shut down for good (Claimant's Memorial on the Merits, para. 156; Respondent's Counter-Memorial on the Merits, para. 53; H. Tr., Day 1, 28 January 2008, p. 59, lines 11 *et seq.*, p. 69 lines 3 *et seq.*). Discussions ensued among the various interested parties to get

the Refinery back into operation, all of which failed for reasons which are at the heart of the present dispute between the Parties.

69. It should be noted that, as a provisional measure, during the 1998 insolvency proceedings, the bankruptcy court had appointed two provisional syndics or trustees in bankruptcy on 25 June 1998, Syndic Penev and Syndic Todorova (R's Exh. 898); their appointment was extended by the court's decision to open bankruptcy proceedings on 29 July 1998.

70. By decision of 18 May 1999, the Pleven District Court appointed Mr. Penev as a permanent syndic (R's Exh. 900).

71. In July 2005, creditors of Nova Plama re-opened the bankruptcy proceedings, a decision reversed by order of the Bulgarian Supreme Cassation Court of 27 December 2005 (R's Exh. 572). Upon re-filing by the creditors of their applications, the Pleven District Court re-opened the bankruptcy proceedings on 28 April 2006 (R's Exh. 966). Nova Plama underwent liquidation and, on 18 June 2007, its assets were sold to Highway Logistics Center ECOD for approximately USD 30.6 million (R's Exh. 1036; Second Navigant Report, p. 31; H. Tr., Day 1, 28 January 2008, p. 20, lines 3 *et seq.* and p. 73, lines 17 *et seq.*; Respondent's Rejoinder on the Merits, para. 8d).

72. Claimant alleges that the Bulgarian Government, the national legislative and judicial authorities and other public authorities and agencies deliberately created numerous, grave problems for Nova Plama and/or refused or unreasonably delayed the adoption of adequate corrective measures. These actions and omissions, according to Claimant, caused material damage to the operations of the Refinery and have had a direct negative impact on the reputations and market values of the respective Plama Group companies. Bulgaria's actions and/or omissions violate the ECT, to which both Bulgaria and Cyprus are parties.[6]

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[6] Bulgaria ratified the ECT on 15 November 1996 and Cyprus on 16 January 1998.

C. The Dispute

73. It is Claimant's case that, in violation of its obligations under the ECT, Bulgaria has failed to create stable, equitable, favorable and transparent conditions for Claimant's investment in Nova Plama; failed to provide Claimant's investment fair and equitable treatment; and failed to provide Claimant's investment the most constant protection and security. Bulgaria has subjected Claimant's investment to unreasonable and discriminatory measures, breached its contractual obligations *vis-à-vis* Claimant, and has subjected Claimant's investment to measures having an effect equivalent to expropriation. Bulgaria's actions have, Claimant contends, deprived PCL of its chance to make its investment in Nova Plama successful and profitable (Claimant's Reply on the Merits, para. 44). In its Request for Arbitration, Claimant also submits that Respondent had breached its obligations under Article 10(12) of the ECT. It claims compensation for all of these breaches.

74. Respondent denies Claimant's allegations.

75. A statement of the Parties' respective positions on the issues is set forth in Chapters IV and V of this Award, in which the Tribunal examines Bulgaria's alleged breach of its obligations under the ECT and the Parties' respective positions. Before that analysis, the Tribunal will address, as a preliminary matter, the issues that were left unresolved in the Decision on Jurisdiction: Claimant's 'ownership' and 'control' and the allegations on misrepresentation by Claimant.

76. While the Tribunal will not elaborate each and every one of the Parties' arguments with respect to each issue, it has submitted all arguments to exhaustive examination. It will confine itself in the following discussion to those issues which it considers most relevant to the decisions it must make.

IV. PRELIMINARY DISCUSSION: CLAIMANT'S 'OWNERSHIP' AND 'CONTROL' AND THE ALLEGATIONS OF MISREPRESENTATION

77. In the operative part of the Decision on Jurisdiction, quoted at paragraph 21 above, two matters were reserved for decision at a later stage: First, the question whether Claimant is a legal entity owned or controlled by citizens or nationals of a State Party to the ECT – this is a question regarding the first

limb of Article 17(1) of the ECT (see Decision on Jurisdiction, paras. 170-178 and 240(B)(3)); and second, the question whether Claimant has misrepresented or willfully failed to disclose to Respondent Claimant's true ownership (see Decision on Jurisdiction, paras. 126-131 and 228-230). These two questions will be examined in the present Section.

78. It is important to note that, in its Decision, the Tribunal made clear that none of these issues affected its jurisdiction and that, consequently, it joined them to the consideration of the merits of the case (see Decision on Jurisdiction, paras. 151 and 229-230 and paras. 130-144 *infra*). A third question deferred in the Decision on Jurisdiction to this second phase of the arbitration, that of costs, is dealt with in Chapter V. F. below.

A. Is Respondent Entitled to Deny the Advantages of Part III of the ECT to Claimant under Article 17(1)?

79. Article 17 of the ECT provides:

> *Each Contracting Party reserves the right to deny the advantages of this Part [Part III] to:*
>
> *(1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized; . . .*

80. Under Article 17(1) of the ECT, Respondent can refuse to afford the protections of Part III of the ECT to Claimant if the latter has no substantial business activities in the State Party to the ECT where it is incorporated and if it is not owned or controlled by nationals of a Contracting Party. Both conditions must be met before a Contracting State may invoke Article 17(1). Both Parties accepted that ownership or control may be direct or indirect.

81. Claimant is incorporated in Cyprus. Cyprus is a party to the ECT. Claimant has acknowledged that it does not have significant business activities in Cyprus (Claimant's Rejoinder on Jurisdiction, footnote 49).

82. The question then arises whether Claimant is owned or controlled by a national or another Contracting Party. The burden of proof on this issue lies with Claimant (C's Exh. 3, p. 18, para. IV section 3).

83. Mr. Vautrin is a French national and, therefore, a national of a Contracting Party (France being a party to the ECT). Mr. Vautrin claims that he indirectly owns and controls 100% of the shares of PCL.

84. As previously stated (para. 57 *supra*), as a result of the Second Privatization Agreement, PCL became the owner of 96.78% of the shares of Nova Plama. At the time, Plama Holding Limited ("PHL"), another Cyprus company, was the beneficial owner of 100% of the shares of PCL (C's Exhs. 41, 42, 43, 93 and 94). Subsequently, PCL issued additional shares to EMU Investments Limited ("EMU"; C's Exhs. 51, 52 and 95), a company incorporated in the British Virgin Islands (C's Exh. 53). As a consequence, PHL owns 20% of the shares of PCL and EMU, 80%. On 13 September 1998, PHL issued 500 shares to Mediterranean Link (Nominees) Limited and 100 shares to Mediterranean Link (Trustees) Limited, both acting as nominees of EMU. PHL also issued 400 shares to Mediterranean Link (Trustees) as nominee of NOT (C's Exhs. 47, 48 and 49). On 26 October 1998, these 400 shares were transferred from Mediterranean Link (Trustees) Limited, as nominee of NOT, to Mediterranean Link (Trustees) Limited, as nominee of EMU (C's Exh. 50). Thus, since 26 October 1998, EMU owned 100% of the shares of PHL. The capital of EMU is represented by 60 bearer shares (C's Exhs. 54 and 74), 30 of which are said by Claimant to be held in trust for Mr. Vautrin by Mr. Per Christian Nordtømme and 30 of which are said to be held in trust for Mr. Vautrin by Mr. Tom Eivind Haug (see affidavits of MM. Nordtømme and Haug, C's Exhs. 57 and 58, and statements of Mr. Vautrin).

85. Respondent contends that the evidence produced by Claimant is not sufficient to establish Mr. Vautrin's indirect ownership or control of PCL. Among other matters, Respondent has produced documents which indicate that two companies incorporated in the Seychelles, Allspice Trading Inc. ("Allspice") and Panorama Industrial Limited ("Panorama") owned and may still own EMU, and that Panorama agreed to pledge 30 bearer shares in EMU to an undisclosed financial arranger (Respondent's Post-Hearing Submission on

Jurisdiction paras. 41 *et seq.*; Exhs. 57 and 58 to Respondent's Post-Hearing Submission on Jurisdiction). However, Mr. Vautrin claims that the transaction underlying the pledge agreement whereby Panorama and Allspice each expected to obtain ownership of 30 bearer shares was never completed and that the pledge agreement was useless, incorrect and not valid. In any event, Mr. Vautrin testified that Allspice and Panorama were owned indirectly by him (Claimant's Post-Hearing Response on Jurisdiction, para. 20; Exhs. 80 and 81 to Respondent's Post-Hearing Submission on Jurisdiction).

86. The contentions of the Parties regarding the application of Article 17(1) of the ECT were fully developed during the jurisdictional phase of this arbitration and will not all be repeated here. Only those arguments most relevant to the Tribunal's decision are here considered.

87. Respondent's contention, essentially, is that Claimant has failed to prove that it is a legal entity owned or controlled by citizens or nationals of a Contracting Party to the ECT within the meaning of Article 17(1) of the ECT and, therefore, is not entitled to the benefits of Part III of the ECT. The evidence, Respondent says, shows that PCL was and is owned by EMU, which is not a national of an ECT Contracting Party. According to Respondent, Claimant has failed to prove with credible evidence that Mr. Vautrin ultimately owns or controls EMU. Therefore, pursuant to Article 17(1), its claims are inadmissible.

88. Claimant rejects Respondent's argument that it is not entitled to the benefits of Part III because of Article 17(1), stating that Mr. Vautrin is a national of France, a Contracting Party to the ECT, and owns and controls the company, EMU, which in turn controls PHL, which controls Claimant.

89. In its Decision on Jurisdiction, the Arbitral Tribunal decided that Article 17(1) of the ECT has no relevance to the Tribunal's jurisdiction to determine Claimant's claims against Respondent under Part III of the Treaty (para. 21 *supra*). It confirms this decision. The Tribunal will, therefore, examine Respondent's arguments concerning the ownership and control of PCL in order to determine whether they justify a denial of the benefits of Part III to

Claimant. As already indicated, the burden of proof to establish ownership and control is on Claimant.

90. As the Tribunal stated in its Decision on Jurisdiction, "*Mr. Vautrin's evidence as to his ultimate ownership and control of the Claimant is not only largely unsupported by contemporary documentation but . . . is materially inconsistent with parts of that documentation and also contradicted by other statements apparently attributable to Mr. Vautrin...*" (para. 177). On the other hand, the Tribunal noted that it did not wish to reject his evidence adduced at the jurisdictional hearing at that stage of the proceedings (para. 178). During the merits phase and at the Final Hearing, the Parties made further submissions on all the evidence submitted, including Mr. Vautrin's numerous statements and oral testimony. The Tribunal has reached the following conclusions on these disputed matters.

91. As seen above, 20% of PCL's shares are owned by PHL, another Cyprus-incorporated company (para. 84 *supra*) and 80% of PCL's shares are held by EMU. EMU owns 100% of PHL's shares. Mr. Vautrin's testimony and the affidavits of MM. Nordtømme and Haug indicate that the latter each hold half of EMU's shares in trust for Mr. Vautrin. The record also contains documents or affidavits from other persons acting for the companies concerned to the effect that they were always acting pursuant to instructions received from Mr. Vautrin. André and NOT have written that they were not shareholders at the time of the Second Privatization Agreement (Exhs. 20 and 23 to Mr. Vautrin's Third Declaration). Moreover, when testifying before the Tribunal and in his witness statements, Mr. Vautrin demonstrated an intimate knowledge of the structure and affairs of the companies concerned, which lend credence to Claimant's contention that he does own or control them.

92. As for the evidence introduced by Respondent that the shares of EMU were transferred to two Seychelles companies, Panorama and Allspice, the Arbitral Tribunal accepts Mr. Vautrin's testimony that the transactions, which were contemplated, were never in fact consummated and that, in any event, he was and remains the ultimate owner of the shares of those two companies.

93. The Arbitral Tribunal has also considered the fact that there is litigation pending in Switzerland, discussed in the Decision on Jurisdiction, in which a company, Dolsamex S.A., and Mr. Timothy O'Neill claim ownership of PCL. However, until that litigation is completed, those claims remain just that: mere claims with allegations that cannot and do not affect the ownership or control of PCL.

94. The Arbitral Tribunal accepts Mr. Vautrin's testimony. Moreover, without losing sight of the fact that Claimant bears the burden of proof on this issue, the Arbitral Tribunal has not found Respondent's attempt to cast doubt on Mr. Vautrin's ownership and control of PCL convincing. Respondent has not been able to show to the Arbitral Tribunal's satisfaction that the evidence produced by Claimant as to its ownership is wholly unreliable nor has it introduced cogent evidence as to who is (or are) the persons or entities who own or control the company, other than Mr. Vautrin.

95. In these circumstances, the Arbitral Tribunal decides that Mr. Vautrin owns and controls PCL. Since Mr. Vautrin is a French national (Exh. 1 to Mr. Vautrin's First Declaration, 25 March 2004), and France is a Contracting Party to the ECT, Respondent cannot rely on Article 17(1) of the ECT to deny to PCL the benefits of Part III of the Treaty.

B. Misrepresentation

1. Parties' Positions

96. Respondent, at the jurisdictional hearing, in its Counter-Memorial on the Merits, Rejoinder on the Merits and Post-Hearing Submission on the Merits, raises objections to jurisdiction over and admissibility of Claimant's claims. It says that Claimant obtained its investment in Nova Plama via misrepresentations in violation of Bulgarian law, which is, therefore, void *ab initio* under the Privatisation Act and voidable under the Bulgarian Obligations and Contracts Act. Accordingly, Claimant does not own the investment and did not acquire control of it in accordance with Bulgarian law. As a consequence, there is no "Investment" within the meaning of Article 1(6) of the ECT, and hence the Arbitral Tribunal lacks jurisdiction over Claimant's claims. Even if the Tribunal were to conclude that it did have jurisdiction,

however, Claimant having obtained its investment by unlawful means would render its claim inadmissible.

97. In the Decision on Jurisdiction, the Tribunal concluded that Respondent's allegations on misrepresentation did not deprive it of jurisdiction in this case and, in light of the serious charges raised, the Tribunal decided to examine these allegations during the merits phase.

98. In its Counter-Memorial on the Merits, Rejoinder on the Merits and Post-Hearing Submission on the Merits, Respondent insisted that obtaining the investment via misrepresentation in violation of Bulgarian law made Claimant's claims inadmissible and, in any event, such misrepresentations defeated its claims on the merits. Since the protections provided in Articles 10 and 13 of the ECT can only apply to an Investment made in accordance with law, Claimant cannot seek the protections of the ECT for that investment, having obtained it in violation of international and Bulgarian law.

99. In addition, Respondent pointed out that Bulgaria denied Claimant the advantages of the ECT's substantive protections prospectively from 18 February 2003. Consequently, to the extent that Claimant seeks to present claims in these proceedings as to alleged violations by Respondent of ECT obligations after that date (*e.g.*, claims relating to the re-opened bankruptcy proceedings against Nova Plama in 2005 and claims regarding Varna Port based on facts arising after 18 February 2003), those claims are inadmissible.[7]

100. In support of its allegation of misrepresentation, Respondent contends that Mr. Vautrin and others representing Claimant during the negotiations for the acquisition of Nova Plama consistently represented to the Bulgarian Privatization Agency and others that Claimant was a consortium owned by two large commercial entities, André and NOT. According to Respondent, after these entities withdrew their interest in the investment, Mr. Vautrin intentionally concealed that fact and the fact that he was the sole owner of

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[7] This argument is no longer relevant, since in this Award the Arbitral Tribunal has decided that Bulgaria cannot deny the benefits of Part III to Claimant on the basis of Article 17(1) of the ECT, see paragraph 95 *supra*.

Claimant. Although Mr. Vautrin contends that he informed someone at some point within the Bulgarian Government of André's and NOT's withdrawal, Respondent asserts that this remains unproven.

101. Respondent says that Claimant was obliged to obtain the consent of the Privatization Agency to its purchase of EEH's shares in Nova Plama. This was a requirement of EEH's 1996 Privatization Agreement and the Bulgarian Privatization Act. Respondent says that Claimant procured the Privatization Agency's consent by means of misrepresentations as to Claimant's actual ownership, in violation of Bulgarian law. The consent thus obtained was null and void under Bulgarian law. According to Respondent, because the consent of the Privatization Agency was a legal prerequisite to Claimant's purchase and also a legal prerequisite to the lawfulness and effectiveness of the Share Purchase Agreement between Claimant and EEH (pursuant to which Claimant acquired the shares in Nova Plama that it claims as its investment), Claimant neither owns nor acquired control of its investment in accordance with Bulgarian law and the ECT.

102. Respondent cites Article 5(1) of the Bulgarian Privatization Act "*...[t]ransactions for acquisition under the Act conducted through a fictitious party or by an unidentified proxy shall be deemed null and void*" and states that Claimant misrepresented its ownership and misled the Privatization Agency within the meaning of Article 5(1) in order to obtain the latter's consent to PCL's acquisition of Nova Plama, thus rendering that consent null and void *ab initio*.

103. Respondent contends that the existence of an "Investment" within the meaning of the ECT is a fundamental element necessary for the observance of Article 26 of the ECT. In view of the lack of an Investment within the meaning of Article 1(6) of the ECT, Respondent asserts, this case should be dismissed.

104. Respondent adds that, under international and Bulgarian law, Claimant had an obligation to act honestly and in good faith in its dealings and contract negotiations and that it violated this obligation.

105. Alternatively, Respondent contends that, should the Arbitral Tribunal not find the Second Privatization Agreement null and void under Article 5.1 of the

Privatization Law, that agreement would be voidable under Bulgarian law due to Claimant's misrepresentations.

106. Respondent's argument under the ECT is that Claimant's misrepresentation defeats its claim on the merits. The obligations undertaken by Bulgaria under Articles 10 and 13 of the ECT can only apply to an Investment made in accordance with law. Respondent asserts that, having obtained its investment in violation of international and Bulgarian law, Claimant cannot seek the protections of the ECT for that investment.

107. Claimant denies that it made any misrepresentation to the Bulgarian Government concerning its investment in Nova Plama. It says it had no duty to inform Respondent of the identity of the shareholder(s) of PCL. Claimant acknowledges, in its Memorial on the Merits, that André and NOT were originally interested in buying the Refinery and accepts that the Bulgarian Government, through its Privatization Agency, wanted to screen foreign investors in privatized enterprises (see para. 27). Claimant contends that during the period July-September 1998, André decided that it was not interested in purchasing Nova Plama and only wanted to play an advisory role; so Mr. Vautrin personally took up the opportunity, together with NOT, to make the investment (*ibid.*, para. 30, p. 9).[8] Subsequently, NOT, too, withdrew from the project as an investor.

108. Claimant says that it informed the Privatization Agency that the purchase of Nova Plama's shares was to be made by a company "*presented by*" André and NOT – not that the purchase was to be made by André and NOT themselves – and that this description of the purchaser was included in the Memorandum of Agreement of 18 August 1998 (Article 1.1), agreeing to the share transfer by EEH to PCL, signed on behalf of the Privatization Agency and PCL. According to Claimant, this wording of the Memorandum of Agreement followed an earlier draft of the agreement, which is not in the record, which stipulated that the company purchasing Nova Plama's shares was a company

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[8] Mr. Vautrin testified at the January-February 2008 hearing (H. Tr., Day 2, 29 January 2008, p. 280) that NOT held 40 percent of the shares of PCL until the end of October 1998.

"*formed by*" André and NOT (See Mr. Vautrin's testimony at the January – February 2008 hearing, H. Tr., Day 2, 29 January 2008, pp. 305 *et seq.*). Therefore, Claimant says, the Privatization Agency knew or should have known that a company different from André or NOT was the purchaser. If the Privatization Agency wanted to receive specific information about the change in the language of the agreement and ownership of the investor to be introduced by André and NOT, it could, contends Claimant, have asked for that information. In fact, Claimant says, the Privatization Agency was not interested in the identity of the investor's shareholders and never asked; they simply wanted the investor to undertake the obligations in the Second Privatization Agreement, which Claimant did. Mr. Vautrin also testified that he had told relevant members of the Bulgarian Government that André and NOT were not to be the ultimate purchasers of Nova Plama's shares (H. Tr. in French, Mr. Vautrin, 20 September 2004, p. 19).

109. Claimant further contends that nowhere is it accused of having made a positive misrepresentation, that is, Claimant is not accused of having falsely informed the Privatization Agency about its ownership. Therefore, there is no proof of a "wrong by Claimant" and Respondent's allegations are only limited to the subjective impressions of various Bulgarian authorities.

110. Moreover, Claimant contends that Article 5(1) of the Privatization Act invoked by Respondent is not applicable to this case since the purchase of Nova Plama shares by PCL from EEH did not correspond to a privatization. According to Claimant, the Refinery had already been privatized after its sale to EEH in 1996. If Respondent retained the right to consent to any further sale, such consent was foreseen only for the sale of a minority of Nova Plama shares.

111. Claimant adds that, even if there were a "passive misrepresentation", as alleged by Respondent, the consent of the Privatization Agency was necessary, if at all, only for the purchase of a minor portion of the shares of Nova Plama – 4.5 million shares out of 51 million. This is so, Claimant contends, because, after the initial privatization of Nova Plama, EEH had increased the company's capital. Consequently, it was possible for Claimant to purchase from EEH 90% of the shares, which represented the increased capital not

covered by the First Privatization Agreement, without the need for any consent from the Privatization Agency. Moreover, even without the consent of the Privatization Agency, Claimant says, it would have owned and made an Investment within the meaning of Article 1(6) of the ECT, which entitles it to the protection in Part III of the ECT.

2. The Requirement of Approval by the Privatization Agency

112. Contrary to Respondent's argument, the matter of the alleged misrepresentation by Claimant does not pertain to the Tribunal's jurisdiction: that was already decided in the Decision on Jurisdiction (paras. 126-130 and 228-230). Rather, the matter concerns the question as to whether Claimant is entitled to the substantive protections offered by the ECT.

113. The Arbitral Tribunal does not accept Claimant's argument that no approval by the Privatization Agency was necessary for PCL's acquisition of Nova Plama's shares because those shares had already been privatized under the First Privatization Agreement. Claimant itself did not at the time act in a manner consistent with the case it is now advancing; it actively sought and obtained the Privatization Agency's approval to purchase Nova Plama's shares from EEH. The First Privatization Agreement was clear, in its Article 22, that EEH did not have the right to sell or transfer Nova Plama's shares for a period of five years without the prior approval of the Privatization Agency. When EEH did, within that period, sell its shares to PCL, the Privatization Agency's approval was, therefore, required. Claimant's submission that, even without the Privatization Agency's agreement, it would have made an Investment within the meaning of ECT is irrelevant because, in fact, it sought and obtained the Privatization Agency's consent to its purchase of the Refinery.

114. Nor does the Arbitral Tribunal accept Claimant's contention that, if any authorization or approval of the Privatization Agency were required, it only pertained to 10% of Nova Plama's shares. Claimant's case is based on the fact that, after the First Privatization Agreement, Nova Plama's share capital was increased and that Article 22 of the First Privatization Agreement only applied to the shares existing at the time of the first privatization. While the language of Article 22, "*[t]he Buyer shall not have the right to sell or transfer the*

shares acquired under this Contract . . ." (emphasis added), if literally read, could be interpreted in the manner contended by Claimant, the Arbitral Tribunal does not consider that that was what the Parties intended. Again, Claimant did not in 1998, when it sought and obtained the approval of the Privatization Agency for its purchase of Nova Plama's shares, act in conformity with the case it is now advancing. It sought approval for the purchase of *all* of Nova Plama's then-outstanding shares.

115. The Arbitral Tribunal has now to determine whether the alleged misrepresentation did in fact occur as alleged by Respondent, and, if so, what the consequences are for the application of the protections provided under the ECT claimed by Claimant.

3. The Occurrence of Misrepresentation

116. The Tribunal accepts Respondent's factual allegation as to the occurrence of misrepresentation by Claimant. It is important here to review the most pertinent elements which lead the Tribunal to this conclusion.

117. By Order No. 456 of 7 August 1998, the Executive Director of the Privatization Agency established an inter-institutional working group of experts to prepare the transfer of Nova Plama shares from EEH to the Consortium André and NOT. On the same date, the Privatization Agency wrote a letter to EEH and to the "*Coordinator of the Consortium*," Mr. Boni Bonev, announcing that it would give its consent for EEH to transfer its shares in Nova Plama to "*the Consortium 'André & Cie and Norwegian Oil Trading'*" in case an agreement were signed with the Consortium for "*updating and unconditional fulfilment of the obligations already undertaken with the signed contract*" (R's Exhs. 658, 659).

118. Ernst & Young sent a letter on 11 August 1998 to the Privatization Agency, indicating that the foreign investor André & Cie had assigned to it the conduct of due diligence of Nova Plama in view of signing a contract for the purchase of shares in the company (R's. Exh. 660).

119. On 14 August 1998, the Privatization Agency sent a letter to Mr. Bonev enclosing a draft agreement between the consortium "*André & Cie and Norwegian Oil Trading*" and the Privatization Agency (R's. Exh. 197).

120. Thereafter – and in accordance with the draft agreement – a Memorandum of Agreement was made on 18 August 1998 by NOT and André, represented by Mr. Bonev, and the Privatization Agency for the sale of all shares of Nova Plama to a company presented by NOT and André. The agreement was signed by Mr. Bonev "*For company*" (R's. Exh. 198). Mr. Bonev provided to the Privatization Agency two powers of attorney to act on behalf of André & Cie and NOT. The first document was dated 17 August 1998 and signed by W. Brocard and J.C. Vautrin in the name of André & Cie, to represent it "*in the negotiations to be held with relevant Bulgarian authorities regarding Plama project.*" The second document was also dated 17 August 1998 and was signed by Born Kanppskig and Torgeir Lien to "*negotiate and sign the Memorandum of Understanding concerning Plama AD on our behalf*" (R's Exhs. 662, 663).

121. On 20 August 1998, the Privatization Agency sent two letters to record that a Memorandum of Agreement had been signed between the Agency, on the one hand, and André and NOT, on the other, authorizing the transfer of Nova Plama shares to a company presented by NOT and André. The first letter was sent to EEH and Mr. Bonev as the "*Consortium Coordinator*" and the second one, to Mr. Radev, Minister of Finance.

122. While Claimant made much of the argument that the language "*a company presented by NOT and André*" did not mean a company *owned* by NOT and André, at the January-February 2008 hearing, Mr. Vautrin testified that, at the time when André and NOT were still contemplating purchasing the Refinery, a July 1998 version of the Memorandum of Understanding (R's Exh. 657) used similar terminology: "*a corporation to be introduced by André and Norwegian Oil Trading.*" How Bulgaria was reasonably to understand without an explicit explanation that virtually the same language was to mean different things at different times has not been explained by Claimant (H. Tr., Day 2, 29 January 2008, pp. 265 *et seq.*). In addition, the evidence, as set out in this section, indicates that the Privatization Agency had strong reasons to believe that NOT and André were part of the consortium.

123. The Business Plan presented by MM. Bonev and Vautrin to the creditors of Nova Plama in September 1998 described the "*Consortium*" which would

"*revive*" the Refinery as consisting of NOT, André, Ingérop and Ernst & Young. This is one of the puzzling elements of the misrepresentation issue, because it is difficult to believe that anyone could reasonably consider Ernst & Young and Ingérop as investors. The same is not true for NOT and André. Throughout the Business Plan, reference was made to the measures to be undertaken by the Consortium to resume operation of the Refinery. Information detailing the organization and experience of NOT and André was provided as Annexes 1 and 2 to the Business Plan (R's Exh. 669).

124. On 8 September 1998, the Ministry of Finance sent a letter to Mr. Bonev, as "*representative of Norwegian Oil Trading A.S and André & Cie*", inviting him to a meeting on the following day, in view of the intentions expressed by both companies to acquire the shares of Nova Plama (R's Exh. 667). This and similar statements made in the correspondence exchanged at that time, were never corrected by Mr. Bonev, Mr. Vautrin or anyone else on Claimant's side.

125. The meeting was held on 9 September 1998 with representatives of the Bulgarian Government, including the Minister of Finance and the Minister of Labour, Mr. Bonev, Mr. Vautrin and Mr. Nordtømme as representatives of the Consortium, as well as the Ambassador of Switzerland, who vouched for the good standing of André (R's. Exh. 668 and witness statement of Mrs. Slavcheva, 28 July 2006). According to Mr. Vautrin, this meeting occurred after André had decided to withdraw as an investor (H. Tr., Day 2, 29 January 2008, p. 279). There was no apparent Swiss interest other than André.

126. The "Additional Agreement to the Memorandum of Understanding" dated 21 September 1998 named André and NOT as parties and was signed by Mr. Bonev, this time, on behalf of André and NOT (R's. Exh. 671).

127. Mr. Vautrin has testified on several occasions that he had informed relevant Bulgarian authorities that André and NOT had decided not to be investors (see, *e.g.*, H. Trans., in French, Mr. Vautrin, 20 September 2004, p. 19 and H. Tr., Day 2, 29 January 2008, p. 295). However, these statements contradict declarations made by the authorities concerned, in particular, Mr. Oresharski (who was the Minister of Finance at the time of the Hearing and the former Deputy Minister of Finance at the time of the transaction) and Mr. Palazov

(the Secretary-General of the Agency of State Receivables). They declared that it was their clear understanding, at all relevant times, that André and NOT were to be the ultimate purchasers of Nova Plama (H. Tr. Day 2, 29 January 2008, p. 329, lines 1 *et seq.*; witness statement of Mr. Oresharki, at paras. 7, 9; and witness statement of Mr. Palazov, at para. 10).[9] Moreover, Mr. Rakov, deputy of the Ministry of Finance, submitted a statement expressly denying Mr. Vautrin's assertions that Mr. Vautrin had informed him that NOT had withdrawn from PCL (witness statement of Mr. Rakov, paras. 5,6; H. Tr., Day 2, 29 January 2008, p. 333, lines 2 *et seq.*).

128. The conclusion which the Arbitral Tribunal draws from all of these elements is that the Bulgarian Government clearly understood NOT and André to be the investors (see, *e.g.*, R's Exh. 39) and that PCL – the "*company presented by*" them – was a special purpose vehicle created by them as a consortium for the purpose of the Nova Plama acquisition (see Mr. Vautrin's testimony, H. Tr., Day 2, 29 January 2008, p. 310).

129. It also appears to the Arbitral Tribunal that Mr. Vautrin did nothing to remove this misunderstanding, of which he was undoubtedly aware. In particular, Mr. Vautrin deliberately did not inform the Bulgarian Government that he was the sole, ultimate owner of PCL (Claimant's Rejoinder on Jurisdiction, paras. 124 and 129). Mr. Vautrin testified during the jurisdictional phase of the arbitration that, for reasons of personal security, he did not want the Bulgarian Government to know that he was the investor who owned and controlled PCL (see Mr. Vautrin's Third Witness Declaration, 26 August 2004, at para. 8 *et seq.* and H. Tr. Jurisdictional Phase, pp. 65-7). However, Mr. Vautrin has insisted throughout the arbitration that he never represented to the Bulgarian Government that André and NOT were the investors. As noted earlier (para.108 *supra*), Mr. Vautrin testified that he did inform certain Bulgarian officials that André and NOT were not investors. His testimony, also referred to earlier, that a comparison of the language "*formed by*" in an early draft of

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[9] This understanding was confirmed by other Bulgarian authorities including Ms. Slavcheva (in her witness statement and during her cross-examination at the Final Hearing, H. Tr., Day 2, 29 January 2008, p. 450) and Mr. Tenev.

the Memorandum of Understanding (which is not in the record) with the final text "*presented by*" showed clearly that André and NOT were not shareholders cannot be verified (H. Tr., Day 2, 29 January 2008, pp. 295 *et seq.*) and is contested by Respondent (Respondent's Post-Hearing Submission on the Merits, para. 15). What is clear is that Mr. Vautrin was determined not to disclose his true role in the privatization and, by doing so, he deliberately misrepresented to the Bulgarian authorities the true identity of the investors in Nova Plama.

4. The Consequences of the Misrepresentation

130. It is Respondent's contention that Claimant's investment is null and void under Article 5.1 of the Privatization Act (para. 102 *supra*), when examined in light of the terms of this so-called "straw man" provision. Counsel for Respondent explained in the January-February 2008 hearing that the straw man in the present case was Mr. Vautrin, acting *as if* he were the representative of André when in fact he was acting for his own account (H. Tr., Day 2, 29 January 2008, pp. 463-4).[10] In the opinion of Respondent's legal expert, Professor Markov, dated 16 July 2006, an "unidentified proxy" within the meaning of Article 5.1. "*acts in his own name but on the ultimate account of and in the ultimate benefit of somebody else*" (para. 54). This is not what happened here. The party to the Second Privatization Agreement, *i.e.*, the party making the investment, was PCL, not Mr. Vautrin. PCL was not a "straw man" acting for someone else; it was acting for its own account.

131. Professor Markov cites a Bulgarian Supreme Court decision, in paragraph 55 of his 16 July 2006 opinion, as follows:

> *What is an interpositioned person? The concept of interpositioned person, known also in legal theory as "straw man" or "wooden head," requires the existence of an agreement between the real right-holder (real party) under the*

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[10] In its Post-Hearing Submission on the Merits, Respondent changed its identification of the straw man as being André and NOT whom Mr. Vautrin used as straw men to conclude the transactions (para. 30).

> *contract, i.e. the person economically interested in the transaction who actually enters into it, and the interpositioned person. Under this agreement the interpositioned person gives his consent that his name will appear in the real estate contract as though he is the party to the contract, whereas the contract is actually between the economically interested person and a third person, the other party to the contract.*

132. In paragraph 56 of his 16 July 2006 opinion, Professor Markov cites the treatise, "Civil Law – General Part" by Professor Pavlova:

> *§ 5 of the Additional Provisions of TPSOMEA* (the Privatization Act) *deserves to be noted among the cases of invalidity for prohibition provided for in special legal provisions. Pursuant to this provision the acquisition transactions under this Act shall be invalid where they are executed through an interpositioned person or an undisclosed representative. The law refers to the cases where the transferee under the privatization transaction conceals his name using another person's name (interpositioned person) or where a person in his own name acquires privatized property acting as a mandatary (a party to a mandate contract) on somebody else's account and with an obligation to transfer the property acquired to the principal. The severe sanction, envisaged in the provision in question, is designed by the legislator to provide maximum transparency in the acquisitions through privatization transactions. The requirement to reveal the identity of the transferee under the transaction constitutes a guarantee against abuse of official and social position and allows the public to watch closely whether the law is circumvented through follow up actions.*

Here, again, we are not dealing with a person who used the name of another person while entering into the Privatization Agreement, nor is the contract signatory acting as a *mandatary* for somebody else's account and with an

obligation to transfer the investment to the principal. In the present case, PCL was the contracting party, acting for its own account and in its own name.

133. Rather, what happened here was that Mr. Vautrin and his representatives presented PCL as a consortium of major companies having substantial assets, whereas in truth, Mr. Vautrin, who personally did not have significant financial resources, was acting alone as the sole investor in the guise of that "consortium." The Arbitral Tribunal is persuaded that Bulgaria would not have given its consent to the transfer of Nova Plama's shares to PCL had it known it was simply a corporate cover for a private individual with limited financial resources. Given the strategic importance of the Refinery and the significant number of employees and creditors, the managerial and financial capacities of the acquirer were a natural concern to the Bulgarian authorities. André, as a world-wide trader and financial institution and NOT as an experienced oil company, appeared to have the required capacities. Mr. Vautrin alone did not.

134. Claimant contends that it acted in good faith, that Respondent never asked who the shareholders of PCL were and that Claimant had no obligation to volunteer this information. The Arbitral Tribunal does not consider that, in the circumstances of the present case, this contention can be accepted. Claimant represented to the Bulgarian Government that the investor was a consortium – which was true during the early stages of negotiations. It then failed, deliberately, to inform Respondent of the change in circumstances, which the Tribunal considers would have been material to Respondent's decision to accept the investment. On the basis of the evidence in the record, Bulgaria had no reason to suspect that the original composition of the consortium, consisting of two major experienced companies, had changed to an individual investor acting in the guise of that "consortium", and no duty to ask. It was Claimant, knowing the facts, which had an obligation to inform Respondent.

135. The investment in Nova Plama was, therefore, the result of a deliberate concealment amounting to fraud, calculated to induce the Bulgarian authorities to authorize the transfer of shares to an entity that did not have the financial and managerial capacities required to resume operation of the Refinery. While the Arbitral Tribunal considers that this situation does not involve the "straw-

man" provision set out in the Bulgarian Privatization Law, the Tribunal is of the view that this behavior is contrary to other provisions of Bulgarian law and to international law and that it, therefore, precludes the application of the protections of the ECT.

136. As noted by Professor Markov in his expert report, Articles 27 and 29 of the Obligations and Contracts Acts (OCA) state:[11]

> *Art. 27. Contracts concluded by persons of legal incapacity, or by their agents without observing the requirements established for such agents, as well as contracts concluded under mistake, fraud, duress or extreme necessity shall be subject to invalidation.*
>
> *Art. 29. Fraud shall constitute grounds for invalidating a contract provided that one of the parties has been misled by the other party into concluding the contract through intentional misrepresentation.*

In addition, Article 12 OCA introduces the principle of good faith by stating that "*parties must negotiate and enter contracts in good faith.*" According to Bulgaria's expert, this principle covers various obligations of the parties, including the obligation to inform the other party of all facts relevant to making a decision concerning the conclusion of the contract.[12]

137. The negotiation and conclusion of the Second Privatization Agreement were carried out by PCL and its owner, Mr. Vautrin, in flagrant violation of these provisions of Bulgarian law. The misrepresentation made by Claimant renders the Agreement unlawful.

138. Unlike a number of Bilateral Investment Treaties,[13] the ECT does not contain a provision requiring the conformity of the Investment with a particular law.

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11 Legal Opinion of Professor Markov, dated 16 July 2006, para. 64.

12 *Ibid*, para 71.

13 For example the Germany-Philippines BIT, Lithuania-Ukraine BIT, and Italy-Morocco BIT.

This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law. As noted by the Chairman's statement at the adoption session of the ECT on 17 December 1994:

> [...] *the Treaty shall be applied and interpreted in accordance with generally recognized rules and principles of observance, application and interpretation of treaties as reflected in Part III of the Vienna Convention on the Law of Treaties of 25 May 1969.* [...] *The Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose.*[14]

139. In accordance with the introductory note to the ECT "[t]*he fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues* [...]".[15] Consequently, the ECT should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law. The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law.

140. The Tribunal finds that the investment in this case violates not only Bulgarian law, as noted above, but also "*applicable rules and principles of international law*", in conformity with Article 26(6) of the ECT which states that "[a] *tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law*". In order to identify these applicable rules and principles, the Arbitral Tribunal finds helpful guidance in the decisions made in other investment arbitrations cited by Respondent.

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[14] Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation*, Chairman's Statement at Adoption Session on 17 December 1994, p. 158.

[15] Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation*, An Introduction to the Energy Charter Treaty, p. 14.

141. In *Inceysa v. El Salvador*,[16] a case in which the investor procured a concession contract for vehicle inspection services in El Salvador through fraud in the public bidding process, the tribunal found that the investment violated the following general principles of law: (i) the principle of good faith defined as the "*absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the investment*"[17] and (ii) the principle of *nemo auditur propriam turpitudinem allegans* – that nobody can benefit from his own wrong – understood as the prohibition for an investor to "*benefit from an investment effectuated by means of one or several illegal acts*".[18] In addition, the tribunal found that recognizing the existence of rights arising from illegal acts would violate the "respect for the law" which is a principle of international public policy.[19]

142. The notion of international public policy was also invoked by an award in the case of *World Duty Free v. Kenya*.[20] In this case, the investor had obtained a contract by paying a bribe to the Kenyan President. According to the tribunal, the term "international public policy" was interpreted to signify "*an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora.*"[21] Accordingly, the tribunal found that "*claims based on contracts of corruption or contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.*"[22] The tribunal further concluded that "*as regards public policy both under English and Kenyan law* [...] *the Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of* ex turpi causa non oritur actio."[23] As

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16 *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, Award of 2 August 2006, ICSID Case No. ARB/03/26 ("Inceysa").

17 *Ibid.*, para. 231.

18 *Ibid.*, paras. 240-242.

19 *Ibid.*, para. 249.

20 *World Duty Free Company Limited v. The Republic of Kenya*, Award of 4 October 2006, ICSID Case No. Arb/00/7.

21 *Ibid.*, para. 139.

22 *Ibid.*, para. 157.

23 *Ibid.*, para. 179.

explained in the award, the *ex turpi causa* defence "*rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct* [...]."[24]

143. Claimant, in the present case, is requesting the Tribunal to grant its investment in Bulgaria the protections provided by the ECT. However, the Tribunal has decided that the investment was obtained by deceitful conduct that is in violation of Bulgarian law. The Tribunal is of the view that granting the ECT's protections to Claimant's investment would be contrary to the principle *nemo auditur propriam turpitudinem allegans* invoked above. It would also be contrary to the basic notion of international public policy – that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal.

144. The Tribunal finds that Claimant's conduct is contrary to the principle of good faith which is part not only of Bulgarian law - as indicated above at paragraphs 135-136 - but also of international law - as noted by the tribunal in the *Inceysa* case. The principle of good faith encompasses, *inter alia*, the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment. This obligation is particularly important when the information is necessary for obtaining the State's approval of the investment.

145. Claimant contended that it had no obligation to disclose to Respondent who its real shareholders were. This may be acceptable in some cases but not under the present circumstances in which the State's approval of the investment was required as a matter of law and dependant on the financial and technical qualifications of the investor. If a material change occurred in the investor's shareholding that could have an effect on the host State's approval, the investor was, by virtue of the principle of good faith, obliged to inform the host State of such change. Intentional withholding of this information is therefore contrary to the principle of good faith.

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24 *Ibid.*, para. 161.

146. In consideration of the above and in light of the *ex turpi causa* defence, this Tribunal cannot lend its support to Claimant's request and cannot, therefore, grant the substantive protections of the ECT.

V. DISCUSSION OF THE ISSUES – CLAIMANT'S CLAIMS ON THE MERITS

147. The Parties have extensively documented their allegations; numerous exhibits, witness statements and expert reports have been submitted by both Parties. The factual and legal arguments have been discussed in detail during the Final Hearing, in which a number of witnesses and experts were also examined by the Parties and the arbitrators. The Tribunal has therefore decided that, in acknowledgement of the Parties' efforts, it will consider their further allegations on the merits. This consideration will lead to the conclusion that, even if Claimant would have had the benefit of the substantive protections of the ECT, Claimant's claims on the merits would have failed.

148. In its analysis, the Tribunal will follow Claimant's presentation of the allegedly unlawful acts and omissions by Respondent (Section C). Accordingly, the Tribunal will first address the allegations regarding environmental damages (Section C.1 *infra*), followed by the allegations regarding the action of the syndics (Section C.2 *infra*), the so-called paper profits (Section C.3 *infra*), the privatization of the Varna Port (Section C.4 *infra*) and Biochim Bank's unlawful breaches of its debt settlement agreement with PCL (Section C.5 *infra*). Before addressing these allegations, the Arbitral Tribunal will consider the ECT protections invoked by Claimant (Section B *infra*). It will rely on those considerations in its subsequent analysis. The Tribunal will commence by presenting a summary of the Parties' contentions on the merits and the relief sought (Section A *infra*).

A. Summary of the Contentions of the Parties and Relief Sought

1. Claimant's Position

149. According to Claimant, despite the promises made at the pre-acquisition stage, the Bulgarian Government, its legislative and judicial bodies and other State organs and agencies "*dashed*" Nova Plama's prospects of success. PCL found itself "*a victim of a series of unlawful acts and omissions which individually*

and cumulatively defeated its efforts to operate the Refinery beyond 1999 and make good its investment." (Claimant's Memorial on the Merits, para. 9). These unlawful acts and omissions included:

(i) *Environmental damages*: Bulgaria's sudden and unfair amendment of its environmental law to exclude the State's liability for past environmental damages at the Refinery site, effectively making Nova Plama and PCL liable instead;

(ii) *Paper Profits*: Bulgaria's failure to amend its corporate income tax laws in a timely manner to enable PCL to file Nova Plama's annual accounts;

(iii) *Varna Port*: the unlawful *de facto* privatization of the Varna Port, which Nova Plama relied upon for its crude oil supply;

(iv) *Actions of the Syndics*: the unlawful actions of Nova Plama's syndics who, *inter alia*, instigated a riot at the Refinery which resulted in the first shutdown of the Refinery in April 1999; and

(v) *Biochim Bank*: the State-owned Biochim Bank's deliberate breaches of its debt settlement agreement with PCL.

150. Claimant alleges that, as a result of these actions, it was unable to secure any working capital financing for Nova Plama since the financial institutions that were initially involved withdrew from the project, and other financial institutions simply refused to participate. Nova Plama was obliged to close the Refinery indefinitely on 15 December 1999 and was consequently unable to settle its debts under the Recovery Plan. Its creditors re-opened the insolvency proceedings against it; and a Bulgarian court ordered the liquidation of Nova Plama in July 2005. Claimant asserts that it has therefore been deprived of all economic benefit and use of its investment since 15 December 1999.

151. It is Claimant's view that these acts are wholly the responsibility of Bulgaria and constitute a violation of several of the protections owed by Bulgaria under Articles 10(1) and 13 of the ECT. In particular, Claimant alleges that Bulgaria has:

(a) failed to create a stable, equitable, favorable and transparent conditions for making the investment;

(b) failed to provide fair and equitable treatment to Claimant's investment;

(c) failed to provide to Claimant's investment the most constant protection and security;

(d) subjected Claimant's investment to unreasonable measures;

(e) breached contracts with PCL; and

(f) subjected Claimant's investment to measures having an effect equivalent to expropriation.

152. Claimant submits that, as a result of the expropriation of its investment, and in accordance with Article 13(1) of the ECT, it is entitled to full compensation in the form of fair market value of the shares of Nova Plama at the time immediately before the expropriation calculated using the Discounted Cash Flow ("DCF") method (Claimant's Memorial on the Merits, para. 341). The same compensation should be granted for the other breaches committed by Bulgaria because the nature of the breaches has caused long-term losses to the Claimant as investor.

153. On the basis of the DCF method, Claimant's expert values PCL's losses in the amount of USD 122,258,000. Accordingly, Claimant's request for relief in its Memorial on the Merits (para. 347) reads:

(a) an order that Bulgaria pay PCL compensation for losses suffered as a result of the expropriation of its investment in the amount of USD122,258,000;

(b) an order that Bulgaria pay PCL compound interest on such compensation at a commercial rate from December 15, 1999 until the date of payment;

(c) in the alternative, an order that Bulgaria pay PCL (i) compensation for losses suffered as a result of the Other ECT Breaches, in the amount of USD122,258,000 and compound

interest on the compensation awarded at a commercial rate established from December 15, 1999 until the date of payment;

(d) an order that Bulgaria pay PCL's costs occasioned by this arbitration, including the arbitrators' fees and administrative costs fixed by ICSID, the expenses of the arbitrators, the fees and expenses of its experts, and the legal costs incurred by the parties (including fees of counsel); and

(e) any other relief that the Tribunal deems appropriate.

154. In its Reply, Claimant supplements its initial request and indicates that, if the Tribunal were to find that the principles of compensation provided in Article 13(1) – full market value of the Investment immediately before the measures – are not applicable to Claimant's claims on expropriation and the violation of the other ECT standards, Claimant should be compensated according to established principles of customary international law as restated in the International Law Commission's Articles on State Responsibility (Claimant's Reply on the Merits, paras. 214, 217).

155. Accordingly, Claimant alleges its right to recover *damnum emergens* and *lucrum cessans* and reformulates its request for relief from the Arbitral Tribunal in the following terms:

(a) to confirm that it has jurisdiction to entertain the claim as submitted by PCL and that such claims are admissible;

(b) to order the Republic of Bulgaria to indemnify Claimant in the amount of US$ 122,258,000 representing the fair market value of its investment in the Plama Refinery;

(c) subsidiarily, to order the Republic of Bulgaria to pay Claimant an amount of US$13,862,152 for its losses, outlays, unpaid loans, financings and expenses relating to its investment in the Plama Refinery, all of which have been lost due to Bulgaria's actions, together with compensation in the amount of US$ 10,000,000

representing its loss of a chance or opportunity of making a commercial success of the project.

(d) to award compound interest at a commercial rate on all sums awarded pursuant to b) and/or c) above from 15 December 1999 through the date of award and until such award is effectively paid in full;

(e) to declare that all costs of this arbitral proceeding, including legal fees, are to be borne by the Republic of Bulgaria; and

(f) to grant Claimant such other relief as the Arbitral Tribunal may deem appropriate.

2. Respondent's Position

156. Respondent denies all of Claimant's claims. It contends that the Refinery's difficulties derived from factors not attributable to the Republic of Bulgaria, in particular, from the combination of Nova Plama's high costs structure and the very difficult market conditions (Respondent's Counter-Memorial on the Merits, paras. 70, 530).

157. It is Respondent's view that it did not engage in unlawful acts and omissions. In particular, Respondent contends:

(a) *Environmental Damages*: Claimant mischaracterizes not only the state of Bulgarian environmental law that was applicable when it acquired Nova Plama but also the terms of the First Privatization Agreement and of the 1999 amendment to the environmental law (Respondent's Counter-Memorial on the Merits, para. 72);

(b) *Actions of the Syndics*: the syndic's actions are not legally attributable to the State and, in any event, Claimant has failed to demonstrate in what manner the syndics acted contrary to law or otherwise improperly and in a manner that caused any harm to Claimant (Respondent's Counter-Memorial on the Merits, para. 72);

(c) *Paper Profits*: the ECT Contracting States do not accept obligations under Article 10 of the ECT with regard to taxation and, in any event, the Bulgarian tax code and accounting rules were transparent and accessible to Claimant; and it had no basis to expect that it would receive some sort of exemption or special treatment (Respondent's Counter-Memorial on the Merits, paras. 285, 308-309);

(d) *Varna Port*: the Varna Port is not "exclusive state property" and Claimant never had any legitimate or reasonable expectation that it would remain in the possession of the State; and its privatization was lawful (Respondent's Counter-Memorial on the Merits, para. 311); and

(e) *Biochim Bank*: Biochim Bank acted in a commercially predictable and reasonable manner in all its dealings with Nova Plama and did not breach any contractual obligations (Respondent's Counter-Memorial on the Merits, para. 360).

158. Consequently, Respondent alleges that it has not breached its obligations under the ECT, nor did the alleged breaches of Articles 10(1) and 13 of the ECT cause Claimant to lose the value of its investment in Nova Plama's shares. It is Respondent's contention that Claimant is not entitled to any compensation because (Respondent's Rejoinder on the Merits, para. 320):

> *(a) Claimant failed to establish a causal connection between Bulgaria's conduct and the failure of its investment; [footnote omitted]*
>
> *(b) Claimant failed to particularize and quantify its alleged loses; [footnote omitted]*
>
> *(c) Claimant's use of the DCF method of valuation is inappropriate because Plama has no relevant history of profitability as its cash flows for years were all negative; [footnote omitted]*
>
> *(d) Even if one were to accept a valuation of Claimant's investment on the basis of the DCF method, Claimant's*

valuation of Plama is flawed in numerous material respects; [footnote omitted]

(e) Plama was not a money-making enterprise [footnote omitted].

159. Finally, Claimant failed to support its alternative claim for compensation on the basis of Claimant's alleged expenses and expenditures or its claim for compensation in the amount of USD 10,000,000 for its alleged loss of chance to make Nova Plama a profitable enterprise (Respondent's Rejoinder on the Merits, paras. 320-321).

160. Consequently, Respondent requests that the Tribunal dismiss Claimant's claims in their entirety and order Claimant to bear all costs incurred by Bulgaria in connection with this arbitration (Respondent's Counter-Memorial on the Merits, para. 575).

B. The ECT Protections Invoked by Claimant

161. Claimant's allegations refer to violations of the protections provided in Articles 10(1) and 13 of the ECT. Whilst Article 13 contains a standard provision on expropriation – including the condition that the expropriation be lawful and that compensation be prompt, adequate and effective, amounting to the fair market value of the Investment expropriated – Article 10(1) contains a complex provision that refers equally to the obligation to create stable, equitable, favorable and transparent conditions for making the Investment and to the standards of fair and equitable treatment, constant protection and security, the prohibition of unreasonable or discriminatory measures and the observance of obligations entered into with an Investor or an Investment.

162. Professor Schreuer has pointed out the interaction of the standards of protection, in particular under Article 10 of the ECT, and notes that the tribunal in *Petrobart v. The Kyrgyz Republic*, a case decided under the ECT,

opted for subsuming all standards under the purview of fair and equitable treatment.[25]

163. This Tribunal is also of the view that the standards of protection of Article 10(1) are closely interrelated. This interrelation will surface when analyzing the Parties' factual allegations. It does not mean, however, that each standard could not be defined autonomously. As noted by Professor Schreuer:

> [...] *FET is connected to other standards of protection in a variety of ways. It has points of contact to the standards of 'constant protection and security' and protection against unreasonable or discriminatory measures'. Some tribunals have even found it unnecessary to distinguish these two standards from FET. The better view is that these standards, though related, are separate and autonomous. In fact, some tribunals have given them their own specific meaning.*[26]

164. The Arbitral Tribunal will therefore attempt to provide a relevant definition of the standards, taking into account practice under the ECT and the practice of tribunals under other investment treaties. It will also apply the rules of interpretation delineated by the Chairman's statement at the adoption session of the ECT on 17 December 1994, quoted at paragraph 139. The Tribunal will also apply the rules provided in the Vienna Convention on the Law of Treaties and, in particular, the ECT will be "[...] *interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose.*"[27]

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25 The tribunal noted: "*The Arbitral Tribunal does not find it necessary to analyse the Kyrgyz Republic's action in relation to the various specific elements in Article 10(1) of the Treaty but notes that this paragraph in its entirety is intended to ensure a fair and equitable treatment of investments,*" *Petrobart v. The Kyrgyz Republic*, Award of 29 March 2005. See also C.H. Schreuer, *Fair and Equitable Treatment (FET): Interaction with other Standards*, Transnational Dispute Management, Vol. 4, issue 5, September 2007, p. 1.

26 C.H. Schreuer, *op.cit.*, pp. 25-26.

27 See Article 31(1) of the Vienna Convention on the Law of Treaties and Energy Charter Secretariat, *The Energy Charter Treaty and Related Document. A Legal Framework for International Energy Cooperation*, Chairman's Statement at Adoption Session on 17 December 1994, p. 158.

165. As noted by both Parties, Article 2 of the ECT states that the purpose of the Treaty is to establish "*a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter.*" Claimant alleges that these objectives and principles of the Treaty include the creation of "*a climate favourable to the operation of enterprises and to the flow of investments and technologies by implementing market principles in the fields of energy.*"[28] Consequently, Claimant concludes that the overall aim of the ECT should be considered as one of favoring the protection of foreign investments.

166. Respondent, for its part, cites the guide to the Energy Charter and the Concluding Document of the Hague Conference on the European Energy Charter to explain that the aim of the ECT is not just the promotion of Investments but also the promotion of the economic development of the Contracting States (Respondent's Counter-Memorial on the Merits, paras. 430-431).

167. The Arbitral Tribunal is of the view that a balanced interpretation which takes into account the totality of the Treaty's purpose is appropriate. In the words of the tribunal in *El Paso Energy International Co. v. Argentina:*

> *This Tribunal considers that a balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow.*

1. Protections provided in Article 10(1)

168. The starting point of the Tribunal is therefore the text of Article 10(1) of the ECT:

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28 European Energy Charter, Title I – Objectives. Cited by Claimant in its Memorial on the Merits, para. 245.

> *Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party. [Footnotes omitted]*

1.1 Stable, Equitable, Favorable and Transparent Conditions

169. Only in its Reply does Claimant introduce the claim that Respondent failed to create stable, equitable, favorable and transparent conditions. Claimant limited its arguments to claiming that it was constantly subjected to "*haphazard and opaque*" decisions by Respondent and that repeated "*interventions*" created "*unstable, inequitable, unfavorable and non-transparent conditions*" for PCL's investment. Claimant was a victim of "*chronic features of unpredictability and inconsistency.*"

170. Claimant did not, however, set out the content of this standard or to explain precisely how it has been violated. The only specific reference in this regard is that the amendment of the Environmental Law allegedly created unstable and inequitable conditions (Claimant's Reply on the Merits, para. 178). As noted by Respondent in its Rejoinder on the Merits, Claimant later used the language of the first part of Article 10(1) with respect to the Paper Profit and Varna Port claims.

171. In addition, Respondent alleges that, since the obligation of the Contracting Parties in the first sentence of Article 10(1) is to create conditions "*to make Investments in its Area*", it applies only to pre-Investment matters or, at most, to the circumstances prevailing when the Investor makes its Investment. In any event, contends Respondent, it did not fail to comply with this standard.

172. The Tribunal observes that the second sentence of Article 10(1) indicates that the conditions listed in the first sentence "*shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment*" and the next sentence links these Investments to the remainder of the protections of this Article. The application of the conditions of the first sentence of Article 10(1) extends in this way to all stages of the Investment and not only to the pre-Investment matters.

173. In addition, the conditions are dependent on their accordance with the other standards. For instance, stable and equitable conditions are clearly part of the fair and equitable treatment standard under the ECT.

174. Consequently, the Tribunal will assess the compliance with these conditions in connection with the other standards analyzed below.

1.2 Fair and Equitable Treatment

175. The Parties appear to agree that, despite the succinct wording of the standard of fair and equitable treatment, arbitral awards published in the past few years have contributed to providing some guidance to ascertain the content of this standard. The Parties agree that the standard includes to a certain extent the protection of the investor's legitimate expectations and the provision of a stable legal framework (Claimant's Memorial on the Merits, paras. 251-252; Respondent's Counter-Memorial on the Merits, para. 436). The Arbitral Tribunal is nonetheless conscious that this may now be a controversial area, particularly with different interpretations being given to the decision of the *ad hoc* Committee in *MTD v Chile*.[29] However, in the Tribunal's view, the

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[29] *MTD Equity Sdn. Bhd. and MTD Chile S. A.* v. *Republic of Chile*, Award of 25 May 2004, ICSID Case No. ARB/01/7 ("MTD"); *ad hoc* Committee Decision on Annulment of 21 March 2007.

present case can be decided on the facts, whatever interpretation is made of the FET standard in the ECT. Accordingly, for the purpose of this Award, the Tribunal has assumed the interpretation most favorable to the Claimant, as follows.

176. With regard to the protection of legitimate expectations, the Tribunal observes that these include the "*reasonable and justifiable*"[30] expectations that were taken into account by the foreign Investor to make the Investment.[31] These should, therefore, include the conditions that were specifically offered by the State to the Investor when making the Investment and that were relied upon by the Investor to make its Investment.[32] These expectations would equally include "*the observation by the host State of such well-established fundamental standards as good faith, due process, and non-discrimination.*"[33]

177. The stability of the legal framework has been identified as "*an emerging standard of fair and equitable treatment in international law.*"[34] However, the State maintains its legitimate right to regulate, and this right should also be considered when assessing the compliance with the standard of fair and equitable treatment. The tribunal in the *CMS v. Argentina* case explained the situation in the following terms:

> *It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the*

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30 *Thunderbird v. The United Mexican States*, Award of 26 January 2006, UNCITRAL-NAFTA, para. 147 ("Thunderbird").

31 *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, Award of 29 May 2003, ICSID Case No. ARB(AF)/00/2, para. 154 ("Tecmed"); *MTD*, para. 114; *Occidental Exploration and Production Company (OEPC) v. The Republic of Ecuador*, Final Award of 1 July 2004, LCIA Case No. UN3467, UNCITRAL, para. 185; *Eureko B.V. v. Republic of Poland*, Partial Award of 19 August 2005, para. 235; *LG&E v. Argentine Republic*, Decision on Liability of 25 July 2007, ICSID Case No. ARB/02/1, para. 127 ("LG&E").

32 *CME Czech Republic B. V v. The Czech Republic*, Partial Award of 13 September 2001, UNCITRAL, para. 611 ("CME"); *Tecmed*, para. 154; *Thunderbird*, para. 147; *LG&E*, para. 127.

33 *Saluka*, para. 303.

34 *LG&E*, para. 125.

> *framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects.*[35]

178. Finally the Tribunal observes that the condition of transparency, stated in the first sentence of Article 10(1) of the ECT, can be related to the standard of fair and equitable treatment. Transparency appears to be a significant element for the protection of both the legitimate expectations of the Investor and the stability of the legal framework.

1.3 Constant Protection and Security

179. Article 10(1) of the ECT also requires the host State to provide to the Investor's Investment "*the most constant protection and security.*" The Parties are in agreement that this standard imposes an obligation of "due diligence" (Claimant's Memorial on the Merits, paras. 277, 286; Respondent's Counter-Memorial on the Merits, para. 466). As noted by the tribunal in *AMT v. Zaire*, later quoted by the tribunals in *Wena v. Egypt* and *Saluka v. Czech Republic:*

> *The obligation incumbent on the [host State] is an obligation of vigilance, in the sense that the [host State] shall take all measures necessary to ensure the full enjoyment of protection and security of its investments an should not be permitted to invoke its own legislation to detract from any such obligation.*[36]

180. The standard includes, in this manner, an obligation actively to create a framework that grants security. Although the standard has been developed in the context of physical security, some tribunals have also included protection

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35 *CMS Gas Transmission Company v. The Argentine Republic*, Award of 12 May 2005, ICSID Case No. AR/O1/8, para. 277 ("CMS").

36 *American Manufacturing & Trading v. Republic of Zaire*, Award of 21 February 1997, ICSID Case No. AR/93/1, para. 28; *Wena Hotel Limited v. Arab Republic of Egypt*, Award on the Merits of 8 December 2000, ICSID Case No. ARB/98/4, para. 84; *Saluka*, para. 484.

concerning legal security. In this last respect, the standard becomes closely connected with the notion of fair and equitable treatment.[37]

181. Finally, this Tribunal observes that the standard is not absolute and does not imply strict liability of the host State. As noted by the tribunal in *Tecmed* and later quoted by the tribunal in *Saluka* "*. . . the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it.*"[38]

1.4 Unreasonable and Discriminatory Measures

182. The host State must also, under Article 10(1) of the ECT, refrain from subjecting the Investor's Investment to "*unreasonable or discriminatory measures.*" In its Memorial on the Merits, Claimant contends that Respondent's conduct was "*unreasonable*" and makes no reference to the existence of discriminatory treatment. However, in its Reply, Claimant introduces the allegation that Respondent has engaged in discriminatory practices in favor of Neftochim, a direct competitor of PCL.

183. The Tribunal observes that, on a number of occasions, tribunals in investment arbitrations have found a strong correlation between this standard and the fair and equitable treatment standard. For instance, the tribunal in Saluka noted that:

> *The standard of "reasonableness" has no different meaning in this context than in the context of the "fair and equitable treatment" standard with which it is associated; and the same is true with regard to the standard of "non-discrimination". The standard of "reasonableness" therefore requires, in this context as well, a showing that the State's conduct bears a reasonable relationship to some rational policy, whereas the*

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37 Schreuer, *op. cit.*, p. 4.

38 *Tecmed,* para. 177; *Saluka,* para. 484.

standard of "non-discrimination" requires a rational justification of any differential treatment of a foreign investor.[39]

184. However, this Tribunal believes that, while the standards can overlap on certain issues, they can also be defined separately. Unreasonable or arbitrary measures – as they are sometimes referred to in other investment instruments – are those which are not founded in reason or fact but on caprice, prejudice or personal preference.[40] With regard to discrimination, it corresponds to the negative formulation of the principle of equality of treatment. It entails like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds.[41]

1.5 Obligations Undertaken Towards Investors

185. The last sentence of Article 10(1) mandates the host State to observe any obligations it has entered into with the Investor or an Investment of an Investor and is described by Claimant as an "*umbrella clause*".

186. The Arbitral Tribunal can limit itself to noting that the wording of this clause in Article 10(1) of the ECT is wide in scope since it refers to "*any obligation.*" An analysis of the ordinary meaning of the term suggests that it refers to any obligation regardless of its nature, *i.e.*, whether it be contractual or statutory.[42] However, the *ad hoc* Committee that decided the annulment in the case, *CMS v. Argentina*, commented that the use of the expression "*entered into*" should

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[39] *Saluka,* para. 460. Other arbitration tribunals have taken a similar position merging this standard and the notion of fair and equitable treatment. As noted by Professor Schreuer, in the context of NAFTA this position could be explained by the fact that there is not a separate provision on the prohibition of arbitrary or discriminatory treatment. Schreuer, *op.cit.,* p. 5. See, *e.g.*, *S.D. Myers* v. *Canada*, Award on Liability of 13 Nov. 2000, 8 ICSID Reports 18, para. 263; *Waste Management, Inc.* v. *United Mexican States*, Award, 30 April 2004, ICSID Case No. ARB(AF)/00/3, para. 98. Tribunals deciding cases under other investment treaties that have taken a similar position include *CMS,* para. 290; *Impregilo* v. *Pakistan*, Decision on Jurisdiction of 22 April 2005, ICSID Case No. ARB /02/2, paras. 264-270; *MTD,* para. 196.

[40] See *Ronald Lauder v. The Czech Republic*, Final Award of 3 September 2001,UNCITRAL, paras. 221, 222, 232; Schreuer, *op.cit.* pp. 8-9.

[41] See A.F.M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview*, 8 J. Transnational Law & Policy, Vol. 8:1 (1998).

[42] *Enron Corporation Ponderosa Assets L.P. v. Argentine Republic*, Award of 22 May 2007, ICSID Case No. ARB/01/3, para. 274.

be interpreted as concerning only consensual obligations.[43] In any case, these obligations must be assumed by the host State with an Investor.[44]

187. Following either the wide interpretation of the clause or the more restricted one proposed by the *ad hoc* Committee, contractual obligations are covered by the last sentence of Article 10(1) ECT. Since the Parties are exclusively concerned with the application of the last sentence of Article 10(1) ECT to this type of obligation, the Tribunal need not extend its analysis any further.

2. Protections Provided in Article 13

188. The relevant part of Article 13 of the ECT reads as follows:

> *Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:*
>
> *(a) for a purpose which is in the public interest;*
>
> *(b) not discriminatory;*
>
> *(c) carried out under due process of law; and*
>
> *(d) accompanied by the payment of prompt, adequate and effective compensation.*
>
> *Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date").*

189. The Parties are in agreement in identifying the main elements of this provision. In fact, Respondent acknowledged in its Counter-Memorial on the

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43 *CMS v. Argentina*, Annulment Decision of 25 September 2007, para. 95.

44 *Impregilo v. Pakistan*, Decision on Jurisdiction of 22 April 2005, paras 214-216.

Merits that it did not dispute that "*Article 13(1) of the ECT states an obligation as to expropriation, or the general propositions that expropriation may be indirect; accomplished by omissions as well as by actions; and measured by means of the effect upon the investment* [...] *that any determination as to whether an expropriation has occurred must be made by reference to the specific facts of an individual case, and* [...] *the claimed loss of the value of the investment must be due to the actions of the State.*" (footnotes omitted) (Respondent's Counter-Memorial on the Merits, para. 505)

190. Claimant's claims refer to the existence of indirect expropriation, *i.e.*, its claims do not relate to the physical taking of the property but to the impact that the State's conduct had on the enjoyment and value of its investment.

191. The Tribunal observes that it is widely acknowledged that expropriation can result from State conduct that does not amount to physical control or loss of title but that adversely affects the economic use, enjoyment and value of the investment. This approach was adopted by the Iran–U.S. Claims Tribunal in the *Starret Housing Corp v. Iran* case in the following terms:

> [I]*t is recognized by international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner.*[45]

192. This position has been reiterated by a number of subsequent arbitral tribunals. In the *Tecmed v. Mexico* arbitration, the tribunal stated:

> *. . . it is understood that the measures adopted by a State, whether regulatory or not, are an indirect de facto expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that "... any form of exploitation thereof ..." has*

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[45] *Starrett Housing Corporation v. Islamic Republic of Iran*, Case No. 24, Interlocutory Award No. ITL 32-24-1, 19 December 1983, 4 Iran-US CTR 122, p.154.

> *disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed . . . Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary. The government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects. (Footnotes omitted)*[46]

193. The Arbitral Tribunal considers that the decisive elements in the evaluation of Respondent's conduct in this case are therefore the assessment of (i) substantially complete deprivation of the economic use and enjoyment of the rights to the investment, or of identifiable, distinct parts thereof (*i.e.*, approaching total impairment); (ii) the irreversibility and permanence of the contested measures (*i.e.*, not ephemeral or temporary); and (iii) the extent of the loss of economic value experienced by the investor.[47]

C. Analysis of the Alleged Violations

1. Environmental Damages

1.1 The Parties' Positions

194. Claimant contends that, by holding Nova Plama liable for environmental damage caused at the plant site prior to its acquisition by Claimant, Bulgaria breached its obligations under Article 10 of the ECT. It did so by failing to

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[46] *Tecmed*, para. 116.

[47] See for a summary of the elements of expropriation under Article 1110 of the NAFTA (which resembles Article 13 of the ECT), *Fireman's Fund Insurance Company (FFIC) v. United Mexican States*, Award of 17 July 2006, ICSID Case No. ARB(AF)/02/01, para. 176.

accord to PCL's investment fair and equitable treatment, failing to provide it the most constant protection and security, impairing by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of PCL's investment and by failing to observe obligations Bulgaria had entered into with PCL. Claimant bases this claim essentially on the alleged breaches by Bulgaria of the provisions of the Second Privatisation Agreement and on the provisions of the Bulgarian environmental law which were amended in 1999, after PCL's acquisition of Nova Plama.

195. Claimant also alleges that Bulgaria violated Article 13 of the ECT because the unlawful amendment of the environmental law resulted in its inability to secure financing for the Refinery. As a consequence, it was forced to shut the Refinery down in December 1999 and was prevented from enjoying any economic benefit from its investment (Claimant's Memorial on the Merits, paras. 332-334).

196. At the time of the Second Privatization agreement, the Bulgarian law on the environment read, in pertinent part, as follows:

> *In case of restitution, privatization or investment in new construction facilities by foreign and Bulgarian natural and legal persons, such persons shall not be liable for environmental damages resulting from past actions or omissions.*[48]

197. The Second Privatisation Agreement (Article 4) provided that:

> *Plama Consortium Limited shall ensure the maintenance of the required level of the environmental conditions related to the activities of the company in accordance with the provisions of the Bulgarian law. Plama Consortium shall bear no*

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[48] In its Post-Hearing Submission, Claimant called this provision "poorly drafted" (para. 49) and as not expressly providing that the Bulgarian State would be liable for environmental damage incurred during the period that the Bulgarian State had owned the polluting enterprise (para. 50).

> *responsibility for any environmental pollution arising prior to the date of signing of this Agreement." (R's Exh. 676)*

198. Claimant contends that this language – and the existing environmental law – protected it from liability both directly and indirectly (*i.e.*, through Nova Plama's being held liable for costs which PCL as shareholder would ultimately have to bear) for the estimated 37.4 million BGN pre-acquisition pollution clean-up costs with respect to Nova Plama.

199. In February 1999, shortly after PCL's acquisition of the Nova Plama shares in November 1998, the Environmental Protection Act was amended[49] so as to provide, in Section 9(1), that:

> *In the event of privatisation, with the exception of privatisation agreements concluded prior to 1 February 1999, or in case of restitution, or in the event of investment in new construction facilities by foreign and Bulgarian natural and legal persons, the liability for any environmental damages resulting from past actions or omissions shall be borne by the State under such terms and procedures as set forth by the Council of Ministers.*

200. PCL claims that it understood the language of Article 5.1 of the Second Privatization Agreement and the Bulgarian environmental law in force at the time to mean that it – and the company whose shares it was acquiring, Nova Plama – would not be responsible to pay for the clean-up of past environmental damage. It believed that the State would assume such liability, especially since the pollution had occurred during the period when Nova Plama was a State-owned enterprise.

201. Claimant refers, in this respect, to the Neftochim Information Memorandum, dated 11 February 1999 (R's Exh. 811, p. 90), in other words before the above amendment entered into effect, which states that "*according to applicable law, the Bulgarian Government is responsible for funding the environmental remediation programme*". It cites this as evidence that the Bulgarian

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[49] The amendment entered into force on 16 February 1999 (Declaration of Denev, para. 58; Claimant's Post-Hearing Submission, para. 51).

environmental law in force even *prior to* the 16 February 1999 amendment and, therefore, at the time of Nova Plama's second privatization, placed responsibility for past environmental damage on the State. However, as Respondent explains in its Post-Hearing Submission on the Merits, at paragraph 51, the amendment to the environmental law explicitly placing such responsibility on the State was adopted by the Parliament on 29 January 1999 and, although it only entered into force on 16 February 1999, provided for an effective date of 1 February 1999; thus, the Neftochim Information Memorandum referred to the law as amended, not as it stood in 1998. The Arbitral Tribunal accepts this explanation.

202. PCL's understanding of past environmental damage finds expression in the Recovery Plan which was adopted pursuant to the Privatization Agreement. At the end of the Recovery Plan, in Section 7, after referring to the issue of cleaning up past environmental damage, it is stated that "[t]*he Bulgarian Government has taken into consideration this fact and has released the new owners (including Plama AD) of any responsibility for environmental pollution having arisen prior to the date of signing the Privatization Contract, i.e. 17 November 1998*." (Underlining added. See R's Exh. 609.)

203. Claimant contends that, by adopting amendments to its environmental law that would hold the State of Bulgaria responsible only for past ecological damage with respect to privatizations occurring *after* 1 February 1999 – and, therefore, not to the privatization of Nova Plama which occurred in 1998 – Bulgaria changed its law to the detriment of Claimant and Nova Plama and breached the contractual obligations to PCL as set out in the Second Privatisation Agreement. This was, in turn, a clear violation of the final sentence of Article 10(1) of the ECT.

204. Claimant also cites a letter of 14 June 2002 (C's Exh. 383) from the Bulgarian Minister of Finance to Nova Plama, threatening to reopen the insolvency proceedings against Nova Plama unless it, among other things, undertook its obligation to clean up the pollution at the Refinery, thereby illegally attempting to force Nova Plama to assume liabilities of which it had been contractually absolved.

205. It is Claimant's case that, as a consequence of this change in the law, Nova Plama became liable for past environmental damage at the Refinery – evaluated by it at 31.4 million BGN – and that the burden of such a financial liability rendered it incapable of raising the necessary financing to resume production at the Plama Refinery.

206. Claimant further asserts that, by adopting the February 1999 amendment to apply prospectively only, Respondent acted in a discriminatory way *vis-à-vis* Claimant and Nova Plama by comparison with the treatment accorded to Nova Plama's competitor, Neftochim, another Bulgarian oil Refinery which was privatized in October 1999 and which, by virtue of the 1999 amendment to the environmental law, was exonerated from responsibility for past environmental damage. This discriminatory treatment violated Respondent's obligations under Article 10(1) of the ECT.

207. Respondent contends that, while the language of Article 5.1 of the Privatization Agreement provides to the investor, PCL, immunity from liability for past environmental damage, it does not remove responsibility from the acquired company, Nova Plama. The law in force at the time of the Second Privatization Agreement was no different concerning this issue, as seen from the text quoted above (para. 196 *supra*). Nothing in the law or in the agreement made the State liable for past pollution.

208. Respondent denies that it committed any breach of its obligations under the ECT to PCL. It contends that Bulgaria's actions *vis-à-vis* Nova Plama concerning the environment at the Refinery site were not aimed at imposing onerous liability for remediation of past environmental damage but rather at ensuring that Nova Plama would take the necessary measures to operate the Refinery in a manner compliant with existing regulations. It cites a 1998 information letter (R's Exh. 528; C's Exh. 189) addressed by the Bulgarian Regional Inspectorate to the effect that Nova Plama had no outstanding unpaid sanctions or fines and summarizing pending steps to bring the Refinery's operations into compliance with environmental regulations. In fact, Respondent asserts that there is no evidence that Nova Plama was ever subject to any sanction by Bulgaria in connection with alleged past environmental damages (Respondent's Counter-Memorial on the Merits, para. 119).

209. Respondent contests the reliability of an expert report prepared for Nova Plama in 1999 (the so-called "Control P. Report" – R's Exh. 521) as an assessment of the measure of past environmental damage. It is upon this report that Claimant relies to determine its estimate of the cost of remediation of past environmental damage. Respondent contends that the Control P. Report is not consistent with the established methodology for assessing the existence of damages actually requiring remediation and that it does not properly assess the costs of any such remediation. It contends that the report fails to distinguish between remediation of past environmental damages and measures regarding compliance with current regulations for re-establishing refinery operations and does not set out reliable costs estimates for the measures it advises should be taken (Respondent's Counter-Memorial on the Merits, paras. 130 *et seq.*).

210. Respondent also says that Claimant has not proven any detrimental consequences to itself or to Nova Plama due to liability for past environmental damage. It has not been fined, sanctioned or banned. Nor, asserts Respondent, does the evidence submitted by Claimant prove that it was unable to obtain financing or insurance due to outstanding environmental liabilities. Respondent adds that Nova Plama benefitted from the sale of liquid waste, which reduced its environmental remediation costs.

211. As regards the Second Privatization Agreement, Respondent says that it is clear from the language of the Agreement that, while the investor – PCL – would not be held liable for past environmental damage, nothing is said regarding the liability of the target of the investment, Nova Plama. Under the Bulgarian environmental legislation in force at the time of Nova Plama's privatization (both in 1996 and 1998), Nova Plama remained liable for past environmental damage and, according to Respondent, that fact must have been taken into account in negotiating the terms of Claimant's purchase of Nova Plama's shares. Respondent contends that the fact that, prior to Nova Plama's privatization, the State owned and controlled the Refinery did not, under the law in force during that time, mean that the State was responsible for environmental damage; rather, the liability, under the law, remained with Nova Plama. Respondent denies that the 1999 amendment of the

environmental law discriminated against Claimant and asserts that Claimant and the investor in Neftochim were not in similar circumstances.

1.2 The Tribunal's Analysis

212. The Arbitral Tribunal does not find the evidence and arguments very clear-cut. It seems not unreasonable for PCL to have understood from the text of Article 4 of the Second Privatization Agreement that neither it nor the company it was acquiring would be held liable for cleaning up past environmental damage. After all, where would a bankrupt company, which Nova Plama was at the time of its acquisition by PCL, obtain the money to clean up past pollution if not from its shareholders(s)? In that case, the exemption of PCL alone from liability for past pollution was a hollow provision. This view finds support in a letter from the Ministry of Economy to Nova Plama dated 8 July 2002 (R's Exh. 465) in which the Ministry states, ". . . *the Ministry of Economy deems valid the text of the agreement signed by Plama Consortium Ltd and the Privatization Agency on 17.11.1998 (the Second Privatization Agreement), i.e., we think that Nova Plama AD should not have to bear material responsibility for cleaning out the past ecological damages.*"

213. At the same time, Mr. Vautrin, in his Fourth Witness Statement, said that obtaining a specific provision in the privatization agreement by which the State accepted liability for past environmental damage was a fundamental condition for him to purchase Nova Plama's shares (see para. 37). Yet, one searches in vain for such an explicit exemption in the Second Privatization Agreement. Such an exemption might have been obtained in negotiation; but no evidence was given as to whether an effort was actually made to procure it. Respondent has submitted evidence of other privatizations in which investor and privatized company were exempted from liability for past environmental damage and in which State responsibility for pre-privatization environmental damage was explicitly provided for (R's Exhs. 701 and 702). If it is correct, as Claimant's Counsel implied during the hearing in January-February 2008 (H. Tr. Day 1, 28 January 2008, p. 49), that Bulgaria changed its environmental law in 1999 in order to protect Neftochim from liability for past environmental damage as part of that company's privatization, how do we know that the

Government would not have done the same for Nova Plama had Claimant bargained for it? Respondent asserts that the price paid for Nova Plama's shares reflected (or should have reflected) all known liabilities, past, present and future and that the state of environmental pollution at Nova Plama was known to all parties. No evidence was given on these aspects of the negotiations.

214. Respondent has contended that, if the assumption of State liability for past environmental damage adopted in February 1999 had been made retroactive beyond 1 February 1999, it would have had to extend such liability to a prohibitive number of other Bulgarian companies (see, *e.g.*, R's Exh. 452). However, when one looks at other evidence in the record, for example the World Bank's Implementation Report (C's Exh. 187), it appears that many of the very companies cited by Respondent as being those to which State aid for past environmental damage would have had to be extended if the February 1999 legislation had been retroactive, were in fact beneficiaries of such aid.

215. Another element which renders the issue of past environmental damage unclear is Section 7 of the Recovery Plan (R's Exh. 609), drafted essentially by Claimant, which states that the Government of Bulgaria excused PCL "*(including Plama AD)*" from paying for past environmental damage. If PCL really believed what it wrote in the Recovery Plan, why did it have to enter a reserve in Nova Plama's books for such damage? Moreover, there is other evidence indicating that Nova Plama did not have any significant past environmental damage to clean up (R's Exhs. 526 and 727, Appendix 3, page 8).[50]

216. Yet, there are elements in the record which seem to indicate the contrary of what is said in Section 7 of the Recovery Plan. Thus, for example, a note to PCL's 1999 Financial Statements stating that, by virtue of the 1999 amendment of the environmental law, Nova Plama is liable for past ecological damages caused in the period when the State was Nova Plama's sole owner

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[50] The Arbitral Tribunal is, of course, mindful of the Control P Report which assesses the Refinery's environmental status.

(C's Exh. 203, p. 13, Section 6), as well as a note from Nova Plama's Chief Ecologist to Syndic Todorova also addressing the Refinery's liability for past pollution (C's Exh. 186, p. 2). There exists also a letter from Minister Vassilev to Mr. Vautrin, dated 14 June 2002 (R's Exh. 463), demanding that Nova Plama "*shoulder the expenses for cleaning out all environmental pollutions resulting from the Refinery's work.*"

217. In light of the foregoing, the Arbitral Tribunal comes to the question of whether there is any element in this confusing situation which establishes a violation by Bulgaria of its obligations under the ECT.

218. The Arbitral Tribunal finds no evidence that the modification of Bulgaria's environmental law in 1999 was aimed directly against Claimant and its investment in Nova Plama or in favor of Neftochim. That modification, implemented pursuant to recommendations made by the World Bank, is seen by the Arbitral Tribunal rather as an effort by Bulgaria to meet its obligations under Article 10(1) of the ECT to create favorable conditions for Investors.

219. In his legal opinion of 28 October 2005, Mr. Denev says that the 1999 amendment of the environmental law was discriminatory against prior investors and, therefore, unconstitutional. The Arbitral Tribunal cannot opine on the constitutionality of the 1999 amendment. However, the Tribunal believes that the ECT does not protect investors against any and all changes in the host country's laws. Under the fair and equitable treatment standard the investor is only protected if (at least) reasonable and justifiable expectations were created in that regard. It does not appear that Bulgaria made any promises or other representations to freeze its legislation on environmental law to the Claimant or at all.

220. Moreover, Bulgaria's environmental law, as it existed prior to PCL's acquisition of Nova Plama (quoted earlier), could give no assurance to Claimant that Nova Plama would be exempt from liability for cleaning up past environmental damage. Claimant admits that the Bulgarian law, as it existed at the time of Nova Plama's second privatization, was, at best, unclear as to liability for past environmental damages (H. Tr. Day 1, 28 January 2008, p. 67). Indeed, Mr. Vautrin must have recognized the uncertainty in the law

because, as he testified (Fourth Witness Declaration, 28 October 2005, para. 37), State assumption of liability for past environment damage was so essential to him that he insisted on an explicit provision in the privatization agreement, exempting Nova Plama from such liability. This indicates to the Arbitral Tribunal that he was aware that Bulgarian law at the time did *not* protect Nova Plama against liability for past pollution but failed to negotiate the contractual guarantees he believed were necessary to avoid such risk. While Claimant criticizes Bulgaria for the inadequacy of its environmental law in this regard, Claimant was, of course, aware of, or should have been aware of, the state of Bulgarian law when it invested in Nova Plama.

221. Claimant also complains that, at the same time as the Privatization Agency was negotiating with PCL over the environmental issue in 1998, the proposal to make the State liable for past environmental damages of privatized companies (which became the February 1999 amendment) was being debated in the Bulgarian Parliament without informing PCL of this impending change in the law. But those parliamentary debates were in the public record and should have been known by PCL's Bulgarian advisors.

222. In light of these circumstances, the Arbitral Tribunal cannot uphold Claimant's allegations that Respondent violated the standard of fair and equitable treatment by amending its environmental law. It is also unclear how Respondent's conduct in this context could amount to a violation of the obligation to provide constant protection and security. Even accepting the approach that this standard includes an obligation to provide legal security, the Tribunal has established that Claimant failed fully to appreciate the scope and specificities of Bulgarian legislation. In addition, Claimant failed to identify and the Tribunal was unable to establish a lack of due diligence in Respondent's treatment of Claimant and its investment with regard to the environmental amendments.

223. As to the claim concerning discriminatory treatment, Bulgaria contended that all companies privatized before 1999 were in the same situation as Nova Plama and did not receive aid to clean up past pollution. There is, nevertheless, evidence that, in the implementation of the 1999 amendment, there may have been some companies not covered by the new law which,

nevertheless, received State assistance, whereas Nova Plama did not (see para. 206 *supra*). However, insufficient evidence has been given to permit the Arbitral Tribunal to determine that Bulgaria's treatment of Nova Plama in this respect was discriminatory. Therefore, the Arbitral Tribunal dismisses Claimant's allegations in this regard.

224. With respect to Claimant's allegation as to the violation of the last sentence of Article 10(1) of the ECT, the Tribunal finds no violation by Bulgaria of its contractual undertakings to PCL. The amendment of the Environmental Law did not breach Article 4 of the Second Privatization Agreement since this provision did not shift Nova Plama's liability to the State.

225. In addition, the Arbitral Tribunal has examined the evidence to see what harm or loss to Claimant or its investment resulted from Nova Plama's liability to clean up past pollution, assuming it existed. Claimant's contention that it could not obtain financing for the project given the large liability for past pollution on its books is not supported by sufficient documentary evidence of a contemporary nature. The only document in the record is a letter from a Swiss insurance company, Intersure, (C's Exh. 204) saying that it needed "*confirmation that the outstanding ecological issue has been solved.*" But such a letter from one insurance company hardly proves that financing was impossible to obtain because of any liability for environmental clean-up. As Counsel for Claimant stated at the January-February 2008 hearing (H. Tr. Day 1, 28 January 2008, p. 42), *"no company or bank would advance money to [Nova Plama] because Plama itself had bad credit."*

226. Bulgaria has insisted in submissions that its governmental authorities never sought to enforce the obligation to clean up past pollution on Nova Plama.[51] While Claimant, in its Post-Hearing Submission on the Merits (para. 91), asserted that the damage to its investment from liability for past environmental damage is readily quantifiable at USD 23 million, nowhere does it show that it

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[51] Indeed, two governmental documents, evaluating Nova Plama's environmental status (R's Exhs. 526 and 528) do not refer to significant past pollution at the Refinery but more to measures which the Refinery would have to take to bring itself into compliance with current standards.

had to pay such amount. There is no evidence of what amounts, if any, Nova Plama actually spent to clean up past environmental damage. In fact, Claimant's Post-Hearing Submission on the Merits does not refer to PCL's or Nova Plama's having had to pay for past environmental damage but rather to the prospect of a demand that they pay (see para. 76). Thus the very basis of Claimant's claim, summarized in paragraph 194 above, that Bulgaria is guilty of "*holding Nova Plama liable for environmental damage*," is not factually established.

227. Absent any proof of harm or loss to the investment or limitation to Claimant's right to use or enjoy its investment as a result of Respondent's conduct with regard to the environmental amendments, it is impossible to see how a claim concerning the expropriation of Claimant's investment could be successful.

228. Therefore, the Arbitral Tribunal is unable to conclude that Respondent violated its obligations under Articles 10(1) and 13 of the ECT.

2. Actions of the Syndics

229. Claimant essentially complains that the syndics appointed to manage Nova Plama while it was in bankruptcy in 1998-1999 failed to fulfil their obligations and took unlawful actions which harmed Nova Plama. It contends that the Bulgarian Government and Courts failed properly to control them, in violation of Respondent's obligations under Article 10(1) of the ECT to afford fair and equitable treatment, the most constant protection and security and to avoid unreasonable measures. Together with other violations, the syndics' actions amount to an indirect expropriation contrary to Article 13 of the ECT.

2.1 Irregularities in the Appointment of the Syndics

230. Claimant contends that there were irregularities in the appointment of the syndics and in the retention of Syndic Penev as a supervisory syndic after approval of the Recovery Plan.

2.2 Unlawful Increases in the Salaries of Nova Plama's Workers

231. Claimant alleges that, prior to its acquisition of Nova Plama, while Claimant was negotiating an agreement with the workers of Nova Plama regarding

payment of back salaries, one of the syndics of Nova Plama, then in insolvency, Syndic Todorova, *ex officio*, and without consulting PCL or Nova Plama, undertook to index workers' salaries in such a way as to increase the amounts owing to the employees as well as to include in the company's receivables payments for taxes, insurance, etc., which were not foreseen. Claimant considers these acts by the syndics, which increased Nova Plama's financial burden, unlawful, citing a Pleven Regional Prosecution Office's conclusion that the syndics had caused Nova Plama to suffer damages in the amounts of BGN 1,583,738.553 by unlawful salary indexation and BGN 2,025,313.581 by unlawful acceptance of amounts corresponding to workers' income tax, social insurance, etc.

2.3 Overloading of Debt by the Syndics

232. Claimant alleges that the syndics unlawfully accepted as debts of Nova Plama pre-insolvency claims which were either fabricated or inflated, thereby burdening the company's debts by BGN 40 million. The creditors of these debts were Mineralbank, First Private Bank and the Bank for Agricultural Credit (BAC). According to Claimant, the Pleven District Court approved all the syndics' actions on 31 May 1999 (C's Exh. 224).

233. Claimant also complains that the syndics unlawfully accepted claims against Nova Plama by First Private Bank which were not owing by Nova Plama to the bank but which were, nevertheless, approved by the competent court. Claimant alleges that the two syndics were criminally indicted in 2004 for accepting non-existent debts in the amount of BGN 40,886,453.645.

234. Claimant says that because, at the time, management of Nova Plama was in the hands of the syndics, and Nova Plama's management board was not given access to the company's financial accounts, PCL and Nova Plama had no way of ascertaining whether the claimed receivables were legitimate or not.

2.4 Misappropriation of Nova Plama's Funds

235. Claimant further alleges that Syndic Penev misappropriated Nova Plama's funds and carried out other unlawful actions during the period from May 1999 to October 2000. According to Claimant, Syndic Penev was found guilty by

the Pleven Regional Court of criminal action in the course of his duties as syndic of Nova Plama.

2.5 Worker Riots

236. Claimant accuses Syndic Todorova of inciting the workers of Nova Plama to strike and riot unlawfully at the Refinery, of herself participating in these actions, and of using violence to evict the Refinery's director from his office (which led to the shutdown of the Refinery on 8 April 1999). In this connection, the police, according to Claimant, failed adequately to protect the Refinery and its management. These unlawful actions allegedly paralyzed the production of the Refinery and blocked all movements of products in and out of the Refinery for two and a half months, escalating into anarchy which lasted for many weeks. Despite reporting these events to the Bulgarian Government, Nova Plama received no police assistance to restore order. Claimant contends that these actions and omissions violate Bulgaria's obligation under Article 10(1) to afford the most constant protection and security to its investment and fall within the scope of Article 12 of the ECT[52], entitling it to compensation for losses caused by civil disturbances.

2.6 Parallel Recovery Plan

237. In its Reply, Claimant alleges that Syndic Todorova unlawfully submitted a parallel recovery plan to that of Claimant's which delayed the lifting of Nova Plama's insolvency (Claimant's Reply on the Merits, paras. 122-3).

238. Claimant further complains that Syndic Todorova refused to account for products shipped to and from the Refinery and refused PCL's request that its own designated financial and accounting representative be on site (Claimant's Post-Hearing Submission on the Merits, para. 17).

239. Respondent denies that it bears any responsibility for the actions of the syndics complained of by Claimant and contends that, in any event, the syndics' actions were in accordance with Bulgarian law in effect at the time.

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[52] See text of Article 12 in the Annex to this Award.

Respondent goes on to rebut Claimant's arguments as to the appointment of the syndics, as to unlawful salary increases having been given to the workers, as to debt overloading by the syndics, as to misappropriation by Syndic Penev, as to the alleged riot and unlawful strike and Syndic Todorova's role therein, as to the failure of the police to provide protection to the Refinery and its management and as to the syndics' submission of a parallel recovery plan. Moreover, the so-called "riot", which occurred on 8 April 1999 could not have caused the Refinery shutdown, which began on 5 April 1999 and, therefore, predated this "riot".

240. Respondent's principal contention is that, under Bulgarian law, a syndic is not an organ of the State and does not perform governmental functions; therefore, his/her actions cannot be imputed to the State. Although a syndic is appointed by a court upon nomination by the creditors, the syndic does not, according to Respondent, perform governmental functions or operate under the direction or control of the State and does not act as an agent of the State or of the court. Therefore, contends Respondent, if Claimant complains about the actions of the syndics, those actions cannot form the basis of claims against Respondent under the ECT.

241. In any event, Respondent says, Claimant has failed to demonstrate that the syndics acted contrary to law or otherwise improperly in a manner which caused any harm to Claimant. Nor has Claimant established that the Bulgarian courts took any action or failed to take any action which was improper.

242. With respect to Claimant's contention that the syndics unlawfully accepted pre-insolvency claims against Nova Plama made by BAC, Mineralbank and First Private Bank, Respondent contends that Claimant ratified, at a creditors' meeting on 22 June 1999, a list of accepted claims containing all claims now challenged by it as well as the Recovery Plan which included such claims. In this connection, Respondent challenges Claimant's assertion that it had no legal standing to contest any measures in the insolvency proceeding.

243. Respondent says that, prior to its acquisition of Nova Plama's shares, Claimant had full knowledge of and unimpeded access to information about the Nova Plama bankruptcy proceedings and all claims admitted therein; that Claimant

specifically agreed to the claims it now contests in the Recovery Plan and elsewhere[53]; that Claimant failed to utilize at the time the remedies available to it under Bulgarian law for contesting the claims in question; and that the syndics' acceptance of the claims of Mineralbank, BAC and First Private Bank was not unlawful because the claims were supported by sufficient evidence.

244. Respondent contends that the syndics' acceptance of the claims in question did not increase Nova Plama's debts and had no adverse effect on the Refinery's net economic condition.

245. As to the workers' "riot", Respondent denies that the workers' protests over not being paid their salaries amounted to a "riot" or that Syndic Todorova in any way instigated a "riot" by the workers. Respondent adds that the Bulgarian police were constantly present at the Refinery at the time the alleged "riot" occurred and provided any necessary protection. In no event, says Respondent, did the events or "riot" of 8 April 1999 cause the shutdown of the Refinery. According to Respondent, the shutdown began – on Claimant's own initiative – on 4 or 5 April 1999.[54] Nor, contends Respondent, were the workers' actions responsible for blocking product from coming into or going out of the Refinery.

246. Respondent contests Claimant's argument regarding the parallel recovery plan submitted by Syndic Todorova, saying she had the right under Bulgarian law to submit such a plan.

247. Finally, Respondent states that the Bulgarian courts, on 13 November 2006, properly acquitted the syndics of criminal charges with the exception of one minor one which had been filed against them (C's Exh. 241).

2.7 The Tribunal's Analysis

248. The factual evidence with respect to the actions of the syndics and the alleged riot of the Refinery's workers is in virtually all respects contradictory.

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53 See, *e.g.*, R's Exhs. 142 and 598.

54 Claimant's Counsel appeared to verify Respondent's argument at the January-February 2008 hearing (H. Tr., Day 5, 1 February 2008, p. 983, lines 20-22 and p. 984, line 1).

Eyewitnesses to the same events gave conflicting testimony as to what they saw. Thus witnesses presented by Claimant testified that the workers at the Refinery rioted, used violence to evict the Refinery's director, Mr. Beauduin, from his office, were encouraged and even led in their actions by Syndic Todorova and that the police did nothing to intervene and afford protection to the premises and its management. Respondent's witnesses testified that the workers gathered to demand payment of their overdue wages, that their demonstration was peaceful, that Syndic Todorova was not seen encouraging or leading the demonstration, that there was no violence and that Mr. Beauduin left his office of his own volition, safely escorted by the police.[55]

249. Given this conflicting evidence, the Arbitral Tribunal is unable to form any firm view as to what really transpired. The burden of proof being on Claimant, the Tribunal cannot, therefore, rule in its favor concerning these allegations, including with respect to its claim under Article 12 of the ECT.

250. As to Claimant's arguments that there were irregularities in the appointment of the syndics, that the syndics unlawfully increased the salaries of the workers, that they accepted debts unlawfully and that they improperly submitted a "*parallel*" recovery plan, the Arbitral Tribunal considers that the evidence shows the contrary (See, *e.g.*, R's Exh. 1030, a decision from the Pleven Municipal Court acquitting the syndics of criminal charges related to the acceptance of claims in the course of the bankruptcy proceedings). The Tribunal is persuaded by Respondent's rebuttal of Claimant's arguments in its Post-Hearing Submission on the Merits (pp. 23 *et seq.*).

251. However, in order to determine the responsibility of Respondent under the ECT, the crucial questions for the Arbitral Tribunal are whether the State is legally responsible for the actions of syndics, whether syndics are instruments of the State and perform State functions and whether the Bulgarian courts failed to control or supervise the syndics in a way which gives rise to State responsibility. Here again, the Arbitral Tribunal has before it conflicting

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[55] This version of the facts is supported by Mr. Beauduin's memorandum dated 8 April 1999, recounting the events of that day (R's Exh. 840).

experts' opinions on the role and authority of syndics and the courts in a bankruptcy situation in Bulgaria such as that of Nova Plama.

252. Article 8 of the Articles on State Responsibility of the International Law Commission provides:

> *The conduct of a person or a group of persons shall be considered an act of State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.*

253. Having reviewed the experts' opinions, the evidence presented and the submissions of the Parties on these points, the Arbitral Tribunal has come to the conclusion that syndics in bankruptcy proceedings, such as that involving Nova Plama, are not instruments or organs of the State for whose acts the State is responsible. Although Claimant's legal expert, Mr. Denev, in his opinion of 28 October 2005 annexed to Claimant's Memorial on the Merits, cites a Bulgarian Supreme Court decision to the effect that a syndic is "*a court's authority*" (see para. 37), the Arbitral Tribunal does not interpret this to mean that a syndic carries out judicial or State functions. Mr. Denev quotes the Commercial Law as defining the syndic as an "*organ of the estate of insolvency*" (see para. 36). The opinions of Professor Chipev, dated 16 July 2006 and 19 July 2007, presented by Respondent, seem more persuasive to the Tribunal in concluding that a syndic is not a State organ and accord with the experience of the members of the Tribunal in other civil law countries. Thus the Arbitral Tribunal concludes that the acts of the syndics, if they were wrongful – and the Tribunal makes no finding in this respect – are not attributable to Respondent, which cannot, therefore, be said to have violated its obligations towards PCL under the ECT.

254. As for Claimant's allegation that the Bulgarian courts failed adequately to control and supervise the acts of the syndics, the Arbitral Tribunal accepts Mr. Denev's opinion that the Bulgarian courts had a role in supervising the work of the syndics. Obviously the courts of a State are organs of that State, and the State may bear responsibility for the acts or omissions of its courts.

According to the expert opinions of Professor Chipev, presented by Respondent, the powers of supervision and control of the courts over syndics are relatively limited, an opinion which the Arbitral Tribunal accepts. It appears that Claimant and/or Nova Plama had access to the Bulgarian courts to complain of actions of the syndics with which they disagreed. In fact, they did bring certain actions in this respect.[56] The Tribunal can find no evidence that such access to the courts was in any way obstructed or that the courts decided the issues presented to them in anything other than a fair way. The Tribunal finds no evidence which would engage the responsibility of Respondent under the ECT.

255. Consequently, the Arbitral Tribunal rejects Claimant's complaints regarding the syndics.

3. Paper Profits

3.1 The Parties' Positions

256. Claimant contends that, because Bulgaria lacked appropriate accounting rules and tax legislation, the discount or rescheduling of Nova Plama's debts in its Recovery Plan resulted in artificial profit which became taxable and thus created a new debt for the company, requiring an accounting reserve in its books. As a consequence, Nova Plama was not in a position to finalize its 1999, 2000 and 2001 financial statements and missed the deadline for filing its tax return for the 1999 fiscal year and in subsequent years. This, in turn, created a new tax liability. The result was that, being unable to show that taxes due had been paid and therefore to present audited financial statements, it was impossible for Nova Plama to obtain the necessary financing to start up the Refinery.

257. Claimant contends that Bulgaria did not have a proper legal framework for companies which had terminated insolvency proceedings, thereby violating its undertaking in Article 10(1) of the ECT to create stable, equitable and

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[56] Claimant made the general allegation that Respondent violated Article 10(12) of the ECT. The Arbitral Tribunal is not persuaded that this is the case.

favorable conditions for Investors. From 1999 to 2001, Claimant says that Nova Plama sought the Government's approval for various accounting measures which would avoid its having to declare a "paper profit" but never received a satisfactory response.

258. Eventually, says Claimant, Bulgaria acknowledged the gap in its legislation and, at the end of 2001, adopted legislation absolving companies of profit tax on such "paper profits".

259. Claimant concludes that, by refusing to assist Nova Plama in finding a solution to the problem of "paper profits" and by failing to amend its laws in a timely way regarding the taxation of the paper profit which resulted from the discounted liabilities under the Recovery Plan, Bulgaria violated its obligation under Article 10(1) of the ECT to accord fair and equitable treatment and the most constant protection and security to Claimant's investment and to avoid unreasonable measures. It also violated Article 13 of the ECT, because Bulgaria's conduct in this regard contributed to PCL's inability to secure financing for the Refinery and resulted in the deprivation of Claimant's right to the use and enjoyment of the economic benefits of its investment.

260. Respondent replies that ECT Contracting States do not accept an obligation under Article 10(1) of the ECT regarding fair and equitable treatment with respect to tax. It refers to Article 21(1) of the ECT which provides:

> *Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency* [...]

261. In any event, Respondent contends, Claimant could not have had any legitimate or reasonable expectation that Nova Plama would not be subject to existing tax law, of which it was perfectly well aware when it purchased the company. It was not excused from filing obligatory tax returns or prevented from preparing financial statements; rather than doing so, it chose to lobby for tax relief and for a change in the law. Respondent submits that the various

Bulgarian authorities concerned acted reasonably and in good faith to respond to Claimant's inquiries and that Bulgaria's tax laws were reasonable and consistent with international standards.

262. In fact, according to Respondent, Nova Plama had available to it alternative accounting methods for treating the discounted debts to that which it adopted which would have avoided the problems it encountered (see Transacta Report, paras. 38-39).

263. Respondent also points out that, in 2001, it did adopt the change to its tax law which Nova Plama sought.

264. Finally, Respondent says that Claimant has failed to produce evidence that it or Nova Plama made any serious attempts to obtain financing that were rejected because of Nova Plama's alleged inability to prepare its financial statements and file tax returns. Nor has it proven otherwise that the "paper profit" issue caused it any injury.

3.2 The Tribunal's Analysis

265. The problem of which Claimant here complains is that the discounted debt (which it was able to negotiate with Nova Plama's creditors) unfairly gave rise under Bulgarian tax law to a "paper profit" on which it was liable to pay company income tax. It demanded a modification of Bulgaria's tax law to eliminate the tax consequences, which it finally obtained in 2001, but until then it was unable, in light of the enormous potential tax liability, to file certified audited financial statements without paying the tax; and this meant it could not obtain financing for the operation of the Refinery.

266. The Arbitral Tribunal cannot see how this claim gives rise to a violation of Bulgaria's obligations under the ECT. In the first place, Article 21 of the ECT specifically excludes from the scope of the ECT's protections taxation measures of a Contracting State, with certain exceptions, one of which is that, if a tax constitutes or is alleged to constitute an expropriation or is discriminatory, the Investor must refer the issue to the competent tax authority, which Claimant did not do.

267. Even putting aside Article 21 of the ECT, the Tribunal finds no action by Respondent which comes anywhere near to being unfair or inequitable treatment or amounting to expropriation. When Claimant purchased the shares of Nova Plama and negotiated its Debt Settlement Agreement, it was or should have been aware of the taxation treatment that would be accorded to debt reduction by Bulgarian law. It could not have had any legitimate expectation that it would be treated otherwise. It had Ernst & Young, one of the world's leading tax advisory firms, advising it on its acquisition.

268. It has been suggested by Respondent and its experts (see Report of Transacta, 28 July 2006, Respondent's Counter-Memorial on the Merits) that Nova Plama could have adopted a method of accounting for its debt reduction under Bulgarian law which would have avoided the tax consequences it complains of. Claimant says that it was not informed at the time. While the members of the Arbitral Tribunal are not experts in Bulgarian accounting or tax law, it is clear to the Tribunal that Claimant, as the investor, was responsible for doing its due diligence regarding the tax consequences of debt reduction and for taking the necessary measures to deal with them.

269. Respondent produced evidence which shows that the tax laws of many countries around the world treat debt reductions, as were negotiated in this case, as income taxable to the beneficiary (see Report of International Fiscal Association, R's Exh. 1027). It cannot be said that Bulgaria's law in this respect was unfair, inadequate, inequitable or discriminatory. It was part of the generally applicable law of the country like that of many other countries.

270. Here again, as in the case of liability for past environmental damage, discussed earlier in this Award, if Claimant was concerned about the tax consequences of the debt reduction it sought and obtained, it could have attempted to negotiate provisions in the Privatization Agreement protecting Nova Plama against them. There is no evidence that it did so.

271. The evidence also shows that Bulgaria did not in fact seek to collect the taxes which were due from Nova Plama.[57] On the contrary, there is much evidence in the record which demonstrates the Government of Bulgaria's efforts to try to assist Claimant and Nova Plama in this respect (C's Exhs. 273, 275, 282). While in its Post-Hearing Submission, Claimant asserts that its damage from the "hollow" tax is readily quantifiable at USD 23 million (see para. 91), nowhere does it say that it ever had to pay any such tax. And in the end, in 2001, Bulgaria changed its tax laws to exempt Nova Plama from any taxation on these "paper profits". (See Report of Transacta, 28 July 2006, paras. 59 *et seq.*; Respondent's Counter-Memorial on the Merits, paras. 289-301; Respondent's Rejoinder on the Merits, paras. 123-4). In terms of diligence, Bulgaria's behavior with regard to the above is beyond reproach and the claim concerning the violation of the standard of constant protection and security under the ECT is without merit.

272. Finally, the Arbitral Tribunal is not persuaded by the evidence that it was the "paper profits" issue that made it impossible for Claimant or Nova Plama to obtain financing for the operation of the Refinery. As Counsel for Claimant stated at the January-February 2008 hearing (H. Tr. Day 1, January 28, 2008, p. 42), Nova Plama in 1998 "*had bad credit, and no company or bank would advance money to it.*" It is therefore not apparent how Bulgaria's conduct could have deprived Claimant of the economic benefits of its investment. Claimant's claim concerning expropriation on this account must be dismissed.

273. In conclusion, the Arbitral Tribunal finds no evidence that Bulgaria violated its obligations under the ECT (assuming it applies to this issue) towards Claimant with respect to the paper profits issue and, therefore, rejects Claimant's claims.

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[57] Claimant's allegation to the contrary at the January-February 2008 hearing (H. Tr., Day 1, 28 January 2008, p. 21 lines 17 *et seq.*) is unsupported by evidence.

4. Varna Port

4.1 The Parties' Positions

274. Claimant submits that Varna Port is the only Bulgarian port through which crude oil and oil products can be supplied to it by tankers. It contends that, under Bulgarian law, Varna Port is "exclusive state property", by virtue of the constitution of the Republic of Bulgaria,[58] the Bulgarian Law on Maritime Spaces, Internal Water Roads and Ports, the Law on Concessions and court decisions. It explains that Varna Port was under the control of a State-owned entity, Petrol A.D., which was privatized in 1999. Claimant says that, contrary to Bulgarian law and its constitution, the Bulgarian Government purported to include Varna Port in the assets owned by Petrol A.D. at the time it was privatized. Even if Varna Port could be transferred to private ownership, it was not transferred to the privatized Petrol A.D. in accordance with the methods available for such transfers under Bulgarian law.

275. As a consequence of Varna Port's unlawful possession by Petrol A.D., Nova Plama (according to Claimant) could not deal with Petrol A.D. since it was not a lawful owner of the port. It could not know with legal certainty with whom it should contract to obtain port services at Varna. Nor did Nova Plama have any guarantee that it would have access to Varna Port as a public service provided by the State in the future. Respondent refused to provide it any assurances that, if it negotiated a contract with Petrol A.D., its contractual rights would be respected. Petrol A.D. was in a position to abuse its dominant position by terminating unreasonably Nova Plama's access to the port or by imposing on it unreasonable conditions. In fact, Claimant alleges, the newly privatized Petrol A.D., controlled by the Naftex Group, a competitor of Nova Plama (Claimant's Reply on the Merits, para. 37), threatened Nova Plama and attempted to impose outrageous prices and conditions for the transit of its crude oil through Varna Port.

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[58] Claimant's legal expert, Mr. Denev, opined in his statement of 28 October 2005 that under the Bulgarian Constitution ports were "republican roads" which could not be privatized.

276. Claimant also complains that Bulgaria amended its Maritime Law in 2004 to make fundamental changes in the regime governing its ports of public transport. By virtue of this amendment, Varna Port can now be divided into two parts, one remaining public property (wharfs, piers, beach and acquatorium) and the other (a load storage area) as the property of Petrol A.D. Claimant characterizes this amendment as arbitrary and unlawful, causing Nova Plama significant loss, in violation of the ECT.

277. Bulgaria's actions, says Claimant, are a violation of its obligation in Article 10(1) of the ECT to accord PCL fair and equitable treatment, and the most constant protection and security to its investment and have subjected its investment to unreasonable measures. Taken together with the other actions of Bulgaria *vis-à-vis* Nova Plama, its unlawful privatization of Varna Port amounts to an expropriation in violation of Article 13 of the ECT.

278. Respondent replies, first, that Varna Port is not exclusive State property under the Bulgarian constitution or Maritime Act or under decisions of the competent courts and that, therefore, Claimant had no legitimate expectation that the port would remain owned by the State. Respondent points out that there is a pending dispute between Petrol A.D. and the State as to the legal status of certain parts of Varna Port. Respondent contends that Claimant has failed to show that this ownership dispute has had any adverse impact on Nova Plama. According to Respondent, Nova Plama was not denied access to Varna Port or use of its facilities, and, in any event, Nova Plama had other alternatives to Varna Port available to it. Nor has Claimant substantiated its allegation that Petrol A.D. abused a dominant position in its dealings with Nova Plama; and in any case Claimant's claims of anti-competitive conduct by Petrol A.D. are inadmissible (see Respondent's Counter-Memorial on the Merits, paras. 348-351).

4.2 The Tribunal's Analysis

279. Claimant's contentions that Respondent violated its obligations *vis-à-vis* PCL under the ECT can be dismissed in a relatively brief manner. This is so because the Arbitral Tribunal finds no evidence that Nova Plama was in any way denied access to Varna Port and to the use of its facilities on

commercially reasonable terms. In its submissions to the Tribunal, Claimant complains about the effects of the privatisation of Varna Port on its ability to use the port and its facilities. It alleges that the new owner of the port threatened Nova Plama's representatives and intended to drive the company back into bankruptcy; but the Tribunal has been unable to verify these allegations through any cogent evidence in the record. Otherwise, the concerns expressed by Claimant seem largely theoretical; and there is persuasive evidence that in practice – if Nova Plama had really wanted access to the port and its facilities – it could have obtained it on terms equivalent to other users. The evidence shows that Rexoil, an affiliated company of Nova Plama, imported oil through Varna Port throughout the year 1999. Why Nova Plama could not do the same was never explained to the satisfaction of the Arbitral Tribunal.

280. Claimant's allegations that Varna Port was unconstitutionally privatized do not fall within the competence of the Arbitral Tribunal to determine but rather that of the Bulgarian courts. However, the ordinary meaning of the words "republican roads" in the Bulgarian constitution, relied upon by Claimant to show that Varna Port was exclusive State property, does not seem to include ports.[59] Claimant's concern that the ownership of Varna Port by Petrol A.D., an alleged competitor of Nova Plama, gave it power to strangle Nova Plama by charging it exorbitant rates or denying it access to and use of the port and its facilities could and should have been tested by Nova Plama's entering into negotiations with Petrol A.D. to see whether commercially acceptable terms could be obtained. Even if Claimant believed that Petrol A.D. was not the legal owner of the port facilities, with the backing of the Government, it could, nevertheless, have negotiated with those who were incontestably in control of the port. The Government offered its assistance in this regard (see, for example, R's Exhs. 458, 463, 465 and 481). There was no evidence that any other person or enterprise had any like difficulty in negotiating terms for use

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[59] See also Article 3(2) of the Bulgarian Roads Act, cited in Professor Chipev's legal opinion of 16 July 2006, para. 163: "[T]*he republican roads shall be motorways and first, second and third grade roads ensuring transportation connections of national significance and forming the state road network.*"

of the port or actually using it, including Rexoil, Claimant's affiliate.[60] While the evidence shows that there were some exchanges and meetings between representatives of Nova Plama and Petrol A.D., there was no evidence that Nova Plama or PCL made any serious effort to work out the terms of an agreement with Petrol A.D. for the use of Varna Port, despite Claimant's contention in its Post-Hearing Submission on the Merits (at paragraph 82 and elsewhere) that it "*attempted to negotiate a renewal of its contract with Petrol.*" The Arbitral Tribunal does not consider that Respondent had an obligation to assure Nova Plama that its rights under any contract it negotiated with Petrol A.D. would be respected, as Claimant demanded.

281. Moreover, the acts of Petrol A.D. complained of by Claimant cannot be attributed to Respondent under Bulgarian or international law. There is no evidence that the Government intervened with Petrol A.D. in any way to encourage it to deny Nova Plama's use of Varna Port on reasonable commercial terms. To the contrary, the evidence shows that the Government tried to assist Claimant and the Refinery to make an arrangement that would allow fuel to flow to the Refinery.

282. The fact that the Government privatized Varna Port is not, in and of itself, violative of any obligation it owed to Claimant under the ECT. There is nothing in the ECT which would prevent Bulgaria from privatizing its ports so long as it was done in a way which did not discriminate against Claimant and did not deprive it of a right necessary to the economic operation of the Refinery - a right which it obtained under its agreements with the Government to purchase the shares of Nova Plama. Nothing in the evidential record persuades the Tribunal that the privatization of Varna Port was done otherwise.[61] As for Bulgaria's amendment of its Maritime Law in 2004, the Arbitral Tribunal finds nothing arbitrary or unlawful in this enactment.

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60 See R's Exhs. 881, 882, 883, 884, 885, 886, 984, 985, 986, 987 and 988.

61 During oral argument at the January-February 2008 Hearing concerning Varna Port, Counsel for Claimant alleged that Respondent allowed a Government-owned oil refinery company, Neftochim, to operate in 1999 on discriminatory terms which made competition by Nova Plama nearly impossible (H. Tr., Day 1, January 28, 2008, pp. 23-24). The Arbitral Tribunal is not persuaded by the evidence of these allegations. In any event, allegations of

(footnote cont'd)

283. Respondent's final argument that, in any event, this amendment occurred after 18 February 2003, when Bulgaria exercised its right to deny the privileges of the ECT to Claimant, falls away, given that the Tribunal in this Award decides that Mr. Vautrin owned or controlled Claimant (para. 95 *supra*).

284. Given these elements, the Arbitral Tribunal finds no breach by Respondent of its obligations to Claimant under the ECT with respect to the use of Varna Port.

5. Biochim Bank

5.1 The Parties' Positions

285. Claimant states that through a State-owned bank, the Commercial Bank Biochim ("Biochim Bank"), Nova Plama received credit facilities which resulted in the accrual of significant debts owed by Nova Plama to Biochim Bank. Claimant claims that during the negotiation of Nova Plama's Recovery Plan, Biochim Bank coerced the company to accept burdensome amendments and refused to fulfil its obligations under the Debt Settlement Agreement and the Recovery Plan unless its amendments were accepted. Thus, according to Claimant, Biochim Bank refused to accept that PCL buy Nova Plama's debts to Biochim Bank at a discounted value and imposed the requirement that Nova Plama repay 100% of its debts. Biochim Bank had, in Article 4.4 of the Debt Settlement Agreement, agreed, on condition that PCL invest USD 6 million in Nova Plama within two months of the date of start-up of the Refinery, to release Nova Plama's property pledged and mortgaged to it so that PCL could use the property to attract new investment financing. Nonetheless, Biochim Bank reneged on its undertaking even though PCL fulfilled its investment commitment.

286. In addition, Biochim Bank refused to extend the time limit for repayment by Nova Plama of its debts to Biochim Bank even though such extension was

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violations of competition law fall outside the scope of arbitration provided for in Article 26 of the ECT. (See ECT, Articles 6(7) and 27).

foreseen in the Recovery Plan, threatening to reopen Nova Plama's bankruptcy proceedings.

287. In 2002, Nova Plama contends it tried unsuccessfully to negotiate another debt settlement agreement with Biochim Bank. It then filed a claim against Biochim Bank in the Sofia City Court, which prompted the Bulgarian Ministry of Transport to convoke the company's management to a meeting where, according to Claimant, they were threatened that the State, as a creditor of Nova Plama, would reopen the insolvency proceedings if it did not withdraw the court action. Claimant also alleges that the chairman of Biochim Bank was convoked to a meeting in the Bulgarian Parliament and instructed not to sign a settlement agreement with Nova Plama. In effect, Claimant says, the Government, which was in the process of privatizing Biochim Bank, favored Biochim Bank to the detriment of PCL and Nova Plama, in order to increase the value of Biochim Bank for purposes of its privatization.

288. Biochim Bank was eventually privatized in June 2002 and sold to Bank Austria. According to Claimant, as soon as Biochim Bank was no longer controlled by the Bulgarian State, Nova Plama reached a debt settlement agreement with Bank Austria.

289. Because of the Government's ownership interest in Biochim Bank, Claimant submits that Biochim Bank's actions *vis-à-vis* Nova Plama violate the last sentence of Article 10(1) of the ECT by breaching contractual obligations entered into with PCL. Bulgaria is also in violation of its obligations under Article 22 of the ECT.[62]

290. Bulgaria's intervention in the relationship of Biochim Bank with Nova Plama is also, contends Claimant, a violation of the fair and equitable treatment standard of Article 10(1) of the ECT, a violation of Bulgaria's obligation to provide PCL's investment the most constant protection and security, a subjection of PCL's investment to unreasonable measures and that it amounts,

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62 See Annex for text of Article 22.

together with the other acts of Bulgaria complained of by Claimant, to an expropriation in violation of Article 13 of the ECT.

291. Respondent's reply is, essentially, that there is no persuasive evidence of State intervention in Biochim Bank's decision-making, that Biochim Bank acted in a commercially predictable and reasonable manner in its dealings with Nova Plama and that Biochim Bank did not breach any contractual obligation. On the contrary, Respondent contends, Claimant and Nova Plama made unrealistic and commercially unreasonable demands of the bank, and even when Biochim Bank agreed to terms with Nova Plama, the latter failed to fulfil its obligations.

292. Respondent says that the Debt Settlement Agreement, which provided for Biochim Bank's release of its mortgage over the Nova Plama plant, never entered into force because it was not signed by all parties, including Biochim Bank, as required by its Article 5.1, and, therefore, Biochim Bank cannot be said to have breached any contractual obligations under it. Moreover, Respondent contends that Claimant has never provided any evidence that it fulfilled its commitment to invest at least USD 6 million within two months of the date of start-up of the Refinery. Finally, Respondent contends, Biochim Bank's General Meeting of Shareholders never approved the release of its mortgage, a requirement of the Debt Settlement Agreement.

293. Respondent denies that Biochim Bank coerced Claimant to accept burdensome amendments to the Recovery Plan. It claims that PCL and Nova Plama themselves submitted an amendment to the Recovery Plan which provided that all creditors of Nova Plama, including Biochim Bank, would retain their pre-existing secured interests (R's Exh. 407). The amended Recovery Plan did not obligate Biochim Bank to release its mortgage over the Refinery. Even if Biochim Bank had released its mortgage, says Respondent, Claimant has failed to prove that it would have been able to secure additional financing for Nova Plama's operations.

294. Respondent also contradicts Claimant's assertion that as soon as Biochim Bank was privatized and no longer under Government control, Nova Plama reached a debt settlement with the bank. Respondent says it took two years of

negotiation to reach that settlement which settlement was due essentially to the unlikelihood by that time that Biochim Bank could ever recover any significant amounts from Nova Plama. Respondent says Nova Plama has never paid anything to Biochim Bank.

295. In any event, Respondent contends that the acts of Biochim Bank are not attributable to the State of Bulgaria, which cannot be responsible for them under Article 10(1) of the ECT. Nor is Article 22 of the ECT applicable, since that provision is found in Part IV of the ECT and, therefore, does not fall within the scope of an arbitration under Article 26. Moreover, Biochim Bank is and was even prior to its privatization a commercial bank governed by private law and not a "State enterprise" within the meaning of Article 22 of the ECT.

5.2 The Tribunal's Analysis

296. As noted above, Claimant contends that Biochim Bank, a State-owned bank, "*coerced*" Nova Plama into accepting "*burdensome amendments*" and deliberately refused to fulfill its obligations under the Debt Settlement Agreement and the Recovery Plan, causi ng Nova Plama great difficulties in obtaining new financing. Moreover, Claimant alleges that the State interfered with Biochim Bank and prevented it from reaching a settlement agreement with Nova Plama prior to Biochim Bank's privatization. Claimant attributes this unlawful conduct to the State on one of two alternative grounds: (i) because Biochim Bank was a State-owned bank and the State used its ownership interest to direct the bank's acts; and (ii) because of the application of Article 22 of the ECT to Biochim Bank's conduct.

297. Article 8 of the ILC Articles on State Responsibility contemplates the possibility that the conduct of companies or enterprises owned or controlled by the State be attributable to that state. In the Commentary to the Articles, the ILC notes that:

> *Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their*

> *activities is not attributable to the State, unless they are exercising elements of governmental authority . . .*[63]

298. However, before the question of attribution arises, it is first necessary to determine whether the corporation has in fact engaged in an unlawful act. The ILC notes in this respect that "[i]*f such corporations* [State-owned and controlled] *act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State.*"[64] The Arbitral Tribunal will therefore proceed to determine whether Biochim Bank acted inconsistently with Respondent's obligations under the ECT.

299. On the evidence before it, the Arbitral Tribunal is not persuaded that Biochim Bank acted *vis-à-vis* Claimant and Nova Plama other than reasonably for its own commercial interests. Nor does it accept Claimant's argument that Biochim Bank's refusal to give up its mortgage over Nova Plama's assets amounted to a breach by Respondent of its obligations *vis-à-vis* Claimant in violation of Article 10(1) of the ECT.

300. Furthermore, while Respondent's argument that the Debt Settlement Agreement by which Biochim Bank gave up its mortgage over Nova Plama's assets never entered into force is correct; Biochim Bank's refusal to give up its mortgage on Nova Plama's assets was also accepted by Claimant and Nova Plama and confirmed in the Recovery Plan, as amended pursuant to a proposal made by Claimant itself (R. Exh. 407). Undoubtedly, Claimant was under pressure to accept Biochim Bank's position; but it was free not to accept it and refuse to make further investments on those conditions. It still had considerable negotiating leverage at that time, given Respondent's strong desire to see Nova Plama continue operations.

301. Nor does the Tribunal find convincing the evidence presented by Claimant that Biochim Bank breached the Recovery Plan or that Respondent exercised undue pressure on Nova Plama to force it into accepting burdensome

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63 Commentary to Article 8 of the ILC Articles, p. 107, para. 6.

64 *Ibid.*

conditions. In particular, the evidence is not sufficient to substantiate the claim that Bulgaria interfered in any way with Biochim Bank's reasonable commercial decision to decline Nova Plama's settlement offer.

302. Under these circumstances, the Tribunal considers that Biochim Bank has not engaged in any unlawful act. There is, therefore, no need to address the question of attribution, nor the issue under Article 22 of the ECT.

303. In conclusion, the Arbitral Tribunal finds that Respondent has not committed any violation of its obligations under the ECT with respect to Biochim Bank.

6. Re-opened Bankruptcy Proceedings

304. Claimant contended that the re-opened bankruptcy proceedings in 2005 were violative of its rights (Claimant's Memorial on the Merits, paras. 229 *et seq.*). The claim was subject to supplementation, depending on the outcome of local proceedings initiated to contest the decision to re-open the bankruptcy proceedings. Claimant did not submit evidence which persuaded the Tribunal of the merits of this claim.

D. Concluding Observations

305. Based on all that the Arbitral Tribunal has seen and heard in this arbitration, it concludes that what happened with respect to Claimant's investment in Nova Plama is that Mr. Vautrin and PCL undertook a high risk project, without having the financial assets of their own to carry it out. It was based on an ambitious plan to borrow enough money to get the Refinery into operation, hoping thereby to generate sufficient revenues through sales of product to finance the continuing operation of the Refinery, to pay off Nova Plama's creditors over time, to pay wages to the Refinery's workers and to make a profit. Unfortunately, for reasons which, in the Tribunal's opinion, were not attributable to any unlawful actions of Bulgaria, Mr. Vautrin's plan did not work, and Nova Plama fell back into bankruptcy.

E. Damages

306. Since the Arbitral Tribunal has found that Claimant is not entitled to the protections of the ECT and that, in any event, Respondent did not breach its

obligations to Claimant under the ECT, the Tribunal need not address Claimant's claims for damages.

F. Costs

307. Claimant requests an award to it of the costs of the arbitration, including legal fees and other costs, as well as such other relief as the Tribunal may deem appropriate.

308. Likewise, Respondent claims all costs of the arbitration, including its legal fees and other costs, and adds that this is so regardless of whether any aspect of Claimant's case is sustained, because of the obstructionist tactics used by Claimant in this arbitration. Respondent did not claim interest on these costs.

309. Each Party has, pursuant to the Arbitral Tribunal's request, subdivided its costs into different categories: costs for the jurisdictional phase of the arbitration, costs for the procedure relating to Claimant's request for provisional measures, costs for the procedure relating Respondent's request for security for costs, and costs for the merits phase of the arbitration.

310. Accordingly, the Parties have submitted the following claims for legal and other costs (excluding advances made to ICSID):

Claimant:	USD
Jurisdictional phase:	1,662,789.49
Provisional remedies	150,211.00
Merits phase:	2,864,521.30
Total:	4,677,521.79
Respondent:	
Jurisdictional phase:	3,023,288.00
Request for urgent provisional measures:	584,024.00
Request for security for costs:	381,992.00
Merits phase:	9,254,053.00
Total:	13,243,357.00

311. Claimant has advanced USD 459,985 and Respondent USD 460,000 (totaling USD 919,985) on account of the fees and expenses of the members of the Arbitral Tribunal as well as ICSID's administrative charges. As of 31 July

2008, interest accrued on the advances made amounted to USD 28,076.82. Therefore, the advances plus interest amounted to USD 948,061.82.

312. The fees and expenses of the Tribunal as well as ICSID's administrative charges and expenses are the following (in USD):

Arbitrators' fees and expenses	803,866.04
ICSID's administrative charges and expenses	144,195.78
Total	948,061.82

313. The Arbitrators' fees and expenses as well as ICSID's administrative charges and expenses are paid out of the advances made by the Parties.

314. Article 61 of the ICSID Convention provides, with respect to costs, that :

> [...] *The Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings and shall decide how and by whom these expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

315. Rule 47(1) of the ICSID Arbitration Rules provides that the Arbitral Tribunal's Award "*shall contain* [...] *(j) any decision* [...] *regarding the cost of the proceeding*."

316. Article 61 of the ICSID Convention gives the Arbitral Tribunal the discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate. In the exercise of this discretion, the Arbitral Tribunal will apply the principle that "costs follow the event," by a weighing of relative success or failure, that is to say, the loser pays costs including reasonable legal and other costs of the prevailing party; or costs are allocated proportionally to the outcome of the case, save for the circumstances described below.

317. In this arbitration, in the jurisdictional phase, in which Respondent sought a decision that the Arbitral Tribunal had no jurisdiction, it was in part the losing party. Respondent contended, however, that whether it won or lost on its jurisdictional pleas, it should be awarded costs for that phase of the arbitration because of the behavior of Claimant (Respondent's Rejoinder on the Merits, paras. 370 *et seq.*).

318. In its Decision on Jurisdiction (para. 238), the Arbitral Tribunal criticized Claimant for not having earlier disclosed to Respondent the details of the ownership and structure of the PCL-PHL-EMU group. That failure of disclosure certainly added to the costs of Respondent during the jurisdictional phase, which have been taken into account by the Tribunal.

319. Following the Decision on Jurisdiction, Claimant made a request for urgent provisional measures, which the Arbitral Tribunal rejected entirely. The Tribunal reserved a decision on the costs resulting from the proceedings on this request to a later stage.

320. The Arbitral Tribunal convened a meeting in Paris on 16 February 2007 to consider with the Parties Respondent's request to limit the scope of further proceedings and to order Claimant to post security for costs. The Tribunal denied both of Respondent's requests (see paras. 36-42 *supra*). Mr. Vautrin testified at this meeting that "*if the costs are reasonable, Plama Consortium will pay through disposal of other assets*" (H. Tr. p. 55).

321. In the merits phase, Respondent is not only the prevailing party, but the Arbitral Tribunal has found that Claimant was guilty of fraudulent misrepresentation in obtaining its investment in Bulgaria and has denied to Claimant the protections of the ECT for that reason.

322. In light of these factors and in particular the circumstance mentioned in the preceding paragraph, the Arbitral Tribunal decides that Claimant shall bear all of the fees and expenses of the Tribunal and ICSID's administrative charges plus the reasonable legal fees and other costs incurred by Respondent.

323. As to the reasonable amount of those legal fees and other costs, taking into account all the circumstances of the present case, the Tribunal determines those fees and other costs of Respondent at USD 7,000,000.

324. Accordingly, the Tribunal determines that Claimant will bear all fees and expenses of the Arbitral Tribunal as well as ICSID's administrative charges and will order Claimant to pay to Respondent USD 460,000 on account of its advance on costs as well as USD 7,000,000 as a reasonable proportion of Respondent's legal fees and other costs.

VI. DISPOSITIVE

325. On the basis of the foregoing, the Arbitral Tribunal makes the following decisions:

1. Incorporates by reference its Decision on Jurisdiction of 8 February 2005;

2. Respondent cannot rely on Article 17(1) of the Energy Charter Treaty to deny Claimant the benefits of Part III of the Treaty until 17 February 2003;

3. Claimant is not entitled to any of the substantive protections afforded by the ECT;

4. Assuming that Claimant would have been entitled to substantive protections afforded by the ECT:

   (a) Respondent did not violate its obligations to Claimant under the ECT with respect to issues of past environmental damages;

   (b) Respondent did not violate its obligations to Claimant under the ECT by virtue of the actions of the syndics;

   (c) Respondent did not violate its obligations to Claimant under the ECT with respect to the matter of taxation of "*paper profits*", even assuming that the ECT applies to this issue;

   (d) Respondent did not breach its obligations to Claimant under the ECT with respect to the use of Varna Port;

   (e) Respondent did not breach its obligations to Claimant under the ECT with respect to the actions of Biochim Bank;

   (f) The Arbitral Tribunal finds no other violations by Respondent of its obligations to Claimant under the ECT;

   (g) The Arbitral Tribunal rejects all Claimant's claims for damages;

5. Claimant bears all fees and expenses of the Arbitral Tribunal as well as ICSID's administrative charges, being USD 919,985, which are paid out of the advances made by the Parties.

6. Claimant is ordered to pay Respondent USD 460,000 on account of Respondent's advance on costs as well as USD 7,000,000 on account of Respondent's legal fees and other costs.

7. All other claims and requests by the Parties are rejected.

Professor Albert Jan van den Berg
Arbitrator
[August 18, 2008]

V.V. Veeder
Arbitrator
[August 13, 2008]

Carl F. Salans
President
[August 8, 2008]

ANNEX

ECT

Article 1 - Definitions

As used in this Treaty:

...

(6) "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;

(b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;

(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;

(d) Intellectual Property;

(e) Returns;

(f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of

which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

"Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat.

(7) "Investor" means:

(a) with respect to a Contracting Party:

(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;

(ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;

(b) with respect to a "third state", a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party.

...

Article 10 – Promotion, Protection and Treatment of Investments.

(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investment shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use,

enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

(2) Each Contracting Party shall endeavour to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3).

(3) For the purposes of this Article, "Treatment" means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable.

(4) A supplementary treaty shall, subject to conditions to be laid down therein, oblige each party thereto to accord to Investors of other parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3). That treaty shall be open for signature by the states and Regional Economic Integration Organizations which have signed or acceded to this Treaty. Negotiations towards the supplementary treaty shall commence not later than 1 January 1995, with a view to concluding it by 1 January 1998.

(5) Each Contracting Party shall, as regards the Making of Investments in its Area, endeavour to:

(a) limit to the minimum the exceptions to the Treatment described in paragraph (3);

(b) progressively remove existing restrictions affecting Investors of other Contracting Parties.

(6)(a) A Contracting Party may, as regards the Making of Investments in its Area, at any time declare voluntarily to the

Charter Conference, through the Secretariat, its intention not to introduce new exceptions to the Treatment described in paragraph (3).

(b) A Contracting Party may, furthermore, at any time make a voluntary commitment to accord to Investors of other Contracting Parties, as regards the Making of Investments in some or all Economic Activities in the Energy Sector in its Area, the Treatment described in paragraph (3). Such commitments shall be notified to the Secretariat and listed in Annex VC and shall be binding under this Treaty.

(7) Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.

(8) The modalities of application of paragraph (7) in relation to programmes under which a Contracting Party provides grants or other financial assistance, or enters into contracts, for energy technology research and development, shall be reserved for the supplementary treaty described in paragraph (4). Each Contracting Party shall through the Secretariat keep the Charter Conference informed of the modalities it applies to the programmes described in this paragraph.

(9) Each state or Regional Economic Integration Organization which signs or accedes to this Treaty shall, on the date it signs the Treaty or deposits its instrument of accession, submit to the Secretariat a report summarizing all laws, regulations or other measures relevant to:

(a) exceptions to paragraph (2); or

(b) the programmes referred to in paragraph (8).

A Contracting Party shall keep its report up to date by promptly submitting amendments to the Secretariat. The Charter Conference shall review these reports periodically.

In respect of subparagraph (a) the report may designate parts of the energy sector in which a Contracting Party accords to Investors of other Contracting Parties the Treatment described in paragraph (3).

In respect of subparagraph (b) the review by the Charter Conference may consider the effects of such programmes on competition and Investments.

(10) Notwithstanding any other provision of this Article, the treatment described in (3) and (7) shall not apply to the protection of Intellectual Property; instead the treatment shall be as specified in the corresponding provisions of the applicable international agreements for the protection of Intellectual Property rights to which the respective Contracting Parties are parties.

(11) For the purposes of Article 26, the application by a Contracting Party of a trade-related investment measure as described in Article 5(1) and (2) to an Investment of an Investor of another Contracting Party existing at the time of such application shall, subject to Article 5(3) and (4), be considered a breach of an obligation of the former Contracting Party under this Part.

(12) Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations.

Article 12 – Compensation for Losses

(1) Except where Article 13 applies, an Investor of any Contracting Party which suffers a loss with respect to any Investment in the Area of another Contracting Party owing to war or other armed conflict, state of national emergency, civil disturbance, or other similar event in that Area, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, treatment which is most favourable of that which that Contracting Party accords to any other Investor, whether its own Investor, the Investor of any other Contracting Party, or the Investor of any third state.

...

Article 13 - Expropriation

(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:

(a) for a purpose which is in the public interest;

(b) not discriminatory;

(c) carried out under due process of law; and

(d) accompanied by the payment of prompt, adequate and effective compensation.

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date").

Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis, of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

(2) The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1).

(3) For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares.

Article 17 – Non-Application of Part III[65] *in Certain Circumstances.*

Each Contracting Party reserves the right to deny the advantages of this Part to:

(1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized;...

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[65] Part III of the ECT provides for the treatment to be accorded by the Contracting Parties to investments covered by the Treaty in their territory and includes Articles 10, 13 and 17 quoted in the Annex to this Award.

(2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:

(a) does not maintain a diplomatic relationship; or

(b) adopts or maintains measures that:

(i) prohibit transactions with Investors of that state; or

(ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments.

Article 22 - State and Privileged Enterprises

(1) Each Contracting Party shall ensure that any state enterprise which it maintains or establishes shall conduct its activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party's obligations under Part III of this Treaty.

(2) No Contracting Party shall encourage or require such a state enterprise to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under other provisions of this Treaty.

(3) Each Contracting Party shall ensure that if it establishes or maintains an entity and entrusts the entity with regulatory, administrative or other governmental authority, such entity shall exercise that authority in a manner consistent with the Contracting Party's obligations under this Treaty.

(4) No Contracting Party shall encourage or require any entity to which it grants exclusive or special privileges to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under this Treaty.

(5) For the purposes of this Article, "entity" includes any enterprise, agency or other organization or individual.

Article 26 – Settlement of Disputes Between An Investor and a Contracting Party.

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party to the dispute;

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

(c) in accordance with the following paragraphs of this Article.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

...

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a)(i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party to the dispute are both parties to the ICSID Convention;

...

(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

...

(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute.

...

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Presidential Documents

Monday, March 23, 1998
Volume 34—Number 12
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WEEKLY COMPILATION OF

PRESIDENTIAL DOCUMENTS

Published every Monday by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, the *Weekly Compilation of Presidential Documents* contains statements, messages, and other Presidential materials released by the White House during the preceding week.

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Well, when I look at you, and I think of where we're going in math and science, I expect America to lead the way. I believe in you to be on the forefront of that. It's up to you to achieve.

Thank you, and God bless you.

NOTE: The President spoke at 1:15 p.m. in the auditorium. In his remarks, he referred to Michael A. Durso, principal, Springbrook High School; Gov. Parris N. Glendening of Maryland; Nancy S. Grasmick, Maryland State superintendent of schools; Nancy J. King, president, Montgomery County Board of Education; Gov. Cecil H. Underwood of West Virginia; Mayor Richard Riordan of Los Angeles; Rudy Crew, chancellor, New York City public schools; Robert Moses, director, the Algebra Project; and William S. (Bill) Nye, host of the PBS children's television program "The Science Guy."

Statement on Proposed Tobacco Legislation

March 16, 1998

I congratulate the public health and tobacco producer communities for working together to promote bipartisan, comprehensive tobacco legislation that dramatically reduces youth smoking and protects American farmers and their communities. I am firmly committed to protecting farmers and their communities and have made this commitment one of the five key elements that I will insist upon before signing tobacco legislation. I hope you will continue your efforts to expand your coalition and to enact comprehensive tobacco legislation this year that protects our Nation's children.

Statement on the Death of Dr. Benjamin Spock

March 16, 1998

Hillary and I were deeply saddened to learn of the death of Dr. Benjamin Spock. For half a century, Dr. Spock guided parents across the country and around the world in their most important job—raising their children. As a pediatrician, writer, and teacher, Dr. Spock offered sage advice and gentle support to generations of families, and he taught all of us the importance of respecting children. He was a tireless advocate, devoting himself to the cause of improving the lives of children. Our thoughts and prayers are with his family.

Message to the Congress Transmitting the District of Columbia Court s Fiscal Year 1999 Budget Request

March 16, 1998

To the Congress of the United States:

In accordance with the District of Columbia Code, as amended, I am transmitting the District of Columbia Court's FY 1999 budget request.

The District of Columbia Courts has submitted a FY 1999 budget request for $133 million for its operating expenditures and authorization for multiyear capital funding totalling $58 million for courthouse renovation and improvements. My FY 1999 Budget includes recommended funding levels of $121 million for operations and $21 million for capital improvements for the District Courts. My transmittal of the District Court's budget request does not represent an endorsement of its contents.

I look forward to working with the Congress throughout the FY 1999 appropriation process.

William J. Clinton

The White House,
March 16, 1998.

Message to the Congress on Iran

March 16, 1998

To the Congress of the United States:

I hereby report to the Congress on developments concerning the national emergency with respect to Iran that was declared in Executive Order 12957 of March 15, 1995, and matters relating to the measures in that order and in Executive Order 12959 of May 6, 1995, and in Executive Order 13059 of August 19, 1997. This report is submitted pursuant to section 204(c) of the International Emergency Economic Powers Act, 50 U.S.C. 1703(c) (IEEPA), section 401(c) of the National Emergencies Act, 50 U.S.C. 1641(c),

and section 505(c) of the International Security and Development Cooperation Act of 1985, 22 U.S.C. 2349aa-9(c). This report discusses only matters concerning the national emergency with respect to Iran that was declared in Executive Order 12957 and does not deal with those relating to the emergency declared on November 14, 1979, in connection with the hostage crisis.

1. On March 15, 1995, I issued Executive Order 12957 (60 *Fed. Reg.* 14615, March 17, 1995) to declare a national emergency with respect to Iran pursuant to IEEPA, and to prohibit the financing, management, or supervision by United States persons of the development of Iranian petroleum resources. This action was in response to actions and policies of the Government of Iran, including support for international terrorism, efforts to undermine the Middle East peace process, and the acquisition of weapons of mass destruction and the means to deliver them. A copy of the Order was provided to the Speaker of the House and the President of the Senate by letter dated March 15, 1995.

Following the imposition of these restrictions with regard to the development of Iranian petroleum resources, Iran continued to engage in activities that represent a threat to the peace and security of all nations, including Iran's continuing support for international terrorism, its support for acts that undermine the Middle East peace process, and its intensified efforts to acquire weapons of mass destruction. On May 6, 1995, I issued Executive Order 12959 (60 *Fed. Reg.* 24757, May 9, 1995) to further respond to the Iranian threat to the national security, foreign policy, and economy of the United States. The terms of that order and an earlier order imposing an import ban on Iranian-origin goods and services (Executive Order 12613 of October 29, 1987) were consolidated and clarified in Executive Order 13059 of August 19, 1997.

At the time of signing Executive Order 12959, I directed the Secretary of the Treasury to authorize through specific licensing certain transactions, including transactions by United States persons related to the Iran-United States Claims Tribunal in The Hague, established pursuant to the Algiers Accords, and related to other international obligations and U.S. Government functions, and transactions related to the export of agricultural commodities pursuant to preexisting contracts consistent with section 5712(c) of title 7, United States Code. I also directed the Secretary of the Treasury, in consultation with the Secretary of State, to consider authorizing United States persons through specific licensing to participate in market-based swaps of crude oil from the Caspian Sea area for Iranian crude oil in support of energy projects in Azerbaijan, Kazakhstan, and Turkmenistan.

Executive Order 12959 revoked sections 1 and 2 of Executive Order 12613 of October 29, 1987, and sections 1 and 2 of Executive Order 12957 of March 15, 1995, to the extent they are inconsistent with it. A copy of Executive Order 12959 was transmitted to the Congressional leadership by letter dated May 6, 1995.

2. On August 19, 1997, I issued Executive Order 13059 in order to clarify the steps taken in Executive Order 12957 and Executive Order 12959, to confirm that the embargo on Iran prohibits all trade and investment activities by United States persons, wherever located, and to consolidate in one order the various prohibitions previously imposed to deal with the national emergency declared on March 15, 1995. A copy of the Order was transmitted to the Speaker of the House and the President of the Senate by letter dated August 19, 1997.

The Order prohibits (1) the importation into the United States of any goods or services of Iranian origin or owned or controlled by the Government of Iran except information or informational material; (2) the exportation, reexportation, sale, or supply from the United States or by a United States person, wherever located, of goods, technology, or services to Iran or the Government of Iran, including knowing transfers to a third country for direct or indirect supply, transshipment, or reexportation to Iran or the Government of Iran, or specifically for use in the production, commingling with, or incorporation into goods, technology, or services to be supplied, transshipped, or reexported exclusively or predominantly to Iran or the Government of Iran; (3) knowing reexportation from a third country to Iran or

the Government of Iran of certain controlled U.S.-origin goods, technology, or services by a person other than a United States person; (4) the purchase, sale, transport, swap, brokerage, approval, financing, facilitation, guarantee, or other transactions or dealings by United States persons, wherever located, related to goods, technology, or services for exportation, reexportation, sale or supply, directly or indirectly, to Iran or the Government of Iran, or to goods or services of Iranian origin or owned or controlled by the Government of Iran; (5) new investment by United States persons in Iran or in property or entities owned or controlled by the Government of Iran; (6) approval, financing, facilitation, or guarantee by a United States person of any transaction by a foreign person that a United States person would be prohibited from performing under the terms of the Order; and (7) any transaction that evades, avoids, or attempts to violate a prohibition under the Order.

Executive Order 13059 became effective at 12:01 a.m., eastern daylight time on August 20, 1997. Because the Order consolidated and clarified the provisions of prior orders, Executive Order 12613 and paragraphs (a), (b), (c), (d), and (f) of section 1 of Executive Order 12959 were revoked by Executive Order 13059. The revocation of corresponding provisions in the prior Executive orders did not affect the applicability of those provisions, or of regulations, licenses or other administrative actions taken pursuant to those provisions, with respect to any transaction or violation occurring before the effective date of Executive Order 13059. Specific licenses issued pursuant to prior Executive orders continue in effect, unless revoked or amended by the Secretary of the Treasury. General licenses, regulations, orders, and directives issued pursuant to prior orders continue in effect, except to the extent inconsistent with Executive Order 13059 or otherwise revoked or modified by the Secretary of the Treasury.

The declaration of national emergency made by Executive Order 12957, and renewed each year since, remains in effect and is not affected by the Order.

3. On March 4, 1998, I renewed for another year the national emergency with respect to Iran pursuant to IEEPA. This renewal extended the authority for the current comprehensive trade embargo against Iran in effect since May 1995. Under these sanctions, virtually all trade with Iran is prohibited except for trade in information and informational materials and certain other limited exceptions.

4. There have been no amendments to the Iranian Transactions Regulations, 31 C.F.R. Part 560 (the ''ITR''), since my report of September 17, 1997.

5. During the current 6-month period, the Department of the Treasury's Office of Foreign Assets Control (OFAC) made numerous decisions with respect to applications for licenses to engage in transactions under the ITR, and issued seven licenses. The majority of denials were in response to requests to authorize commercial exports to Iran—particularly of machinery and equipment for various industries—and the importation of Iranian-origin goods. The licenses issued authorized certain financial transactions, transactions relating to air safety policy, and to disposal of U.S.-owned goods located in Iran. Pursuant to sections 3 and 4 of Executive Order 12959 and consistent with the Iran-Iraq Arms Non-Proliferation Act of 1992 and other statutory restrictions concerning certain goods and technology, including those involved in air-safety cases, the Department of the Treasury continues to consult with the Departments of State and Commerce on these matters.

The U.S. financial community continues to scrutinize transactions associated with Iran and to consult with OFAC about their appropriate handling. Many of these inquiries have resulted in investigations into the activities of U.S. parties and, where appropriate, the initiation of enforcement action.

6. The U.S. Customs Service has continued to effect numerous seizures of Iranian-origin merchandise, primarily carpets, for violation of the import prohibitions of the ITR. Various enforcement actions carried over from previous reporting periods are continuing and new reports of violations are being aggressively pursued. Since my last report, OFAC has collected six civil monetary penalties totaling nearly $84,000 for violations of IEEPA and the ITR.

7. The expenses incurred by the Federal Government in the 6-month period from September 15, 1997, through March 14, 1998, that are directly attributable to the exercise of powers and authorities conferred by the declaration of a national emergency with respect to Iran are reported to be approximately $1.3 million, most of which represent wage and salary costs for Federal personnel. Personnel costs were largely centered in the Department of the Treasury (particularly in the Office of Foreign Assets Control, the U.S. Customs Service, the Office of the Under Secretary for Enforcement, and the Office of the General Counsel), the Department of State (particularly the Bureau of Economic and Business Affairs, the Bureau of Near Eastern Affairs, the Bureau of Intelligence and Research, and the Office of the Legal Adviser), and the Department of Commerce (the Bureau of Export Administration and the General Counsel's Office).

8. The situation reviewed above continues to present an extraordinary and unusual threat to the national security, foreign policy, and economy of the United States. The declaration of the national emergency with respect to Iran contained in Executive Order 12957 and the comprehensive economic sanctions imposed by Executive Order 12959 underscore the United States Government's opposition to the actions and policies of the Government of Iran, particularly its support of international terrorism and its efforts to acquire weapons of mass destruction and the means to deliver them. The Iranian Transactions Regulations issued pursuant to Executive Orders 12957, 12959, and 13059 continue to advance important objectives in promoting the nonproliferation and anti-terrorism policies of the United States. I shall exercise the powers at my disposal to deal with these problems and will report periodically to the Congress on significant developments.

William J. Clinton

The White House,
March 16, 1998.

Remarks at a Democratic Business Council Dinner

March 16, 1998

Thank you, please be seated. Thank you Tom, Steve, Len, Terry. Ladies and gentlemen, thank you all for being here tonight, for your support for the Democratic Party, and especially for the Business Council.

The two things that I really like, that have kind of flowered in the last 5 years since I've been here for our party, are this Democratic Business Council and the Women's Leadership Forum. And Hillary is in Georgia tonight at a WLF meeting. We really believe in what they have done to broaden the base of the Democratic Party—not just the financial base but also the political base of the party—bringing people in and giving them a voice and giving them a chance to be heard and bringing in new areas of expertise that have made a real difference to us. And so I thank you for that.

I was sitting here tonight wondering what I ought to say. One of you gave me this little cup of coffee with my name on it—a little cup. If this is the case, we won't have any small coffees at the White House. [*Laughter*] I thought that was pretty funny. [*Laughter*] Another one of you in the line said that your 96-year-old grandmother said to tell the President that he and that young man are doing a good job. I said, "Who's the young man?" And she said, "Al Gore." [*Laughter*] That really hurt. [*Laughter*]

Today I did two things that embody what I hope the next 3 years will be about. Namely, taking advantage of these good times: first balanced budget in a generation and the lowest unemployment, the lowest crime rate in 24 years, the lowest welfare rolls in 27 years, highest homeownership in history, lowest inflation in 30 years—these good times, taking advantage of them and preparing for the long-term prosperity and success of the American people, and trying to advance the cause of peace and freedom and prosperity throughout the world.

I started the day by going out to a high school in suburban Maryland and meeting with two dozen other people, including the

Iran Award 141-7-2 (Iran-U.S.Cl.Trib.), 6 Iran-U.S.C.T.R. 219, 1984 WL 301305

TIPPETTS, ABBETT, McCARTHY, STRATTON, Claimant,
v.
TAMS-AFFA CONSULTING ENGINEERS OF IRAN, THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, CIVIL AVIATION ORGANIZATION, PLAN AND BUDGET ORGANIZATION, IRANIAN AIR FORCE, MINISTRY OF DEFENCE, BANK MELLI, BANK SAKHTEMAN, MERCANTILE BANK OF IRAN & HOLLAND, Respondents.

CASE NO. 7
CHAMBER TWO

AWARD NO. 141-7-2

Iran - United States Claims Tribunal
Filed June 29, 1984
Signed June 22, 1984

'AWARD

Appearances:

***1** For the Claimants: Mr. John A. Rudy Attorney Mr. Donald R. Peirce Mr. John E. Bandes Mr. Joseph L. Scarin Representatives of Claimant
For the Respondents: Mr. Mohammad K. Eshragh Agent of the Islamic Republic of Iran Mr. Yaha Madani Legal Adviser to the Agent Mr. Esmail Bakhshi Plan & Budget Organization Mr. Emami Ministry of Defence Mr. Mohsen Kakavand Bank Tejerat Mr. Mostafa Kalantari Mr. Zhirir Simonian Mr. Abbas Khoshbin Mr. Mehdi Pour Ashraf Civil Aviation Organization Mr. Serj Enjilian Mr. Ali Akbar Zarsazan Bank Maskan
Also Present: Ms. Jamison M. Selby Deputy Agent of the United States of America

I. The Claims

The Claimant, TIPPETS, ABBOT, McCARTHY, STRATTON ("TAMS") is a United States engineering and architectural consulting partnership. TAMS and Aziz Farmanfarmaian and Associates ("AFFA"), an Iranian engineering firm, created and equally owned TAMS-AFFA, an Iranian entity created for the sole purpose of performing engineering and architectural services on the Tehran International Airport ("TIA") project. This performance was based on a contract entered into on 19 March 1975 by TAMS and AFFA on the one hand and the Civil Aviation Organization ("CAO") on the other.

TAMS presents four claims to the Tribunal. First, TAMS claims against the CAO on the basis of the TIA contract for its share of the billed and unbilled amounts allegedly due TAMS-AFFA under that contract and for amounts retained as good performance guarantees by CAO from invoices that were paid to TAMS-AFFA. Second, TAMS claims against the Government of Iran for the value of its fifty-percent interest in TAMS-AFFA which it alleges was expropriated by the Government of Iran. In the event the Tribunal should hold that its first claim against CAO is excluded from the jurisdiction of the Tribunal by the forum selection clause, then TAMS asserts that the value of TAMS-AFFA would include TAMS-AFFA's accounts receivable from CAO under the TIA contract. Third, TAMS seeks a cash deposit it maintained with Bank Melli and which it alleges was wrongfully retained by Bank Melli. Finally TAMS seeks the cancellation of bank guarantees and undertakings related to the TIA project. TAMS originally presented a fifth claim for personal property allegedly expropriated, but it later withdrew that claim.

The Respondents deny the jurisdiction of the Tribunal on various grounds and deny any liability to the Claimant on the claims. The CAO counterclaims, alleging inadequate and defective contract performance by TAMS. The Respondents deny that TAMS-AFFA was expropriatedand allege that its value had by 1979 become negative. TAMS-AFFA counterclaims for a

share of the debts it allegedly owes to third parties. Bank Sakhteman and the Mercantile Bank of Iran and Holland counterclaim for maintenance charges for bank guarantees issued at the request of TAMS-AFFA.

II. Jurisdiction

1. General

***2** The Claimant has satisfied the Tribunal that it is a national of the United States. During all relevant periods of time it has been a partnership registered in the State of New York, and all the partners have been citizens of the United States. The Tribunal is also satisfied that all named Respondents, except TAMS-AFFA, are included within the definition of "Iran" in Article VII, paragraph 3 of the Claims Settlement Declaration.

In view of the other holdings of the Tribunal on jurisdictional issues, which are set forth below, the Tribunal does not need to decide whether, TAMS AFFA is included within the definition of "Iran" in Article VII, paragraph 3 of the Claims Settlement Declaration or whether the Claimant's ownership interests in TAMS-AFFA were sufficient at the time the claim arose to control TAMS-AFFA.

2. Jurisdiction over the TIA Contract Claim

Under Article II paragraph 1 of the Claims Settlement Declaration the Tribunal has jurisdiction over a claim arising out of a contract unless such claim arises under "a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts...."

Article XIX of the TIA contract provides:
All the disputes that arise between the parties hereto over this Contract or the interpretation of its contents that cannot be settled through negotiation or correspondence, shall be primarily referred to a committee consisting of the highest authority of the executive agency (or his deputy) and the Consultant for settlement and in case they fail to settle the dispute on the basis of this Contract and the relevant regulations, the dispute shall be settled through competent Iranian courts and in accordance with Iranian Laws.... [emphasis added].

A similar clause in the BHRC contract in T.C.S.B. Inc. - and - Iran Interlocutory Award 5-140-FT (5 Nov. 1982) was found to divest this Tribunal of jurisdiction.[1] The Tribunal finds no significant distinctions between the clause in the instant case and the clause in the BHRC contract. While the Claimant argues that disputes "over" the contract are more limited than disputes "arising out of" the contract, the Tribunal is not convinced that there is any significant difference. Therefore the claim and the counterclaims based upon the TIA contract are dismissed for lack of jurisdiction.

3. Jurisdiction over the Bank Guarantees and the Related Undertakings

***3** Article II paragraph 1 of the Claims Settlement Declaration provides that the Tribunal has jurisdiction over claims which "arise out of ... contracts (including transactions which are the subject of letters of credit or bank guarantees)...." The Tribunal therefore as an initial matter has jurisdiction over the subject matter of this claim.

The bank guarantees and related undertakings at issue in the instant case however, were entered into pursuant to obligations created by the TIA Contract, and the claim to have them cancelled is ancillary to the claim on that contract, in that the basis for the relief requested is breach of that contract, not the contracts between TAMS-AFFA and the banks. For the reasons stated in the preceding section, claims based on the TIA contract are excluded from the jurisdiction of this Tribunal. Therefore,TAMS' claim for cancellation of bank guarantees and related undertakings is dismissed for lack of jurisdiction.

Inasmuch as the claim against the banks is excluded from the jurisdiction of the Tribunal as TAMS-AFFA, rather than the Claimant, was the contracting party with the banks with respect to these guarantees, the counterclaims for maintenance charges must also be dismissed for lack of jurisdiction.

4. Jurisdiction over the Claim for Property Interest in TAMS-AFFA

TAMS has also filed a claim based on the alleged taking of its property interest in TAMS-AFFA. The subject matter of such a claim (i.e., "expropriation or other measures affecting property rights...") clearly is within the Tribunal's jurisdiction.

The Tribunal therefore has jurisdiction over TAMS' claim for its property interest in TAMS-AFFA.

5. Jurisdiction over the Claim for Bank Deposit

TAMS lastly claims $24,601, the dollar equivalent of an October 1979 rial deposit with Bank Melli Iran. Bank Melli has stated that TAMS does currently possess such a deposit in the amount of IR 1,736,840. Bank Melli further states, however, and Claimant admits, that TAMS made no demand for such monies prior to 19 January 1981. Inasmuch as no demand was made, there was not, as is jurisdictionally required by Article II, paragraph 1, of the Claims Settlement Declaration, a claim outstanding on 19 January 1981. See Harza Engineering Company -and- The Islamic Republic of Iran Award No. 19-98-2 (30 December 1982).

The Tribunal therefore dismisses for lack of jurisdiction the claim of TAMS for its bank deposit.

6. Jurisdiction over TAMS-AFFA's Counterclaims

Respondent TAMS-AFFA contends that its value is negative and counterclaims for payment by the Claimant of its share of debts allegedly owed by TAMS-AFFA to third parties. In view of its holdings below on the merits, the Tribunal does not need to decide in this case whether it has jurisdiction over such a counterclaim. However, to the extent that TAMS-AFFA purports to present a counterclaim for taxes and social security premiums allegedly owed separately by TAMS to the Iranian authorities, it lacks standing to assert such a counterclaim, so it is unnecessary to decide whether in this case such a claim would be within the jurisdiction of the Tribunal.

III. The Merits

1. The Claim for Deprivation of Property

***4** The TAMS-AFFA partnership was established in August 1975 as a 50/50 partnership. Equal shares of the IR 1,000,000 capital were held by each partner, and TAMS-AFFA was managed by a four-member coordination committee, two members of which were appointed by each partner. Article 6 of the articles of partnership required that any decision by TAMS-AFFA required the consent of at least one member appointed by TAMS and at least one member appointed by AFFA. Authority to sign documents creating obligations for TAMS-AFFA was vested in two persons, one appointed by each partner. The evidence indicates that TAMS-AFFA operated on the prescribed principle of joint control until 1979.

As a consequence of the Iranian revolution, work on the TIA project stopped almost completely in the December 1978-January 1979 period. Prior to further significant discussions between TAMS-AFFA and the CAO concerning the future of the TIA project, the Plan and Budget Organization of the Government of Iran on 24 July 1979 appointed a temporary manager for AFFA. The Farmanfarmaian family was one of the fifty-one individuals or families whose enterprises were placed under Government management pursuant to Paragraph 15 of the Law for the Protection and Development of Iranian Industry. Although the appointment named only AFFA, there seemed to be some confusion as to whether the new manager was manager only of AFFA or also of TAMS-AFFA. The Official Gazette published the appointment on 11 August 1979 as that of the manager of TAMS-AFFA, and the new manager assumed the right to sign checks on TAMS-AFFA's accounts by himself and make personnel and other decisions without consulting TAMS.

During the months of August through November 1979 TAMS representatives in Iran managed to rectify at least partially these violations of the partnership agreement. They restored, for example, the practice of two signatures on checks, and they obtained the cooperation of the Government-appointed manager in their ultimately successful efforts to be paid some 34 million Iranian rials owed to them by TAMS-AFFA and to obtain permission to convert that sum to dollars for export from Iran to the United States. However, the crises in the relations between the United States and Iran that developed in November 1979 reversed this trend. The last remaining TAMS representative with signature authority apparently left the country in December 1979. TAMS wrote and telexed TAMS-AFFA on several occasions in January and February 1980 concerning

further work on the TIA project but received no responses. After December 1979, TAMS-AFFA ceased all communication with TAMS, neither reporting to it on the status of the TIA project and TAMS-AFFA's finances nor responding to its letters or telexes. It seems evident from the pleadings filed by TAMS-AFFA in the present case that TAMS-AFFA continues to function, although doubtless at a reduced level of employees and expenditures, and that it is being managed by the Government-appointed successors to the original Government-appointed manager.

***5** In light of these facts, the Tribunal concludes that the Claimant has been subjected to "measures affecting property rights" by being deprived of its property interests in TAMS-AFFA since at least 1 March 1980 and that the Government of Iran is responsible, by virtue of its acts and omissions, for that deprivation. The Claimant is entitled under international law and general principles of law to compensation for the full value of the property of which it was deprived.[2] The Tribunal prefers the term "deprivation" to the term "taking", although they are largely synonymous, because the latter may be understood to imply that the Government has acquired something of value, which is not required.

A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.[3]

While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.

In the present case, the Claimant and the Government-appointed manager of TAMS-AFFA managed to cooperate sufficiently well in mid 1979 so that such appointment could not by itself in this case be considered an act depriving the Claimant of its property. However, the developments of late 1979 and early 1980, particularly the complete absence of answers to letters and telexes and of any communication from TAMS-AFFA to the Claimant, effectively ended such cooperation and deprived the Claimant of its property interests in TAMS-AFFA. If any doubt remained about this question in early 1980, it has been removed by the absence of new developments and the passage of time.

2. The Value of TAMS-AFFA

***6** Claimant in the instant case seeks only the dissolution value of its interest in TAMS-AFFA, i.e. the value of TAMS-AFFA after the collection of all assets and the discharge of all obligations. Thus, the task of the Tribunal is to make its best estimate of the assets and liabilities of TAMS-AFFA as of 1 March 1980. This involves not merely the valuation of bank accounts and fixed assets, but also the valuation of TAMS-AFFA's accounts receivable, including those under the TIA contract and TAMS-AFFA's debts, including those to the tax and social security authorities, and potential liabilities such as those represented by the counterclaims under the TIA contract asserted in this case and those that could possibly arise under the bank guarantees.[4]

That the accounts receivable are those of TAMS-AFFA, rather than those of the individual partners, seems clear from the conduct of the parties to the contract. The invoices were submitted to the CAO by TAMS-AFFA, and payments were made by the CAO to TAMS-AFFA. Division of revenues between the partners was effected from time to time on the basis of decisions by TAMS-AFFA. The Tribunal notes that, in the pleadings in this case, the Respondents argued that only TAMS-AFFA, not TAMS, could claim under the TIA contract. The establishment of an independent entity and payment of the contract remuneration to that entity were authorized by Article XX (3) of the TIA contract.[5] While that Article made clear that TAMS and AFFA could not thereby divest themselves of liability under the contract, it allowed what the subsequent practice confirmed — that the new entity, rather than the two partners, would be the entity entitled to receive payments from CAO under the contract.

In determining the value of the accounts receivable under the TIA contract and the related liabilities, the Tribunal recognizes the difficulty of precision in the absence of final and authoritative resolution of the contract disputes between the CAO and TAMS-AFFA, disputes that are outside this Tribunal's jurisdiction. Similar difficulties arise with respect to determination of TAMS-AFFA's debts to third parties. It should clearly be understood that this Award involves no adjudication of the rights and obligations of the parties to the TIA contract or of any obligations owed by TAMS-AFFA to the tax and social security

authorities of Iran or other third parties.[6]

***7** Thus, in making its best estimate of the net value of TAMS-AFFA, the Tribunal is not deciding issues that are excluded from its jurisdiction. It would be unjust and logically indefensible to completely ignore such assets as the accounts receivable under the TIA contract and such debts as the tax and social security liabilities, even though the adjudication of disputes concerning those assets and debts would be outside the Tribunal's jurisdiction.

In this connection, the Tribunal notes that, if the CAO had paid the invoices submitted by TAMS-AFFA and such funds were part of the undistributed accounts of TAMS-AFFA, then obviously they would be part of the dissolution value of TAMS-AFFA. Similarly, if TAMS-AFFA had paid all its tax and social security obligations, those payments would have reduced the dissolution value of TAMS-AFFA. If payments for work on the TIA project have been wrongfully withheld by an Agency of the Government of the Islamic Republic of Iran and if for the lack of such payment the Tribunal did not include such monies in the dissolution value of TAMS-AFFA, then the Respondent Agency would profit by its own wrong. Conversely, if TAMS-AFFA wrongfully failed to pay tax and social security obligations and if the Tribunal did not deduct such obligations, then TAMS-AFFA would profit by its own wrong. It is a well recognized principle in many municipal systems and in international law that no one should be allowed to reap advantages from their own wrong, Nullus Commodum Capere De Sua Injuria Propria.[7]

On the other hand, it would be equally unjust and logically indefensible for the Tribunal to assume that all payments on the TIA project alleged by the claimant to have been wrongfully withheld, were in fact so withheld, or to assume that all tax and social security obligations alleged by the Respondent to be due by TAMS-AFFA are in fact due and were not paid. As stated above, the adjudication of disputes concerning these assets and debts would be outside the Tribunal's jurisdiction. At the time the claimant was deprived of his property interest in TAMS-AFFA, those disputes did not yet exist. From the statements and evidence submitted to the Tribunal by both parties it appears, on the one hand, that a number of factual circumstances are not in dispute even today, and, on the other hand, that such disputes as do exist are supported only partly by evidence and contain elements of divergent legal appreciation of the facts. Under those circumstances, the Tribunal can make only a very rough evaluation of the assets and liabilities involved, which evaluation must take into account the uncertainty of the outcome of any final adjudication of the disputes by a competent court.

Finally, the Tribunal notes that the evidence indicates that TAMS-AFFA owed AFFA approximately IR 47,000,000 more than it owed TAMS for reimbursement of costs, which amount must be deducted before a dissolution value is determined.

***8** On the basis of the foregoing considerations the Tribunal determines the dissolution value of TAMS-AFFA as of 1 March 1980 to be Rials 800,000,000. Thus, the Claimant is entitled to IR 400,000,000 for its fifty percent interest in TAMS-AFFA.

For the above reasons, the Respondent Government of the Islamic Republic of Iran is obligated to compensate the Claimant in the amount of U.S. $5,594,405, which was the equivalent on 1 March 1980 of IR 400,000,000.

IV. Interest

In order to compensate the Claimant for the damages it has suffered due to the delay in payment, the Tribunal considers it fair to award Claimant interest at the rate of 12 percent per year, calculated from 1 March 1980.

V. Costs

Each of the parties shall be left to bear its own costs of arbitration.

AWARD

THE TRIBUNAL AWARDS AS FOLLOWS:

The Respondent, Government of the Ialamic Republic of Iran, is obligated to pay the Claimant, Tibbets, Abbot, McCarty, Stratton, U.S. $5,594,405, plus interest at the rate of 12 percent per year, calculated as from 1 March 1980 to the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account. This obligation shall

be satisfied by payment out of the Security Account established by paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria of 19 January 1981.

The counterclaims of TAMS-AFFA are dismissed on the merits, except to the extent the counterclaims include a counterclaim for taxes allegely owed by the Claimant to the Iranian tax authorities, which counterclaim is dismissed for lack of standing by TAMS-AFFA to present it. The remainder of the claims and counterclaims are dismissed for lack of jurisdiction.

Each of the parties shall bear its own costs of arbitrating this claim.

This Award is hereby submitted to the President of the Tribunal for the purpose of notification to the Escrow Agent.

Dated, The Hague 22 June 1984

Willem Riphagen
Chairman Chamber Two
Shafie Shafeiei
George H. Aldrich

Mr. Shafeiei took part in the hearing and deliberation of this case. Having been invited to sign the Award, he refused to do so.

Willem Riphagen

Chairman Chamber Two

Geogre H. Aldrich

DR. SHAFEI SHAFEIEI'S REASONS FOR NOT SIGNING THE AWARD

On 19 March 1975, The Civil Aviation Organization of Iran (a Respondent in the present case) on the one part, and TAMS (the American Claimant in the present case) and Abdol Aziz Farmanfarmaian and Associates (an Iranian partnership) on the other part, concluded an engineering and architectural services contract ("the Contract") for building the Tehran International Airport. In conformance to that which consulting engineering contracts impose by their nature, the Contract was non-transferable, and the technical services involved therein were to be rendered directly by TAMS and Farmanfarmaian and Associates, partly in Iran and partly in the United States. Several months after the contract was signed, TAMS and Farmanfarmaian and Associates formed a non-profit, non-commercial partnership, in fact with a joint office in Tehran, under the name TAMS-AFFA. The role played by the TAMS-AFFA partnership was merely that of liaison, or at most, of coordinating and carrying out the joint works.

***9** On 20 October 1981, after the creation of this Tribunal, the Claimant filed a Statement of Claim wherein it lodged a number of claims against the Government of the Islamic Republic of Iran, several banks, and various organizations of the Iranian Government. It is not necessary to enumerate all of the Claimant's claims; the two claims which are relevant and important to discuss here are the following:

(a) The first is the Claimant's contractual claim — that is, the claim arising out of the Contract. In this connection, the Claimant alleges that certain invoices it sent for services rendered were not paid, and also that it rendered certain services for which invoices have not yet been sent. On this basis, the Claimant demands a total of $8,885,589.

(b) TAMS' other claim arises out of the alleged expropriation of TAMS-AFFA. TAMS-AFFA did not engage in commercial activities, but it did necessarily have funds in the banks in order to manage its routine affairs. The Claimant has alleged that this partnership was expropriated by the Islamic Republic of Iran. The Claimant has also carried out its own valuation of TAMS-AFFA's assets and has demanded $514,536.

By virtue of the express provisions of Article XIX of the Contract, the Iranian courts are vested with sole jurisdiction over

interpretation of the Contract and over all disputes arising therefrom. The Contract is subject to the laws of Iran, and its controlling language is Farsi (Articles XXIV and XXV of the Contract). In view of the express provisions of the said Articles, and in accordance with Article II, paragraph 1 of the Claims Settlement Declaration setting forth the condition for the jurisdiction of the Iranian courts, the majority has of necessity been compelled to admit that the Tribunal lacks jurisdiction over the Contract and the claims arising therefrom. However, in actuality, it has accepted those provisions on the one hand while setting out to violate them on the other. The majority has made a presumption that TAMS-AFFA was expropriated, and then, taking the Claimant's claim and the sums allegedly due from the Contract in isolation and divorced from the Defence and Counterclaim of CAO, it has regarded the former as constituting a part of TAMS-AFFA's assets. Out of the total of the sums allegedly due the Claimant, namely $8,889,589, the majority has then awarded it the sum of $5,594,405 plus interest and has refused to entertain CAO's Defence and Counterclaim for lack of jurisdiction.

The majority award does not deal with the facts and contentions of the Parties in a manner properly reflecting the realities involved; and it makes no mention of the Respondent's objections to the jurisdiction of the Tribunal, nor to their defenses on the merits to the various claims of the Claimant, nor to their arguments with respect to the counterclaim. The majority's positions and reasoning are entirely mute and ambiguous as well. Overall, the award completely fails to address the numerous legal issues involved in the present claim, and the reader cannot discern the facts at issue or the reasoning underlying the majority's decision. The majority commences in the first paragraph of the award with a discussion of the formation of TAMS-AFFA, whereas this matter is not among the first facts and issues involved in the case. There are other facts preceding the formation of the partnership, which it is necessary to mention and elaborate upon. Moreover, the objective reality of TAMS-AFFA differs entirely from the way in which the majority has depicted it and presumed that the partnership was expropriated. The picture which the majority has drawn of TAMS-AFFA is a hypothetical and entirely imaginary one. Even if we were to accept, in arguendo, that TAMS-AFFA has been expropriated, it must first be determined what elements comprised the partnership's assets. In particular, there arises a question as to whether the monies allegedly due under the Claimant's consulting services contract ought to be regarded as a part of TAMS-AFFA's assets. This point raises numerous legal issues. TAMS-AFFA's legal nature and its role should have been analyzed in the light of the relevant provisions of the Contract. For example, a part of the demands which TAMS asserts, as has been noted above, relate to services which have allegedly been rendered but for which no invoice has to date been presented to CAO for payment. Aside from all other matters, is such a claim, on principle, an outstanding claim as intended by Article II, paragraph 1 of the Claims Settlement Declaration, and is it cognizable before this Tribunal? Yet the majority has avoided all these judicial realities by silence and ambiguity and has even gone far beyond the remedy sought by the Claimant itself. There is another issue which is extremely important to discuss. CAO has denied TAMS' contractual claim and demands, and it has stated that it has paid TAMS' fees in proportion to the percentage of work performed and owes TAMS nothing further. CAO has, moreover, lodged a counterclaim, but because the majority lacks jurisdiction over the Contract, as it itself admits, it acts as if it has not seen these defences and counterclaim, and merely takes into account the Claimant's claim and demands for monies allegedly due in isolation, considering them to constitute a part of TAMS-AFFA's proven assets.

***10** Amidst all these ambiguities and problems, the reader arrives at page 17 of the award, which is, unlike the preceding murky and obscure pages, entirely lucid and specific, and which reveals the majority's definite intent and decision to transfer the sum of $5,594,405, plus interest at 12% as from 1st March 1980, from the Security Account of the Government of the Islamic Republic of Iran to the account of the Federal Reserve, New York, for transfer to the American Claimant. No ambiguity whatsoever remains in this regard. It is also essential to point out that the appraisal of the Claimant's contractual demands was carried out in an entirely arbitrary manner. After dealing with the facts and with the Claimant's contractual claim and its claim of expropriation in greater detail, I shall turn to an analysis of the facts and legal points involved therein. This examination will commence with a brief mention of the consulting services contract, which forms the basis of the Claimant's first claim, and with the Tribunal's lack of jurisdiction over both the Contract at issue and the claims arising therefrom (I). Following that will come an examination of the claim that TAMS-AFFA has been expropriated. In this section, it will be necessary to provide a short description of TAMS-AFFA, its formation and purpose, and its alleged expropriation. The legal status and role of the said partnership must in particular be determined (II). It is also necessary to give a brief account of the mechanism relating to the fees of the consulting engineers, together with CAO's defence in this regard; this issue forms the subject of section III. This study will demonstrate that the withdrawal from the Security Account of the Government of the Islamic Republic of Iran in favor of the American Claimant in the present case, which is being effected by the Chamber majority, constitutes an illegal and illegitimate withdrawal.

I

There is nothing to be gained from enumerating all of TAMS' claims; instead, we shall discuss two of them which are relevant here.

1. The Claimant's first, and indeed most important, claim is the contractual claim. The object of the Contract was the preparation of the design and architectural plan, provision of consultation services, and execution of the construction of a new airport in Tehran. Pursuant to Article I, paragraph 2 of the Contract, the Consultants consisted of TAMS and Abdol Aziz Farmanfarmaian and Associates, acting with joint and several liability in connection with performance of the obligations undertaken under this Contract.

Furthermore, pursuant to Article XX, paragraph 1 of the Contract:

"**ARTICLE XX - RIGHT OF ASSIGNMENT**
1. The Consultant shall carry out the object of this Contract via its employees, however, the Consultant shall not assign or transfer, without the Client's approval the services relating to the Contract or any part of those services to other persons be it legal or natural or his employees." [sic]

***11** The above provisions are in actuality nothing more than confirmation of a simple, logical matter. In a contract for consulting services, the identity and scientific capability of the consulting engineers is a matter of the utmost importance and is regarded as being among the fundamental elements of the contract. Therefore, such contracts cannot be assigned.

Article XIX of the Contract provides for the means whereby any eventual disputes arising therefrom are to be settled:

"**ARTICLE XIX - SETTLEMENT OF DISPUTES**
All the disputes that may arise between the parties hereto over this Contract or the interpretation of its contents that cannot be settled through negotiation or correspondence, shall be primarily referred to a committee consisting of the highest authority of the executive agency (or his deputy) and the Consultant for settlement and in case they fail to settle the dispute on the basis of this Contract and the relevant regulations, the dispute shall be settled through competent Iranian courts and in accordance with Iranian Laws." [sic]

Furthermore, pursuant to Article XXV of the Contract:
"This Contract shall be governed from all aspects by the law of the Imperial government of Iran." [sic]

Provision has also been made in Article XXIV for the official language of the Contract as follows:
"The text of this Contract has been prepared in Farsi and English. In case of discrepancies, except in Appendix A and D, where the English text is valid, the Farsi text shall be valid from the legal and judicial point of view."

Finally, Article IV of the Contract provides for the duration of the different phases of the Contract.

Completion of construction of the airport was scheduled for 1981; Article IV, paragraph 2, provides that:
"It is understood that the construction activities will be ompleted by the end of 1980 and the final handover of the project shall take place at the end of 1981."

With the consulting engineer's departure from Iran shortly after the victory of the Revolution, all work on the airport project ceased.

2. The suspended Contract is the basis for the principal claim filed by the American party, and for the counterclaim filed by the Iranian party. The first concerns the payment of fees allegedly owed by Iran to the American consulting engineers; the latter concerns reparation for damages allegedly resulting from the poor execution and breach of contract by the American

party. Further to this, the Iranian defendants object to the Tribunal's jurisdiction.

The sum total of the Claimant's alleged demands is as follows:

ITEM	**AMOUNT**
TAMS' services to CAO - billed but unpaid	US$ 7,058,988
TAMS' services to CAO - unbilled	$ 1,826,601[1]
TOTAL	$8,885,589

TAMS' services to CAO - billed but unpaid	$5,773,454
TAMS' services to CAO - unbilled	$1,493,953
TOTAL	$7,267,407

TAMS-AFFA undistributed accounts -	
TAMS' share	$ 420,832

***12** The latter concerns reparations for damages allegedly resulting from the poor execution and breach of contract by the American party. In addition to this, the Iranian Respondents object to the Tribunal's jurisdiction.

3. The jurisdiction of the Tribunal has been defined in Article II, paragraph 1 of the Claims Settlement Declaration as follows:

"1. An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or Bank Guarantees), expropriations or other measures affecting property rights... excluding claims arising under a binding contract between the

parties specifically providing that any dispute thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position."

This Article sets forth the framework of the Tribunal's jurisdiction with respect to claims by United States nationals against the Government of Iran, together with their conditions.

It is not necessary to point out that the exclusive nature of a choice of forum made by parties to a contract does not depend upon the specific term "sole jurisdiction". The simple fact that a forum selection clause was inserted confers an exclusive jurisdiction upon the forum designated by the contracting parties. However, it must be emphasized that any interpretation of Article II, paragraph 1 of the Claims Settlement Declaration must take into consideration the Iranian law authorizing the Iranian Government to conclude the agreement embodied by the Declaration — and indeed, this law was notified to the Government of the United States and is expressly referred to in Article II, paragraph 1.

With respect to the governing law and the competent courts, the provisions of the Contract at issue are entirely clear. The Contract is in all respects subject to the laws of Iran. Interpretation of the Contract, and all disputes arising therefrom, shall be settled by the competent Iranian courts in accordance with Iranian law. In light of the above, the alleged claims of the Claimant, Iran's Defence, and the counter-defence, which is the subject of the Claimant's first claim, all lie outside the scope of the Tribunal's jurisdiction, as has been acknowledged by the majority itself.

II

As has been shown hereinabove, the Claimant's first, and in fact most important, claim is its demand for fees in consideration of services which, it alleges, it rendered in accordance with the consulting services contract. This claim arises directly out of the Contract and has been directed against CAO. However, examination and interpretation of the Contract, and adjudication of all disputes arising therefrom, are outside the scope of this Tribunal's jurisdiction, and the majority has admitted its lack of jurisdiction in this regard. Another claim has been brought by the Claimant against the Government of the Islamic Republic of Iran, arising out of the alleged expropriation of TAMS-AFFA, 50% of the assets of which belonged to the Claimant, by the Government of the Islamic Republic of Iran. The Claimant has appraised the assets of the partnership itself, fixing its own share at US$ 514,536, and it has demanded payment of that amount by the Government of the Islamic Republic of Iran. The majority has accepted the presumption that TAMS-AFFA has been expropriated, and it has also regarded the monies allegedly due the Claimant on the basis of the consulting services contract — examination of which is outside the jurisdiction of the Tribunal — as constituting a part of TAMS-AFFA's assets, without taking into account CAO's Defence and Counterclaim. In this roundabout fashion, the majority has endeavored to honor these allegedly due claims.

***13** Neither would the expropriation of the TAMS-AFFA entity in itself constitute a basis for the jurisdiction of the Tribunal over the first claim concerning payment of fees for services allegedly rendered by the Claimant under the Contract at issue. The TAMS-AFFA entity was in fact defined as an agent interposed between Iran on one side, and TAMS and AFFA on the other, and as such was responsible for transmitting invoices, notices and documents issued by the latter to the former. The rights and contractual obligations of the Parties to the Contract were independent and would not be affected by expropriation or dissolution of TAMS-AFFA. Furthermore, it is clear that the contractual rights and invoices of TAMS do not constitute assets owned by the entity TAMS-AFFA. These points will be examined hereinbelow. However, prior to elucidating all other matters relating to TAMS-AFFA, it is necessary to take up the issue of its alleged expropriation.

1.a After signing the consulting services contract relating to construction of the Tehran International Airport in March 1975, the consulting engineers, namely TAMS and Farmanfarmaian and Associates, commenced carrying out the services in Iran and the United States. Thereafter, in August 1975, these two parties formed a joint partnership, named TAMS-AFFA, for the purpose of carrying out, coordinating and providing engineering services. In accordance with Article III of its Articles of Association, the partnership was formed with the sole object of providing professional engineering services and construction engineering services relating to the new Tehran International Airport, pursuant to and subject to the provisions of the consulting services contract. The capital funding of the partnership was approximately 1 million Iranian rials (roughly US$ 15,000), of which 50% belonged to TAMS and 50% to Farmanfarmaian and Associates. The management of the partnership, decision-making, signing of all documents and checks, and effecting all payments, were jointly carried out by two representatives: one from TAMS and one from Farmanfarmaian and Associates. In addition, on 16 October 1975, the partnership was registered with the Iranian Registrar of Companies as a non-commercial partnership, under No. 1674.

Coinciding with the revolutionary events in Iran, performance on the consulting services contract fell into abeyance, and in this context, the purpose of the partnership was frustrated. The Farmanfarmaian family fled Iran, whereupon the conduct of TAMS-AFFA's ordinary and routine affairs fell into disorder. TAMS-AFFA was not engaged in commercial activities, nevertheless it did have an office with a number of staff and the sudden departure of its directors created problems with respect to paying the salaries and settling the accounts of its employees, and paying the rent, utility bills and other expenses. Thus, on 24 January 1979, the Government designated a manager for the partnership in order to resolve these problems. The majority has regarded the Government's designation of the manager as constituting evidence of expropriation of the partnership, without bothering to consider the facts attending said designation nor taking into account the subsequent events. The facts relating to the said designation and the subsequent events require further elaboration.

***14** 1.b In actuality, the collapse of the former regime destroyed a social, political, economic and military order. The establishment of a new order appeared difficult. Moreover, certain directors of enterprises, many of which were heavily indebted to Iranian banking institutions, fled Iran at its moment of crisis. It was the task of the newly-installed government to avoid social disorganization, maintain order, and prevent economic activity from coming to a halt. It was in this context that the Bill of 19 June 1979 was voted into force by the Revolutionary Concil, whereby the Iranian Government was authorized to appoint provisional managers for enterprises abandoned by their directors, whether these latter had ceased to work or had for some reason or another found it impossible to manage the day-to-day affairs of the enterprise. Article 1 of the said Bill is as follows:

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Article 1. With regard to manufacturing, industrial, commercial, agricultural and service units belonging to either the public or private sector including firms and institutes with the following activities: industrial and mining, agricultural, contracting, consultant engineering, building and installations, residential building, transportation and loading and unloading of goods at ports; whose managers or owners have left the said units or worksites, stopped work or cannot be reached for any reason; and at the request of owners or managers of the said units, each of the government ministries, institutes or companies who have entered in some way into dealings with, have some connection with $^{and}/_{or}$ are related to the activities of the said units, are permitted to appoint, with the Ministry of Labour and Social Affairs' knowledge, one or more persons as managers, members of board of directors or observers for management $^{and}/_{or}$ observation over affairs in order to prevent closure of same.

These provisions clearly indicate the reasoning behind the Bill for the Designation of Managers. Once appointed, these managers personally direct the enterprise and do not act in the capacity of agents of the Iranian Government. The Iranian Government is not entitled to exercise the slightest degree of control over the enterprise, nor may it revoke or cancel any decisions taken by the provisional managers. In accordance with the said Bill, the Government of Iran named Mr. Azad Zarrin Nejad as provisional director for AFFA on 24 July 1979. His letter of appointment was as follows:

"Since the principal directors of Abdol Aziz Farmanfarmaian and Associates have abandoned their firm, by virtue of the Bill Concerning Appointment of Provisional Director(s) to Supervise Productive, Industrial, Commercial, Agricultural and Services Units both in the public and private sectors approved at the Islamic Revolutionary Council's session of 24.3.1358 (June 14, 1979), and in order to prevent closure of the firm, you are, with the prior approval of the Ministry of Labour and Social Affairs, hereby appointed as the provisional director of the firm to manage it with due and full observance of the abovementioned Bill, a copy of which is enclosed herewith.

***15** Your salary and total fringe benefits will be determined and advised later. Should you encounter any difficulties in practice, please report the matter so that action may be taken thereon.

(Signed by) Ali Akbar Moinfar Minister of State for PBO
cc: Abdol Aziz Farmanfarmaian & Associates"

I believe that this appointment was made in the sole interest of all those involved with AFFA, of which the sudden disappearance of the directors would otherwise have disrupted the company's operations.

Furthermore, it has been thoroughly established that the manager appointed by the Government was only a locum tenes for

Farmanfarmaian and Associates' representative in TAMS-AFFA and he did not interfere with with TAMS' rights in the partnership. Moreover, the reasons for his appointment was that Farmanfarmaian and Associates' representative had abandoned TAMS-AFFA. The other events subsequent to this appointment are as follows: On 7 October 1979, TAMS presented Mr. Danesh as its representative, and as a result the routine affairs of TAMS-AFFA have been managed jointly by the Government representative acting as a locum tenes for Farmanfarmaian and Associates' representative, and by TAMS' representative, in accordance with the partnership's Articles of Association. The memorial filed on 15 September 1983 by one of the Iranian Respondents contains abundant correspondence and documentation, all of which speaks for the good understanding and full cooperation between the Government's representative and TAMS, and the joint management of TAMS-AFFA.

In August 1979, the sum of 34,071,978 Iranian rials which had been deposited in TAMS-AFFA's account in payment of TAMS' fees was paid out to TAMS.

Particular note should be taken of the honest endeavor of both the government-appointed Iranian manager of AFFA and that of CAO to intervene in Bank Markazi Iran with regard to TAMS' foreign exchange request in August 1979, the date on which foreign exchange came under strict control. In his letter dated 21 August 1979, addressed to Bank Markazi Iran, the government-appointed manager wrote:

"...I wish to state that in so far as government regulations may permit, I endorse and support Tippetts-Abbett-McCarthy-Stratton's request for foreign exchange in the amount of Rls. 34,071,878, ..."

CAO, too, as is evident from its letter no. 600-100-11617 dated 3 September 1979 to Bank Markazi, in good faith tried its utmost to assist TAMS to obtain foreign exchange permission.

As stated hereinabove, the partnership's affairs were managed jointly by the Governmental manager and TAMS' representative. The last correspondence addressed by TAMS-AFFA to CAO (14 November 1979) bears two signatures. Subsequently, in January 1980, Mr. Danesh, TAMS' representative, left Iran with no prior notice. Here it must particularly be noted that TAMS-AFFA is a non-profit, non-commercial partnership, and that upon suspension of the consulting services contract coinciding with the occurrence of the revolutionary events in Iran in 1978, the purpose of the TAMS-AFFA partnership was, for all practical purposes, frustrated.

***16** How, then, could the appointment of a director by the Iranian Government be construed as expropriating or otherwise affecting the property rights of TAMS? Was it not a measure of protection, in the absence of which TAMS could very well have suffered disruption? Is it not contrary to the principles of morality to treat that action as constituting an act of expropriation and holding the Government of Iran liable for it? It is equally important to point out that TAMS-AFFA is a non-profit, non-commercial entity and that a director was required to manage the day-to-day affairs, such as the local payments for water and electricity, and to deal with the personnel abandoned there.

1.c Teh manner in which the majority has portrayed TAMS-AFFA does not, in the least, correspond to the facts. It will suffice to note one or two points in this regard. The majority states:

"[The] Plan and Budget Organization of the Government of Iran on 24 July 1979 appointed a temporary manager for AFFA. The Farmanfarmaian family was one of the fifty-one individuals or families whose enterprises were placed under Government management pursuant to Paragraph 15 of the Law for the Protection and Development of Iranian Industry." (page 8)

This statement gives the reader the impression that the Government's decision to appoint a manager was carried out for the purpose of expropriating the properties of the Farmanfarmaian family et al pursuant to the Law for the Protection and Development of Iranian Industry. Unfortunately, however, the statement by the majority is absolutely baseless. TAMS-AFFA was not an industrial company, and the reason for the government's appointment of a manager was, as is expressly stated in the letter of appointment, due to the fact that the manager appointed by the Farmanfarmaian family had abandoned TAMS-AFFA.

On page 9, the majority also states:

"It seems evident from the pleadings filed by TAMS-AFFA in the present case that TAMS-AFFA continues to function,

although doubtless at a reduced level of employees and expenditures, and that it is being managed by the Government-appointed manager." (emphasis added)

The object of TAMS-AFFA was to provide professional consulting services as intended under the consulting services contract. But as the majority itself admits, that Contract fell into total abeyance in December 1978 or January 1979. In light of this fact, what possible purpose could there be for continuing with TAMS-AFFA's work and activities? Still, even if we were to suppose, in arguendo, along with the majority, that TAMS-AFFA has been expropriated, one fact still remains: namely, that the rights and contractual obligations of the parties to the Contract at issue survive, despite any expropriation or dissolution of the entity, and any amounts owed by CAO to TAMS by no means constitute assets of an entity.

2.a The 19 March 1975 consulting services contract was signed by CAO as the client, on the one hand, and by TAMS and Farmanfarmaian and Associates as the consulting engineer, on the other hand. In accordance with Articles I and XX of the Contract, these entities were the direct and liable parties to the Contract, and the Consulting Engineers did not have the right to transfer the Contract.

***17** The TAMS-AFFA entity has, in fact, been an agent interposed between the contracting parties, responsible for submitting to CAO invoices and documents issued by the consulting engineers, for assuring the communication between the parties, and finally, for receiving the fees and remitting them to the consulting engineers.

The method adopted in practice for carrying out the Contract and the partnership's work, confirmed the preceding characterization. In its Memorial filed on 29 June 1982, the Claimant itself describes and characterizes TAMS-AFFA in the above manner:
"This was a contract entered into directly between TAMS and AFFA, as Consulting Engineer, and CAO, under the direction of PBO (and later assigned to IAF), as Client. TAMS and AFFA, as specifically contemplated by the Contract, joined to create the TAMS-AFFA entity, and requested that the Client made payment for invoiced services to that entity. In this regard, the Contract specifically provides that:
'For the purpose of carrying out its obligations, the Consultant may establish an independent entity under the laws of Iran and register the same. Execution of the service of this Contract through such entity shall not be considered as a transfer of this Contract and the Consultant's obligation shall remain the same as per this Contract and its Appendices thereof.

The Consultant may submit a written request to the Client asking for the deposition of the remuneration in the account of such entity.'

(TAMS Statement of Claim, Ex. 1, Art. XX[3].) Under the terms of the Contract, the obligations of the parties to each other remain fixed, despite the interpositioning of the TAMS-AFFA entity. In accordance with the last sentence of Article XX[3], TAMS and AFFA invoiced CAO and IAF for their Contract services through the TAMS-AFFA entity." (emphasis added)

These terms employed by the Claimant itself clearly indicate the legal nature of the TAMS-AFFA entity and the responsibility conferred on it in relation to the Contract of 19 May 1979 concerning the Tehran Airport project. It should also be noted that this responsibility was not irrevocable: at any moment TAMS or AFFA equally could terminate the procuration conferred upon the TAMS-AFFA entity; TAMS-AFFA also could renounce its mandate. It is therefore very clear that any expropriation or disappearance of such an agent would not in the slightest degree affect the rights and obligations of the contracting parties.

2.b From the foregoing it is apparent that the Contract, fees, invoices, claims, etc., must directly belong to TAMS, as party to the Contract. They by no means constitute assets of the entity TAMS-AFFA. Nonetheless, the majority refused to analyze TAMS-AFFA's legal nature and rule, or to determine the status and ownership of the invoices and claims for debts, merely contenting itself with commenting as follows:
"In this connection, the Tribunal notes that, if the CAO had paid the invoices submitted by TAMS-AFFA and such funds were part of the undistributed accounts of TAMS-AFFA, then obviously they would be part of the dissolution value of TAMS-AFFA.... It is a well recognized principle in many municipal systems and in international law that no one should be allowed to reap advantages from their [sic] own wrong" p. 15).

***18** It must be remarked that if CAO had paid the said invoices, the monies paid therefor would certainly have gone to TAMS, and that there is no way by which they would now comprise a part of TAMS-AFFA's undistributed accounts. For the same reason, the sum of Rls. 34,071,878 which CAO paid into the account of TAMS-AFFA for the last time in payment of TAMS' fees, was paid to TAMS by the Government-appointed manager of TAMS-AFFA in August 1979. But apart from this issue, it is essential to note the following points relating to this statement by the majority. The majority forgets that it is supposed to be appraising the assets and capital of TAMS-AFFA as an independent juridical person, and that it is not supposed to be appraising the assets and capital of TAMS-AFFA's partners. In fact, these invoices are the property of TAMS and Farmanfarmaian and Associates themselves, and not to TAMS-AFFA. Furthermore, CAO has no debts to TAMS-AFFA, nor does it have any contractual relationship with it; if it does have any debts, it owes them to TAMS and Farmanfarmaian and Associates themselves, and these two entities must take action to receive any monies allegedly due them. But worst of all, a part of TAMS' claim concerns fees for services, for which no invoices have yet been sent to CAO — CAO therefore has no knowledge of them and thus no obligation to pay. How can these claims possibly be construed as constituting a part of TAMS' assets? The preparation of a company's balance sheet must be limited solely to that company's own asseets, and the only assets which ought to be taken into account and counted are those which exist and are specified and definite. A balance sheet cannot be prepared on the basis of factors which are uncertain and merely hypothetical, and the property and assets of other entities must not be included in the balance sheet. This is perhaps among the most elementary, and yet the most fundamental, principles of accounting. Furthermore, CAO has denied these claims for monies due and has stated that the consulting engineers' fees have been paid in proportion to the percentage of work performed, and that it has no further debts; in addition, CAO has brought a Counterclaim. In view of its lack of jurisdiction over this Defence and the Counterclaim, the majority is to be excused, and yet, notwithstanding the above, it has regarded the Claimant's allegedclaims for monies due in connection with the consulting services contract as constituting a part of TAMS-AFFA's assets!

2.c It must also be pointed out that the Claimant itself never considered the Contract, its invoices, its fees and that which was due to it from CAO as being the property of TAMS-AFFA. Claimant has in fact drawn the distinction between its claim for reimbursement of fees for services it rendered by virtue of the Contract and its claim of expropriation of TAMS-AFFA by the Government of Iran. With respect to this latter, Claimant maintains in its own Statement of Claim that "the largest portion of TAM's total claims arise out of the contract with CAO for services on the TIA project. It is appropriate to note those claims include only amounts owed to TAMS for services already rendered." These services have been evaluated at $8,885,589. Concerning its claim based on expropriation of TAMS-AFFA by the Government of Iran, Claimant explains:
***19** "On July 24, 1979, the date of the expropriation, TAMS had interests in the accounts and other items of property of TAMS-AFFA which had not been distributed to the TAMS-AFFA owners — TAMS and AFFA. Annexed hereto as Exhibit 10, is a schedule of those accounts and items of property and a statement of TAMS's share of them. Exhibit 10 shows that TAMS's interest on July 24, 1979, as adjusted for payments in October 1979, totalled US $ 514,536."

In Exhibit 10 of its Statement of Claim, Claimant has very well evaluated the debits and credits of TAMS-AFFA to determine the balance and the respective portion owing to it, that is $514,536.

It is to be noted that the majority, having ignored all these facts, has totally altered the sense and remedy sought in the Claimant's claim. The majority also employs the term "deprivation of property" even though this expression can be found in neither the Algiers Declarations nor the Claimant's Statement of Claim. In addition to all that, the majority made an entirely arbitrary appraisal of the claims for monies owing.

III

1. <u>The mechanism provided for in the Contract for the Consulting Engineer's Remuneration</u>.

The object of the Contract at issue was the utilization of the Consulting Engineer's services by CAO in connection with Tehran International Airport. Consultants' Services are set forth in Appendix A of the Contract and comprise eight parts:

Parts I - Master Plan

IA - Site Investigation and Testing Program

II - Preliminary Design

III - Detailed Design

IV - Construction Supervision

V - Project Management

VI - Supervision of Subconsultants

VII - Organization Plan and Training Program

Article VIII of the Contract states that the remuneration of the consultants for services rendered shall be in accordance with Appendix B of the Contract. Article I of that Appendix relates to the Consulting Engineer's remuneration for services rendered on the various parts of the Contract. For the Master Plan, a fixed remuneration of Rls. 180,000,000 was set. However, according to Article I, paragraph 2, the Consulting Engineer's remuneration for Parts II, III, IV and V of the Contract consists of various percentages of The Construction Cost. The Construction Cost and its constituents are in turn determined and specified in Article I, Paragraph B. Appendix B also contains a table of various percentages. Naturally, the higher the Construction Cost, the higher the Consulting Engineer's remuneration. Meanwhile, the percentages relate to the various parts of the Contract so, consequently, the Consulting Engineer's fees vary. This mechanism gives rise to one problem: on the one hand, the estimation of the Construction Cost, and consequently the Consulting Engineer's remuneration, becomes possible only upon completion of the Project; on th other hand, monthly payments had to be made to the Consulting Engineers both at the outset and during the course of the work. What, then, was the basis for the calculation of these payments? In this connection, the Note under Article II of Appendix B provides:

***20** Note: In order to determine the amounts of monthly payment relating to the second and third parts of the Consultant's services, the Consultant shall in due time, which in any case shall not exceed eight months from initiation of the Project, prepare and submit to the Client a Preliminary estimate. After approval by the Client, this estimate shall be the basis for the payment of each installment. Upon completion of each part of the services, a thorough estimate shall be prepared as per stipulation of Appendix "A", which after approval shall form the basis for determination and payment of the monthly remunerations. In cases where the previous estimates have been up-dated in the course of each part of services and approved by the Client, the up-dated estimate shall be the basis for the payments. Upon completion of the services, the Consultant's remuneration shall be calculated on the basis of the Contractors final statement and Construction Cost which shall form the basis for final payment to the Consultant. (emphasis added)

Based on the above provision, and at the start of the Project, the Consulting Engineer estimated the final Construction Cost to be US$ 787,000,000, and later increased this amount to US$ 1,075,000,000. However, the CAO formally informed the Consulting Engineer in a letter dated 22 October 1975 that a budget of RLS. 60,000,000,000 had been established for the entire TIA Project Cost.

It is therefore evident that the cost of construction of the TIA Project, as referred to in Appendix B, Article I, Section B, was not intended to exceed the approved budget of Rls. 60 billion.

Upon notification of the approved budget, the Consulting Engineers prepared a detailed cost estimate in relation to the various parts of the Project, taking into account the budgetary limits, and proposed the new estimates to the employer, the CAO. According to this arrangement, the monthly payments were meant to be made on a provisional basis with a view to their being taken into account at the final estimation of the Consulting Engineers remuneration.

2. Determining the Consulting Engineer's remuneration under the present conditions.

The Claimant has claimed for account stated and services rendered on the basis of its own cost estimate which is at variance with the Construction Cost mentioned in the approved budget. This error could easily be corrected, but the crucial difficulty lies elsewhere. Determining the Consulting Engineer's remuneration upon completion of the Project need not pose any problems when the Consulting Engineer has fully performed its duties in connection with all parts and when the performance has been approved by the Employer. However, at present, the Project is not completed and the work has been abruptly stopped. Under the circumstances it therefore becomes necessary to: (a) determine the percentage of work performed by the Consulting Engineers in each part of the Contract and then determine its entitlement accordingly; and (b) evaluate the quality of the work performed. Under the present circumstances, these two factors are fundamental to the determination of the Consulting Engineer's remuneration. However, there are radical differences among the parties on this issue. The following list contains the percentages of work performed, as contended respectively by the parties in their Statement of Claim and Statement of Defence:

				PERCENTAGE COMPLETE (October 1979)	
		CONTRACT PART		Claimant	Respondent
Part I	-	Preparation of the Master Plan		100%	100%
Part I(A)	-	Soil Investigations and Testing Program	Unknown (performed) by sub-consultants		-
Part II	-	Preparation of documents regarding the Preliminary Design		100%	100%
Part III	-	Preparation of the Detailed Design and Tender Documents		86%	35%
Part IV	-	Construction Supervision		5%	0

Part V	-	Project Management	40%	0
Part VI	-	Supervision of the sub-consultants	0%	0
Part VII	-	Preparation of Organization Charts and implementation of training services for the airport personnel	0%	-
		Site mobilization	100%	

***21** What the CAO particularly objected to is the quality of the work performed under the Contract. The Consulting Engineer is responsible for the correctness of documents. The Contract specifies in its Article V (B.4) that:
"The approval of the Client does not release the Consulting Engineer of his responsibility for the correctness and fitness of these documents."

Further, in Article II (B.4 and B.3) of Appendix 2, and particularly under the section specifying the percentages of remuneration for the services rendered in the various parts, it is clearly stated that payment of the last installment of each part shall be subject to the approval of the respective final report.

Article XII of the Contract, which concerns the precision, efforts and professional skill to be employed by the Consultant, states:

ARTICLE XII - CARE AND DILIGENCE
The Consultant shall fulfill his obligations under this Contract using the best professional methods and in accordance with the best technical Standards acceptable to the Client, and shall exercise all his duties subject to this Contract using his utmost care and diligence.

The CAO has submitted evidence according to which it has regularly informed the Consulting Engineer of the deficiencies and inadequacies of the work performed. Particularly, in connection with the Detailed Design, the CAO expressly declared in its letter No. 36/41 dated October 3, 1975, that the Consulting Engineer could start the Detailed Design, at solely its own responsibility, since the drawings prepared in connection thereto involved certain problems, a part of which had been brought to the attention of the Consulting Engineer in the letter No. 1505-2-10/32 dated 27 December 1980. At any rate, the Conulting Engineer performed only 55% of the work, of which only 35% has been approved by the CAO. Furthermore, the Consulting Engineer was never authorized to proceed with the work related to Project Management pursuant to Paragraph 2, Article III. Furthermore, the Consulting Engineer never sent the separate invoices provided under Article II (B.5) of Appendix 2 to signify any management services rendered.

The CAO also submitted a counterclaim, which the majority has dismissed for lack of jurisdiction. Nevertheless, regardless of the claims and counterclaims presented by Iran, the determination of the Consulting Engineer's remuneration involves various problems of a technical, accounting and legal nature. Confronted with all these difficulties, the majority merely resorts to absolute silence or assumes an ambiguous position. Amidst that silence and ambiguity, it states:
It should clearly be understood that this Award involves no adjudication of the rights and obligations of the parties to the TIA contract or of any obligations owed by TAMS-AFFA to the tax and social security authorities of Iran or other third parties."

On the contrary, the majority is far from ambiguous and in fact completely clear when it instructs payment of US$ 5,595,405 from the Security Account to the Claimant.

CONCLUSION

***22** 1. The claim brought before this Tribunal arises out of a contract signed in Tehran 19 March 1975 by CAO, on the one hand, and by Farmanfarmaian and Associates and TAMS (the American Claimant) on the other. The rights and obligations arising from the Contract were directly related to the immediate signatories to the Contract, and were not transferable. In accordance with Article XIX and XXV of the Contract, the Contract and all contractual relations between the two parties were subject to the laws of Iran, and all disputes arising therefrom lay within the sole jurisdiction of the Iranian courts; and pursuant to Article XXIV, even the controlling language of the Contract was Farsi. Furthermore, by virtue of the forum exclusion clause embodied in Article II, paragraph 1 of the Claims Settlement Declaration, this claim lies outside the scope of this Tribunal's jurisdiction. In light of the provisions of the Contract, and of Article II of the Claims Settlement Declaration, which specifies and at the same time limits the mandate of this Tribunal, the majority has acknowledged its lack of jurisdiction. But on the other hand, by resorting to another tactic it has contravened all the above provisions.

The Consulting Engineer, the second party to the Contract, formed an entity called TAMS-AFFA in order to provide for liaison and coordination in carrying out the Technical Services which were the subject of the Contract. The majority has wrongly assumed that TAMS-AFFA has been expropriated, and it has then taken note of and counted the sums allegedly due the Claimant under the Contract as if they constituted assets of TAMS-AFFA, in isolation and without any consideration of Iran's Defence and Counterclaim.

2. The picture provided of TAMS-AFFA by the majority is not any unbiased one, for a large part of the facts and the Respondents' defences in this regard have been concealed. TAMS-AFFA was registered solely as a non-profit entity with a capital investment of US$ 15,000, and its role was simply that a liaison office between all of the parties to the technical services contract in question. Naturally, upon cessation of performance of the Contract in 1978, the subject and purpose of said entity was frustrated. This non-profit entity is not capable of expropriation, and in particular, as of March 1980, the date postulated by the Tribunal as that of its expropriation, the entity became defunct.

The Government of Iran has taken no action against TAMS' interests, and at any event, any expropriation or dissolution of TAMS.-AFFA would not be prejudicial to TAMS contractual rights. The Contract, Claimant's hypothetical contractual rights, and the invoices can under no circumstances be regarded as constituting a part of TAMS-AFFA's assets. The fact of the matter is that TAMS comes before the Tribunal suffering another problem — namely, Articles XXV and XIX of the Contract and the forum exclusion clause embodied in Article II, paragraph 1 of the Claims Settlement Declaration — and this Tribunal has simply sought some device whereby to relieve it of its problem; thus the "expropriation" of TAMS-AFFA as depicted and presumed by the majority must be seen in this light.

***23** The majority refers in numerous places to international law, but at the same time it ignores many fundamental rules of international law relating to interpretation and execution of international treaties, such as the principle of "useful effect" ("l'effet utile") and particularly the principle of interpretation in good faith; and contrary to the above rules, in practice the majority has prevented application of the forum exclusion clause. In a void, it invokes a number of definitions and formulae relating to expropriation from the point of view of international law, but it fails to answer just how this supposed expropriation applies to the present concrete situation; nor does it provide any answer to the legal, technical and financial issues in the present case.

The majority takes up examination of the Contract and the contractual claims, but in order to avoid adjudicating CAO's Defence and Counterclaims, it states that:

"It should clearly be understood that this Award involves no adjudication of the rights and obligations of the parties to the TIA Contract or of any obligations owed by TAMS-AFFA to the tax and social security authorities of Iran or other third parties".

3. At the foot of the Award issued by the majority in Case No. A-18, we Iranian arbitrators have written that this Tribunal, as now constituted, is in no sense impartial and is not competent to adjudicate the disputes of a Trird World country with the United States. I perceived this clear and overt lack of impartiality in the adjudication of the present case. Mr. Riphagen ignored all the rules of law and even the most elementary technical and accounting rules. At a certain stage of our study and deliberations, it became thoroughly clear to me that Mr. Riphagen's aim is to transfer millions of dollars to the United States from Iran's security account. Therefore, all my efforts spent in analyzing the legal, technical, and accounting issues, and even my efforts to arrive at least at a more or less equitable solution, have been to no avail.

I must also note with regret that the appraisal of the Claimant's contractual claims, which was performed separately and in isolation from Iran's Defence and Counterclaim, was completely arbitrary. The Contract concerns a highly technical project, and it is impossible to determine the level of fees without an acquaintance with the contractual mechanism for payment of fees and without a thorough examination of the relevant provisions of the Contract and a technical and accounting-oriented study of the facts. I can honestly testify that Mr. Riphagen studied neither the technical and accounting aspects of the Contract nor Iran's Defence. The three figures A, B and C were proposed to him, and he selected one of them without knowing what they represented or of what they consisted. Why figure "B" and not figure "A" or "C"? He had no clear answer to the legal issues in the present case, and the Award contains no argumentation or justification, or even the least explanation, with respect to the method of appraisal.

***24** Because I am entirely convinced that the deliberations and adjudication in connection with the present case were neither just nor impartial, and that the transfer of these millions of dollars to the United States from the account of the Iranian nation is taking place in an illegal and illegitimate manner, I have refused to sign the present award. Should the "award" be automatically enforced, depriving thereby the Government of the Islamic Republic of Iran of its rights to a meaningful defence and legitimate objections, then what has taken place as "international arbitration" cannot, in my view, be regarded as anything but a clear instance of misappropriation of the national assets of the Islamic Republic of Iran.

Dr. Shafie Shafeiei

SUPPLEMENTARY COMMENTS BY DR. SHAFIE SHAFEIEI ON HIS NON-SIGNATURE OF THE AWARD IN CASE NO. 7

An Award was recently issued in Case No. 7 by the majority in Chamber Two, in favor of the United States Claimant. I refused to sign the Award, having become totally convinced that it constituted a flagrant injustice and ultra vires on the part of the majority arbitrators. In the extremely limited four-day period at my disposal, I attempted to set forth my contentions in this regard. The Award was filed with the Tribunal Registry on 29 June 1984 under AWARD NO. 141-7-2. Because the majority had no answer for the highly complex legal, technical and financial issues raised in the Case, they refrained from addressing those issues and took a vague or mute position in drawing up the Award. This Award does not elucidate the legal and technical facts and issues in the Case, nor does it reveal the reasons upon which the Decision is based, and I therefore believe that further comments are necessary in order to clarify the facts at issue.

In this single Case, the Claimant brought a number of claims against the Government of the Islamic Republic of Iran and several Iranian State banks and governmental organizations. From among these claims, two are important and deserve discussion. The first of the two is the contractual claim. The majority declared that it lacked jurisdiction over both this claim and the counterclaim brought by the Respondent against the Claimant on the basis of the same Contract. The second claim asserts that an Iranian company in which the Claimant held a 50% interest had been expropriated. The majority has entertained this claim without adequately taking into account the facts or the Respondents' defences, and without itself advancing adequate argumentation, and it has then consciously committed a major and highly regrettable error in the appraisal of the said Iranian company's assets. If "X" dies or Company "X" is expropriated or dissolved, then only "X"'s property must later be taken into account when an appraisal is carried out. However, the majority has appraised and computed the property of "Z", which did not belong to "X", together with "X"'s own property. Furthermore, this appraisal was carried out in a manner which took no notice of the Respondents' defences or the technical and financial factors in the Case. In my

earlier statement, I examined the Case in three parts: (I) the contractual claim, (II) the claim of expropriation, and (III) the method of appraisal. I shall supplement my earlier comments according to the same format.

I. The Contractual Claim

***25** The Claimant's first claim arises out of the consulting services contract (referred to in the Award as the TIA Contract) executed on 19 March 1975. The first party to this Contract (the "Client") was the Civil Aviation Organization, referred to in the Award by the abbreviation "CAO". The second party to the Contract (the "consulting engineer") consisted of two firms; one was an Iranian firm named Farmanfarmaian and Associates, abbreviated as "AFFA", and the other was a United States firm named Tippetts, Abbett, McCarthy & Stratton, referred to as "TAMS". This latter entity is the Claimant in the present Case.

The subject of the Contract was the performance of technical and consulting services by the second party, the Consulting Engineer, for building the new Tehran International Airport. Pursuant to Articles XIX and XXV of the Contract, the said Contract and all of the Parties' contractual relations were subject to Iranian law; moreover, all claims arising therefrom fell under the sole jurisdiction of the Iranian courts, and even the language of the Contract, in its legal and non-technical parts, was Farsi.

After the Contract was signed, performance on it was begun and continued. However, coincident with the events associated with the Revolution in Iran and the departure of the Consulting Engineers, all performance on the Contract ceased as of late 1978. This Contract is the source of one principal claim and one counterclaim.

The Claimant's (TAMS') claim is against CAO. The Claimant alleges that some of its invoices for services performed on the basis of the Contract have not been paid, and also that it had performed certain services for which it had not yet sent invoices. It therefore demanded payment of the as-yet unpaid invoices and payment of its fees for the services which it had performed and had not yet sent invoices. The total amount demanded by the Claimant on these grounds was US$ 8,885,589. It should, of course, be noted that the fee was payable in Iranian rials. The Claimant has calculated and converted its accounts payable at a rate of 70.6 rials to the dollar, but if we were to use as the basis for conversion the rate existing at the time the Award was issued, i.e., at least 86.32 rials to the dollar, then the Claimant's demands on the basis of the Contract would amount to US$ 7,267,507.

The relief sought in the Counterclaim by the Civil Aviation Organization is for compensation for losses allegedly incurred as a result of the Claimant's faulty performance of works done and its delay in performance of the Contract. With regard to defects in work, CAO has stated that the Consulting Engineer failed to carry out its contractual obligations correctly and carefully and has in various instances been guilty of default. The Consulting Engineer failed to make adequate studies as necessary with respect to the underground water channels existing within the airport grounds, or to carry out their demolition and filling in. The soil investigations by the Consulting Engineer were totally inadequate and defective. Sufficient care and study were not given to the selection of the subcontractor and his technical qualifications and abilities. On the basis of the foregoing, CAO suffered damages amounting to 910,060,830 rials. The other part of the CAO Counterclaim concerns delay in performance of the Contract. In this connection, CAO has stated that according to the Contract, the Airport project should have been completed and ready for service in 1981. However, the state of progress of the work reveals that the actual services rendered in performing the work lagged far behind the performance schedule provided for in the Contract. As a result, the project remained incomplete, and CAO lost its entire capital investment and was deprived of the income which it had rightfully expected to receive. CAO also asked that these losses be assessed and awarded as damages.

***26** In light of the provisions of Articles XIX and XXV of the Contract, which designate the competent courts and specify applicable law, and in light of the exclusion clause embodied in Article II, paragraph 1, in fine, of the Claims Settlement Declaration, the majority conceded that the Tribunal lacked jurisdiction over the claims arising out of this Contract (i.e., the principal claim and the Counterclaim) (cf. pages 4 and 5 of the Award). Nevertheless, the majority subsequently adjudicated and awarded payment on the Claimant's principal claim under the guise of another claim, and so in actuality "honored" its declared lack of jurisdiction only with respect to Iran's Counterclaim.

II. The Claim of Expropriation

As stated hereinabove, the Second Party to the said Contract for consulting services consisted of an Iranian firm named

Farmanfarmaian and Associates (AFFA) and an American firm ("TAMS", the Claimant in the present Case). Part of the consulting services provided for in the Contract were to be performed in Iran, and part in the United States. Several months after the Contract was signed, these two firms established a non-profit company called TAMS-AFFA in accordance with Iranian law, in order to provide for coordination of the work and for performing the services in question for the Client. The Claimant has alleged that this company was expropriated by the Government of the Islamic Republic of Iran and has brought claim against the Government of Iran in demand of US$ 514,536 on this ground, for its share in the said company. This claim poses numerous substantive and legal issues, some of which relate to the basic issue of expropriation (Point 1), and others of which concern the appraisal of TAMS-AFFA's assets (Point 2).

1. (a) With respect to expropriation, the majority prefers to employ the term "taking" or "deprivation." I myself prefer the term "expropriation," and "any measures affecting property rights", which have been advanced by the Claimant and are employed by the Algiers Declarations. Of course, these terms must be defined within the special context of the Algiers Declarations. On another, more appropriate occasion, I shall address myself to this task, but for now I will confine myself to discussing the Tribunal's practice in this regard. In AWARD NO. 135-33-1 (Sea-Land Service, Inc. and Islamic Republic of Iran), Chamber One of this Tribunal stated in connection with expropriation that:

"A finding of expropriation would require, at the very least, that the Tribunal be satisfied that there was deliberate governmental interference with the conduct of Sea-Land's operation, the effect of which was to deprive Sea-Land of the use and benefit of its investment. Nothing has been demonstrated here which might have amounted to an intentional course of conduct directed against Sea-Land. A claim founded substantially on omissions and inaction in a situation where the evidence suggests a wide-spread and indiscriminate deterioration in management, disrupting the functioning of the port of Bandar Abbas, can hardly justify a finding of expropriation. Thus the claim against the Government of Iran based on expropriation must be dismissed."

***27** In that Award, Chamber One has striven at least to determine some of the constituent elements of expropriation. Naturally, of course, it is necessary to establish that a property right exists, and to determine its nature. The Government must have interfered intentionally with such property rights, and their owner must as a result have been deprived of his property and rights. It is particularly important that the existence of such a causal relationship be established. The deprivation of the owner's proprietary rights must have occurred as a result of actions by the Government. Therefore, if an owner personally renounces his right to his property and does not attempt to obtain consideration for it; or if the deprivation of the owner's property rights results from other factors, the Government obviously will not incur responsibility. Moreover, it has been accepted in international law that extraordinary measures taken by a Government in extraordinary situations or in times of crisis in order to safeguard its own national interests, will not entail international responsibility. Chamber One has accepted this fact as well in its said Award and has furthermore referred in this respect to the Decision by the Mexican-United States General Claims Commission:

"...It is well recognised that in comparable situations of crisis governmental authorities are entitled to have recourse to very broad powers without incurring international responsibility. As the Mexican U.S. General Claims Commission said in the case of Dickson Car Wheel Co. v. United Mexican States:

'States have always resorted to extraordinary measures to save themselves from imminent dangers and the injuries to foreigners resulting from these measures do not generally afford a basis for claims. The foreigner, residing in a country which, by reasons of natural, social or international calamities is obliged to adopt these measures, must suffer the natural detriment to his affairs without any remedy.' (U.N.R.I.A.A. Vol. 4, p. 669 at p. 681-2)."

1. (b) The claim that TAMS-AFFA was expropriated must now be examined and evaluated in light of the approach adopted by this Arbitral Tribunal.

Any examination of the claim of TAMS-AFFA's expropriation and any taking of a decision in this connection, requires that a full account be given of this company and its birth, life and demise. Nonetheless, as was stated in my earlier comments, the majority merely contented itself with a brief and cursory description of the company, and even this description fails to conform to the truth. An important part of the facts and of the Respondents' defences in this respect have been totally concealed. Therefore, I must before all else emphasize that TAMS-AFFA was not a commercial trading company; it was a professional organization established several months after the consulting services contract in question was executed. Its object was to carry out and perform the professional services envisaged in the Contract. TAMS-AFFA was to submit the said

services — which were to be carried out by Farmanfarmaian & Associates and TAMS in Iran and the United States — to CAO and receive the fees from CAO, on behalf of and for the account of, these two companies. The company was jointly managed by two representatives, one of whom was appointed by AFFA and the other by TAMS. Simultaneous with the events attending the Iranian Revolution, performance upon the Contract slowed and finally came to a complete halt toward the end of 1978. At the same time, the Farmanfarmaian family also fled Iran. Because the representative appointed by AFFA abandoned TAMS-AFFA, a representative was appointed by the Government in July 1979 for the purpose of managing the company's routine affairs and to prevent it from shutting down. On this basis, the Letter of Appointment of Mr. Zarrin Nejad (the Government-appointed manager) issued on 24 July 1979, which was submitted to the Tribunal by the Claimant itself, states that:

***28** "Since the principal directors of Abdol Aziz Farmanfarmaian and Associates have abandoned their firm ... you are hereby appointed as provisional manager ... in order to prevent closure of the firm..."

Of course, TAMS-AFFA did not engage in any commercial activities, and appointing a manager was necessary only to ensure that the routine affairs of the company, such as watching the office, paying the water and electric bills, and particularly paying and settling the accounts of the company's employees, were taken care of. In August 1979, Mr. Scarin came from the United States to Tehran on TAMS' behalf. At this time, the sum of 34,071,978 Iranian rials, which had been paid by CAO into TAMS-AFFA's account as fees to TAMS, was paid to Mr. Scarin, and through the extremely considerate assistance of the Government-appointed manager and CAO, Mr. Scarin was able to convert this money into foreign currency and expatriate it from Iran. Moreover, all of the many documents and pieces of correspondence submitted to the Tribunal by the Iranian Respondents demonstrate the good understanding and full cooperation between the Government's representative and TAMS, and the joint management of TAMS-AFFA.

TAMS also introduced Mr. Hoshang Danesh as its representative for the management of TAMS-AFFA's routine affairs, and the company was thereby managed as usual, through the cooperation of two individuals — one the representative appointed by TAMS, and the other the Government-appointed representative serving as locum tenens for AFFA's representative — and all of the company's correspondence bears two signatures. Subsequently, around January 1980, Mr. Danesh, the TAMS representative, left TAMS-AFFA and Iran without giving prior notice.

It should also be noted that TAMS-AFFA came into existence in order to carry out the consulting services contract. By 1978 the said Contract had fallen into total abeyance, and as a result TAMS-AFFA lost its raison d'etre; in January 1980, simultaneous with the departure of TAMS' representative, TAMS-AFFA necessarily ceased to exist. In such circumstances, how can it be supposed that the said company was expropriated? And how can TAMS allege that TAMS-AFFA was expropriated by the Government on 24 July 1979, especially in light of the fact that TAMS' representative was present in Iran in August 1979 and received the monies owed him and converted in into foreign currency, as well as in view of the cooperation extended to TAMS in appointing a representative to manage the company? Of course it cannot. Or at least this kind of allegation could only be presented before a Tribunal presided over by Mr. Riphagen. In any event, the sum total of the majority's contentions with regard to expropriation of TAMS-AFFA is as follows:

"After December 1979, TAMS-AFFA ceased all communication with TAMS, neither reporting to it on the status of the TIA project and TAMS-AFFA's finances nor responding to its letters or telexes. It seems evident from the pleading filed by TAMS-AFFA in the present case that TAMS-AFFA continues to function, although doubtless at a reduced level of employees and expenditures, and that it is being managed by the Government-appointed successors to the original Government-appointed manager."

***29** This statement raises two points, one concerning the status of the consulting services contract, and the other the financial status of the company. As for the Contract, at the time of the occurrence of the revolutionary events in Iran, the two firms comprising the Second Party to the Contract left Iran (the Farmanfarmaian family having fled Iran permanently). Therefore, even according to the majority's own statement on page 8 of the Award, by December 1978 or January 1979, the Contract had fallen into virtual abeyance; therefore, its status was, and is, perfectly clear. Indeed, rather, one of the CAO's objections to TAMS is that TAMS' representative suddenly left Iran without notice towards the end of 1979, and that in this way all direct relations and contract between CAO and TAMS ceased. Therefore, the cessation of performance on the Contract may be more attributable to the acts and conduct of the Consulting Engineers themselves; and in any case, TAMS-AFFA had, and has, no conceivable role or duty or actions to take in this respect. As for TAMS-AFFA's financial status, we should keep in

mind that this company had no commercial or investment activities. As the Claimant has alleged, its assets consisted mainil of a rial deposit account, amounting to approximately one million U.S. dollars; however, as stated by the Respondents in their defence, the company has a net negative worth in light of its obligations, recurrent expenses, settlement of its employees' salary accounts. In these circumstances, there was no need to draw up the company's balance sheet and report it to TAMS; in any event the failure to do so cannot possibly be construed as constituting expropriation. The majority also refers to certain telexes and letters: what letters and telexes these were, and on what subjects, is not at all clear.

Then, following up its above-cited contention, the majority comes to the conclusion that:
"In light of these facts, the Tribunal concludes that the Claimant has been subjected to 'measures affecting property rights' by being deprived of its property interests in TAMS-AFFA since at least 1 March 1980 and that the Government of Iran is responsible, by virtue of its acts and omissions, for that deprivation."

In this connection, the following queries might be raised: specifically what measures were taken by the Government? What were the Claimant's property rights? Just how did this measure by the Government affect these rights? Exactly what measures, and particularly, what rights? Just what right was the Claimant attempting to exercise? Just how was it prevented from exercising these rights as a result of the Government's intervention? What has it lost? Upon what facts does the presumption rest that the company was expropriated on March 1, 1980? The Award by the majority gives no answers and mades no contentions with respect to these questions. Naturally, then, it is difficult for me to argue the issue in a void. Still more questions arise: Does this "expropriation", which the majority presumes to have taken place, correspond to the Algiers Declaration's definition of "expropriation"? Isn't the American arbitrator — and more so, Mr. Riphagen — abusing the authority unfortunately vested in this Tribunal on 19 January 1981? The answer to this last question, I believe, is in the affirmative, and I therefore refused to sign the Award.

***30** 2. Of course, one might suppose with the majority, however, that TAMS-AFFA was expropriated by the Government of the Islamic Republic of Iran, and in that event the issue of appraising TAMS-AFFA's property would arise. Were we to do so, only the property of TAMS-AFFA must be appraised; the assets of Mr. "Z" should not also be calculated along with TAMS-AFFA's property. In Exhibit 10 to its Statement of Claim, the Claimant itself appraised TAMS-AFFA's assets and set its own share thereof at $514,536. On the grounds, however, that the alleged accounts due were receivable by TAMS-AFFA, the majority has held that TAMS' demands for accounts receivable under the consulting services contract constituted a part of TAMS-AFFA's assets, and has included them in its calculation of the company's balance sheet. The following issues are to be raised in this connection:

(a) Was the Contract transferred to TAMS-AFFA, and did this company therefore own the invoices and contractual claims which the Claimant has sought on the basis of the Contract? Just what was the role and capacity of this company in receiving payment on these invoices?

(b) We should bear in mind that these alleged accounts receivable are the very contractual claims which CAO has disallowed and which form the subject of the Claimant's principal claim, and that the majority has stated that the Tribunal lacks jurisdiction over this claim and the Counterclaim. That being the case, on what grounds is the majority now authorized to adjudicate the said claim? Moreover, these amounts allegedly due constitute at most hypothetical and contingent assets, so how can they be entered into and calculated on the company's balance sheet as confirmed assets?

(c) On principle, what responsibility does the Government bear towards these claims?

2. (a) Pursuant to Article I, paragraphs 1 and 2 of the Contract, the immediate Parties and signatories to the consulting services contract consisted of CAO on the one part, and Abdol Aziz Farmanfarmaian & Associates (AFFA) and TAMS on the other part. In accordance with Article XX, paragraph 1 of the Contract, AFFA and TAMS — that is, the second party to the Contract — were not entitled to assign or transfer all or any part of the services relating to the Contract to any other person(s) or legal entity(s), or even to their own employees. However, because the second party to the Contract consisted of two firms, one of them Iranian and the other American, and because a part of the work was being carried out in Iran and another part in the United States, it was provided in Article XX, paragraph 3 of the Contract, in order to coordinate and facilitate the works, that:
"In order to carry out its obligations, the Consulting Engineer may establish and register an independent company in conformity to Iranian law. Performance by such company of the services which are the object of the present Contract must

not be taken as constituting a transfer of the Contract, and the Consultant's obligations shall continue to conform to that which has been set forth in this Contract and its Annexes. The Consultant may request the Client in writing to pay the cost of its services to the said new company."

***31** In light of the foregoing, it is certain that the rights arising out of the said Contract belonged exclusively to AFFA and TAMS, and that these two entities were jointly responsible for the obligations arising out of the Contract. These rights and obligations were incapable of transfer, and they were never transferred to TAMS-AFFA. TAMS-AFFA has never become the successor to the immediate Parties to the Contract in their contractual rights and obligations. What has been particularly provided for in Article XX, paragraph 3, in fine, of the Contract, is that the Consulting Engineer may in writing request the Client — that is, CAO — to pay the fees for its services to TAMS-AFFA. Therefore, if the invoices were submitted to CAO by TAMS-AFFA, the role of the latter in this respect was merely that of an intermediary and agent. In actuality, AFFA and TAMS, which were carrying out the operations embodied in the Contract, partly in Iran and partly in the United States, submitted their documents and invoices to CAO through TAMS-AFFA, having requested that the amounts of those invoices be deposited into TAMS-AFFA's account. This request could certainly have been withdrawn as well; in still more explicit terms, these invoices and accounts receivable did not belong to TAMS-AFFA and the latter merely received them temporarily on behalf of, and for the account of, AFFA and TAMS, and under no circumstances could they be regarded as constituting a part of TAMS-AFFA's confirmed assets and entered into its balance sheet.

It is also important to state that in order to determine TAMS-AFFA's legal status and the ownership of the invoices, the majority referred to the Parties' practice rather than analyzing the Contract's articles. While it is in any case improper to rely on practice in the face of the explicit terms of these articles and contractual relations, it is also necessary to note that in its 29 June 1982 Memorial, even the Claimant described TAMS-AFFA as merely an intermediary company and stated that TAMS and AFFA had sent the invoices for their services to CAO through TAMS-AFFA; pursuant to the terms of the Contract, the Parties' reciprocal obligations were fixed, despite TAMS-AFFA's formation. However, even if we were to suppose, arguendo, that the Contract was transferred to TAMS-AFFA, with the latter being an independent company, then in that event TAMS-AFFA was an Iranian company, and the Claimant did not have the right to control it. Pursuant to Article VII, paragraph 2 of the Claims Settlement Declaration, the Claimant cannot bring its contractual claim before this Tribunal, and the Respondents particularly emphasized this last issue in their defences.

2. (b) It might be possible to suppose that the consulting services contract was transferred to TAMS-AFFA along with the rights and obligations arising therefrom, or to hold that because the latter company took receipt of these invoices, the contractual invoices ought therefore to be treated as a part of TAMS-AFFA's assets, regardless of the capacity in which TAMS-AFFA received them, or on what ground. But even with this presumption, still more difficulties emerge. The Claimant's invoices and contractually-based claims have been disallowed and disputed. There is merely one claim; in accordance with Articles XIX and XXV of the consulting services contract, and by virtue of the exclusion clause embodied in Article II, paragraph 1, in fine, of the Claims Settlement Declaration, interpretation of the provisions of the said Contract and adjudication of disputes arising out of the Contract, lie within the sole jurisdiction of the Iranian courts and must be settled in accordance with the laws of Iran. In light of these provisions, the majority was compelled to declare as well that this Tribunal lacks jurisdiction over this claim. Either it has jurisdiction, or it does not. It categorically does not, and there is no third solution or compromise. Therefore, the present claim must be settled exclusively by the Iranian courts and in accordance with Iranian law. Nonetheless, on the pretext of "evaluation", the majority arbitrarily adjudicated this claim, acting in a manner which cannot be justified and has no legal or logical basis.

***32** As against the Claimant's claims, there also exists a Counterclaim, which it is neither logical nor just to separate from the former. In view of all these factors, the Claimant's alleged accounts receivable constitute at best a hypothetical and contingent asset, and this kind of asset cannot be regarded as being a part of TAMS-AFFA's confirmed assets. Moreover, a part of the Claimant's alleged accounts receivable relate to fees for services which, the Claimant asserts, it performed, but for which it has not yet sent an invoice to CAO. The last-mentioned fees had not been demanded as of 19 January 1981 — that is, the date on which the Algiers Declarations were signed; furthermore, they were first brought before this Tribunal and asserted on 20 October 1981, in the Claimant's Statement of Claim. For this reason, because on 19 January 1981 there existed no claim or outstanding claim, as intended in Article II, paragraph 1 of the Claims Settlement Declaration, in this part of the Claimant's action, the demands and claim embodied in the said section are not, on principle, capable of being adjudicated before this Tribunal. In these circumstances, how could these accounts receivable possibly be conceived as

constituting a part of TAMS-AFFA's confirmed assets?

Another interesting point remains, which I would like to mention. The assets of TAMS-AFFA, as shown by its balance sheet dated March 20, 1979 (Claimant's rebuttal filed 14 November 1983, Annex I, Attachment 3), which balance sheet has been prepared and approved by TAMS and AFFA, the company directors and owner, excluded the accounts receivable under the Contract. It is clearly evident that TAMS as a director and owner of the company has admitted that the accounts receivable under the Contract were not to be regarded as an asset of TAMS-AFFA. Therefore, how could Judge Riphaghen regard it as such? The above-mentioned balance sheet also indicates that as of March 20, 1979, TAMS-AFFA's liabilities exceeded its assets by the amount of 36,118,855 rials. This indicates that the Claimant has a negative interest as of that date.

2. (c) Let us set aside all the preceding matters; let us forget that the Farmanfarmaian family quit Iran and left TAMS-AFFA without a responsible officer or supervisor, so that the Government was compelled, in order for TAMS-AFFA's routine affairs to be managed and particularly for its employees' situation to be decided, to appoint a representative to TAMS-AFFA on 24 July 1979 to replace the representative appointed by AFFA. Let us forget that after this appointment was made, Mr. Scarin came to Iran on behalf of TAMS from the United States and obtained the moines owing from TAMS-AFFA, and that he was able, because of the considerate help of the Government-appointed manager, to convert these monies into U.S. dollars and expatriate them from Iran at a time when the export of foreign currency was subject to extremely severe restrictions. Let us forget as well that at this time Mr. Scarin designated Mr. Danesh as TAMS' representative for TAMS-AFFA, and that shortly thereafter the latter representative also left Iran without notice. Let us suppose, despite all the facts at hand, that TAMS is able today to allege before this Tribunal that TAMS-AFFA was expropriated by the Government of Iran on 24 July 1979. Let us close our eyes to the object and purpose behind TAMS-AFFA's formation as well, and suppose that, in arguendo, TAMS-AFFA was a highlyimportant, foreign-owned manufacturing company, which the Government expropriated discriminately. Even then, the act of expropriation would not give rise to an unlimited degree of responsibility. The Governmenths responsibility is at most confined to those rights and that property which it has expropriated. The property and rights of TAMS-AFFA should be determined as of March 1, 1980, the date on which, according to the unsupported contention of the majority, the supposed expropriation took place. What property did TAMS lose; of what rights was it deprived? At any event, the Government of Iran bears no responsibility with respect to the Claimant's contractually-based claims. As of March 1, 1980, these accounts receivable had not been paid, and for this reason TAMS had itself sent a number of telexes from the United States to CAO requesting that the account be settled and fees be paid for the services allegedly rendered by it. CAO, however, believed that the fees had been paid in proportion to the amount of work performed and that it had no further obligation; in addition, CAO has a Counterclaim of its own. For these reasons, the alleged accounts receivable on the basis of the consulting services contract were disallowed, and in this regard, on March 1, 1980, there existed only one dispute and one claim. It ought particularly to be noted that TAMS-AFFA does not have the right to bring a claim; it is only TAMS (that is, the Claimant), which is a direct Party to and signatory of, the Contract, possesses the right to bring suit. Therefore, the supposed and imaginary expropriation of TAMS-AFFA by the Government of Iran constituted, and constitutes, no bar to the Claimant's exercise of its rights. The Claimant could and can bring this claim before the competent courts. The Government of Iran has not divested TAMS of this right; it has not encroached on the Claimant's rights in this regard, and the Government of Iran cannot conceivably be held responsible on this account. Instead of undertaking this kind of legal analysis, however, the majority unfortunately cited a number of definitions of international law and employed the term, "full value." This latter term, however, is peculiar to the United States Department of State and is not a term used in international jurisprudence.

***33** It should be noted that "full" compensation, invented by U.S. Secretary of State Hull in his letter to the Mexican Government in 1938, is a myth and does not reflect the reality of international law. It goes without saying that the United States Department of State, as a matte of course, is in no position to represent its views as constituting international consensus. In this respect, even the editors of the Restatement of the Foreign Relations Law of the United States (Revised) have rightly rejected the Hull formula and "full" compensation as reflecting the state of international law. See the Editorial Comment by Oscar Schachter in The American Journal of International Law, entitled "Compensation for Expropriation," 78 AJIL 122-125 (1984). Yet Mr. Riphagen, unfortunately but not surprisingly, followed the position taken by the United States Department of State, in particular the one detailed by that Department in a letter to the American Law Institute on 14 April 1983 (U.S. Department of State Bulletin of June 1983, Vol. 83/No. 2075 at 52 and 53; 78 AJIL 176 (1984).

Mr. Riphagen's reference to the archaic cases of Chorzow Factory and Norwegian Shipowners Claims is out of context and totally irrelevant to the case presently under consideration. These two age-old cases should be confined to their special facts;

moreover, they never refer to the myth of "full" compensation. The former refers only to a duty to payment of "fair" compensation, while the latter speaks of "just" compensation determined by fair actual value at the time and place in view of all surrounding circumstances. See Schachter, supra, at 123. Mr. Riphagen's decision prompts even more regret, considering the sobering reality that none of the Parties ever argued any of these questions, and the shallowness of his decision becomes even more obvious in light of the following well-known facts, also reiterated by Professor Schachter:

"It was clear that European state practice showed substantial deviation from what one would ordinarily understand as "full" compensation or as prompt and effective payment. American scholars, by and large, came to share the views of their European counterparts and in the postwar period they increasingly challenged the official U.S. view on the Hull standard. In particular, their examination of state practice in cases of postwar nationalization showed that compensation was less than full value (or fair market value), and that payments were deferred and often made in nonconvertible local currency. To maintain that the Hull formula was law seemed far removed from reality." (Id., at 124)

III. Method of Appraisal

The Contract is accompanied by two Annexes (A and B). Annex A, in eight parts, specifies the technical services which were the object of the Contract.

Annex B to the Contract discusses the mechanism relating to the Consulting Engineer's fee, down payments, monthly instalments and, finally, final reconciliation of the account. For the first part — i.e., the Master Plan — a fixed amount of money was envisaged, but the Consulting Engineer's fees under Parts Two, Three, Four and Five of the Contract were to be paid as a specific percentage of the construction costs; said construction costs, and their component elements, are described therein as well. It is impossible, of course, to determine the construction costs because the works were not completed. However, the over-all project budget, and the detailed budget for the various parts of the project, had been determined, so that it is entirely certain that the construction costs could not and must not exceed this approved budget. In order to determine the Consulting Engineer's fees under existing conditions, it is necessary to determine what percentage of the work in each part the Consulting Engineer performed, and in this respect the claim and the defence are in essential disagreement. The Claimant's assertions in connection with certain of these parts appear particularly unreasonable. The photographs relating to the Airport project which were submitted to the Chamber by the Iranian Respondents, demonstrated that the Airport is only in the initial stages of the topographical survey. Construction work, and the subcontractors' works, have not been completed. The project grounds are merely open lands, and have not even been graded. Yet, in such circumstances, the Claimant asserts that it has completed 40% of the management of the project, which seems difficult indeed to accept. Moreover, the Iranian Respondents have objected to the quality of the work actually performed. Determination of the proportion of work performed under each part, and investigation of the quality of the work, represents a complex and totally technical matter outside the competence of this Tribunal, and it requires an expert opinion. In this regard, throughout the Hearing, CAO profferred detailed reasons explaining why technical expert opinions were necessary for evaluating the works performed by the Claimant and all the other technical and financial aspects of the case, and thus requested that the Tribunal refer the matter to an expert opinion. Nonetheless, despite this request and in particular despite all the technical and financial issues involved, the majority refused to appoint an expert and instead arbitrarily evaluated the Claimant's demands.

Conclusion

***34** A. Pursuant to Article V of the Claims Settlement Declaration, the Tribunal "shall decide all cases on the basis of respect for law." Furthermore, pursuant to Article 32, paragraph 3 of the Tribunal Rules:

"The arbitral tribunal shall state the reason upon which the award is based..."

With this aim in mind, an award by the Tribunal should contain a fully clear description of the facts and contentions of the parties. The objections and contentions advanced by the parties to the case should all be set forth in detail in the award, and the Tribunal should explain in detail its grounds and reasons for its award. The Tribunal award should also be responsive to the grounds and contentions of the parties to the case. Unfortunately, however, the present Award by the majority fails to set forth the facts in the case. It is not clear which claims are attributed to which Iranian organizations, and the majority does not even state what relief was sought in the various claims, or on what grounds. As for CAO's Counterclaim, it is merely referred to Vaguely and tersely in a line or so. The Award fails to pose the substantive and legal issues attending expropriation, especially with respect to appraisal of TAMS-AFFA's assets.

Pursuant to the relevant terms and conditions of the consulting services contract, the said Contract was subject to the laws of Iran, and the interpretation of the said Contract and the adjudication of all disputes arising therefrom lay within the exclusive jurisdiction of the Iranian courts. In light of these provisions, and in particular in view of the exclusion clause contained in Article II, paragraph 1, in fine, of the Claims Settlement Declaration, the majority acknowledged that the Tribunal lacks jurisdiction over the claim and the counterclaim arising out of the said Contract. Subsequently, however, it adjudicated the Claimant's claim separately from the counterclaim on the pretext of the imaginary expropriation of TAMS-AFFA, and awarded payment thereon. What is the source of the majority's newfound competence to adjudicate this claim? And how can the claim be disassociated from the counterclaim?

The accounts receivable allegedly due the Claimant under the Contract have been repudiated and are the subject of dispute, and so constitute at best a merely contingent asset. As against this contingent asset, there exists the counterclaim — that is, a contingent debt — as well, and these contingent assets and debts cannot be taken in isolation from one another. Nonetheless, in violation of all relevant legal and accounting principles, the majority took note of the former as constituting confirmed assets of TAMS-AFFA and yet ignored the second, namely, CAO's counterclaim. Such an adjudication lacks all rational basis and appears to be a flagrant example of discrimination.

The Contract at issue was a technical contract. Determining the Consulting Engineer's fee presents complex technical and financial issues and absolutely requires recourse to an expert opinion; and yet the majority has arbitrarily assigned a figure of US$ 5,594,405, equivalent to 400,000,000 Iranian rials. The majority fails to utter a single word in answer or explanation of just how it arrived at this figure, what were the bases for its calculations, how it has managed to solve the technical and accounting problems involved, and what response it has to Iran's defences. The Award by the Chamber involves a judgement in excess of eight million dollars (the judgement amount plus interest) and yet it fails to contain a single word justifying and arguing in support of this computation. Such being the case, even a simple law student will discern that this arbitral proceeding does not constitute an honorable judicial and arbitral process. I earlier avowed that Mr. Riphagen had failed to study Iran's Defence or the technical and accounting aspects of the case. Three figures "A", "B", and "C" were proposed to him and he selected one of these, in ignorance of what it comprised and represented. This being the case, if the person who submitted the figures to him had proposed instead figures "D", "E", and "F", Mr. Riphagen would have selected one of the latter group.

***35** Moreover, it is possible for the Tribunal to err in making its appraisal and calculations, and so naturally either of the Parties to the claim will be entitled to bring the details to the attention of the Tribunal within a specified period of time and request that the Award be amended. In this regard, Article 36 of the Tribunal Rules states:
"1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitral tribunal may within thirty days after the communication of the award make such corrections on its own initiative."

The Chamber has not provided any explanation of its method of appraisal or calculation in this case. Therefore, the Parties to the case are completely unable to check its calculations, and so if the Chamber has committed an error, it will be utterly impossible to correct it.

In accordance with the principles of good faith and effectiveness, which are well-established and well-known principles of international law, international treaties must be interpreted and carried out in good faith. Interpretation in particular must be made in such a way so as to ensure that the provisions of a clause are fully implemented, in the manner intended by the governments which have signed that agreement. In the present case, Mr. Riphagen has acted in direct violation of both of these principles. By virtue of the exclusion clause embodied in Article II, paragraph 1, in fine, of the Claims Settlement Declaration, the claim arising out of the consulting services contract lay outside the jurisdiction of the Tribunal. Initially, Mr. Riphagen admitted the Tribunal's lack of jurisdiction, and yet he subsequently submitted the Claimant's contractual claim to adjudication by resorting to a different tactic. In this way, he has to all effect violated the exclusion provisions of Article II, paragraph 1, and prevented their implementation.

The Tribunal should take its decisions only after entirely free and democratic deliberations and discussions, and its Decisions

should reflect a completely impartial legal opinion. Deliberations require study, thought and reflection; and all of the substantive and legal issues in a case ought, together with all the contentions advanced by the parties, to be analyzed and examined impartially and in good faith. Without question, if after such a free and legal analysis and examination the Tribunal arrives unanimously, or by a majority, at a legal conclusion and that conclusion forms the basis of the Tribunal's Decision, then of course such a legal decision or ruling must be respected. Unfortunately, however, this is not the case in the present instance. This Decision by the Chamber is not the result of a legal analysis and examination, and it demonstrates the majority's intention to transfer millions of dollars of Iran's assets to the United States. I am totally convinced of this fact and for this reason refused to sign the Award. It is unfortunately now impossible to conduct an impartial and proper arbitration in Chamber Two; and the arbitrator appointed by the United States is consciously deriving benefit from and exploiting the unfavorable conditions prevailing within this Chamber.

***36** B. The issue of nullifying and setting aside an arbitral award has been a topic of discussion for many years. The issue having been raised in 1873 in the Institute of International Law, the Institute adopted the position that under certain circumstances an arbitral award can be nullified ab initio. According to Article 27 of the Draft Regulations for International Arbitral Procedure:

"The arbitral decision is null in the event of a null compromis, excess of power, the proven corruption of one of the arbitrators, or an essential error.[1]

This doctrine also regards as null and void, awards in which arbitrators have exceeded their powers or failed to observe and respect fundamental rules of arbitration. In the opinion of the French jurist, Dr. Albert Acremant:

"To exceed their powers, the arbitrators have only to accord to one party satisfaction greater than that allowable to them by the compromis, or, they have only to neglect the provisions of that compromis relating to procedural matters."[2]

In light of all the foregoing, the majority has acted ultra vires in this case; the Award is contrary to the principles of law and therefore null, void, and unenforceable.

Dated, The Hague 27 July 1984

Dr. Shafie Shafeiei

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Footnotes

1 The BHRC forum selection clause provided:
All disputes arising out of this Subcontract, or the interpretation and understanding of its provisions between the parties, which cannot be settled through amicable negotiations or correspondence, shall first be referred to a committee composed of a representative of each of the Employer, Housing Organization, and Subcontractor. In case no agreement can be reached or if one of the parties does not agree with the judgment of the majority of the committee, the dispute will be settled according to the laws of Iran by reference of it to competent courts of Iran.

2 See Chorzow Factory Case (Merits) (Ger. v. Pol.), 1928 P.C.I.J. Ser. A, No. 17, at 47 (Judgement of 13 September); Norwegian Shipowners' Claims (Nor. v. U.S.), 1 U.N. Rep. Int'l Arb. Awards 307 (1922). The parties in this case have not argued the question of the relevance of the investment protection provisions of Article IV, paragraph 2 of the Treaty of Amity of 15 August 1955 between Iran and the United States.

3 See 8 Whiteman, Digest of International Law 1006-20; Christie, What Constitutes a Taking Under International Law? 38 Brit. Y.B. Int'l. Law 307 (1962); and the Lena Gold-field's Case reprinted in Nussbaum, The Arbitration Between the Lena Goldfield's, Ltd. and the Soviet Government, 36 Cornell L.Q. 31 (1950).

4 While tax and social security premium liabilities of TAMS-AFFA must be estimated for purposes of valuing TAMS-AFFA, the

alleged separate tax and social security liability of TAMS, are, of course, irrelevant to the value of TAMS-AFFA.

5 Article XX(3) provided:
For the purpose of carrying out its obligations, the Consultant may establish an independent entity under the laws of Iran and register the same. Execution of the service of this Contract through such entity shall not be considered as a transfer of this Contract and the Consultant's obligations shall remain the same as per this Contract and its Appendices thereof. The Consultant may submit a written request to the Client asking for the deposition of the remuneration in the account of such equity.

6 Inasmuch as the tax and social security premium counterclaims and the monies owing for work performed on the TIA project could not be presented directly to this Tribunal, the Tribunal's collateral consideration of those items is not res judicata. See K. Carlston, The Process of International Arbitration 88 (1946).

7 See generally, B. Cheng, General Principles of Law as Applied by International Courts and Tribunals 149 (1953).

1 Of course, the Claimant's alleged demands were, like TAMS-AFFA's funds, in Iranian rials, which the Claimant has evaluated at the rate of 70.6 rials to the dollar, but if we consider the exchange rate as of the date of issuance of the Award, which was at least 86.32 rials, then the amount of the remedy sought by the Claimant in connection with the contractual claim and the claim of expropriation, will in fact be as follows:

1 Annuaire de l'Institut de Droit International, 1st year, 1877, p. 133. Emphasis added. Translated from the original French: "La sentence arbitral est nulle en cas de compromis nul ou d'exces de pouvoir ou de corruption prouvee d'un des arbitres ou d'erreur essentielle."

2 La procedure dans les arbitrages internationaux, Paris, 1905, p. 163. Translated from the original French: "Pour exceder leurs pouvoirs, les arbitres n'auront qu'a accorder a une partie des satisfactions plus grandes que celles que leur permittait le compromis, ou bien ils n'auront qu'a negliger les regles de ce meme compromis quant a la procedure a suivre."

Paul Reuter, Driot international public, Paris, 1968, p. 284; Pierantoni, "La procedure dans les arbitrages internationaux," R.C.I.L.C., 1898, pp. 456-7; Guermanoff, L'exces de pouvoir de l'arbitre Paris, 1929, p. 60.

Arbitration pursuant to the
Canada-Ecuador Bilateral Investment Treaty
and the UNCITRAL Rules

EnCana Corporation

(Claimant)

versus

Republic of Ecuador

(Respondent)

AWARD

Professor James Crawford, President

Mr. Horacio Grigera Naón

Mr. Christopher Thomas

Secretariat

London Court of International Arbitration

3 February 2006

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(3) The exclusion of taxation measures: Article XII(1) of the BIT

133. The Respondent's third and main jurisdictional objection is that the present claim is inextricably associated with a "taxation measure" and therefore excluded from the scope of the BIT by Article XII(1) except in so far as it concerns the expropriation claim under Article VIII. The terms of Article XII were set out in paragraph 108 above.

134. The Claimant's position at the jurisdictional phase, as summarised by the Tribunal in its Jurisdictional Award, was that:

> "the essential dispute concerns the meaning of the participation factors agreed under the oil contracts; in particular, whether they were concluded on the assumption of a certain fiscal balance concerning the existing practice of VAT recovery. At most, in the Claimant's view, the dispute concerns the relationship between the participation factors and VAT liability, and therefore falls partly within and partly outside the scope of Article XII... A dispute as to the content and meaning of the oil contracts is not a dispute, or at least not exclusively a dispute, as to a taxation measure within the meaning of the BIT."[86]

By contrast, the Respondent took the position that the participation factors had no relevance whatsoever to VAT liability "which depends on nothing but the tax laws of Ecuador".[87]

135. In its pleadings in the present phase, the Respondent argued once more that all of EnCana's claims concern simply the issue of tax refunds, and they have no validity independent of the denial of VAT. It took issue with the Claimant's assertion that there is agreement at the level of principle that EnCana is entitled to be reimbursed in respect of VAT paid in respect of inputs to exports and that the only disagreement concerns whether the participation factors already allow for these costs. According to Ecuador, EnCana is not entitled to any refund of VAT as a matter of Ecuadorian law, both in terms of the original meaning of the law and in the light of Interpretative Law No. 2004-41 (2004). It expressly denies the position attributed to it by EnCana "that EnCana is entitled to a refund and that the refund was granted through a contract."[88]

136. As to the issue of the Participation Contracts, the Respondent argues that these do not entitle COL and AEC to a tax refund; this is a matter for the ITRL. Rather, it argues that the calculation of the X factors under the Contracts were intended to take account of all taxes and other costs, and it is in this sense that the companies are in effect compensated by the participation factors.[89]

137. As regards the Denying Resolutions, the Respondent admits (as is plainly the case) that SRI did initially justify its position on the basis that VAT costs were covered by the Participation Factor. But the significance of this fact is said to be eliminated by the fact that

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86 Tribunal's Decision on Jurisdiction, 27 February 2004, §34.
87 Ibid., §35.
88 Respondent's Rejoinder, 25 June 2004, §93.
89 Ibid., §§99-101.

in later resolutions and in the court proceedings, SRI justified the decisions on the basis that the companies were not entitled to refunds as a matter of Ecuadorian law in any case.[90]

138. In response EnCana stresses that SRI in the initial Denying Resolutions had claimed that the relevant provisions of the tax legislation was not applicable because of reimbursement through the Participation Contracts.[91] It notes that the Tribunal in the *Occidental* award characterised the dispute as one about whether the refund was secured under the X factors.[92] It submits that, despite Ecuador's efforts to frame the actions taken by SRI as "taxation measures", SRI's actions were based on a conclusion as to the scope of the Participation Contracts, and accordingly the claim does not relate solely to "taxation measures" within the meaning of Article XII.[93]

139. In addition, EnCana argues that:

(1) the sums claimed were not taxes but rather "refunds and credits of amounts collected by [COL and AEC] in respect of which they are to act as collection agents only", since according to the "destination" principle universally adopted in VAT systems, exporters are not subject to taxation via VAT in respect of business-to-business transactions;[94]

(2) the "idiosyncratic" application of VAT refund rules to exports of oil (in distinction with other like products such as cut flowers) amounts to discrimination; "taxation measures" are by definition measures of a general character, not *ad personam* exactions.[95]

(3) that Article XII(1) should not be read as permitting measures of SRI adopted in clear disregard of the applicable provisions of domestic law, contrary to Andean Community Law and in violation of almost universal practice in relation to the granting of VAT credits and refunds.[96]

140. The Tribunal will consider, first, the extent to which matters concerning VAT liability fall in principle within the scope of the exemption for taxation measures in Article XII(1); secondly, whether SRI's initial reliance on the Participation Contracts takes EnCana's claim outside the scope of that exemption; thirdly, the position of Petroecuador; fourthly, the internal developments in Ecuador, including domestic decisions and the dismissal of the justices of the Supreme Court, apparently on grounds related to the dispute with the oil companies.

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90 Ibid., §102.

91 Claimant's Response, 10 August 2004, §§190, 194.

92 Claimant's Response, 10 August 2004, §200, referring to *Occidental Award*, §74: "the parties do not dispute the existence of the tax or its percentage. What the parties really discuss is whether its refund has been secured under Factor X of the Contract, as claimed by the Respondent, or if that is not the case, whether, as argued by the Claimant, it should be recognized as a right under Ecuadorian Tax Law."

93 Claimant's Response, 10 August 2004, §§201-202.

94 Ibid., §§203-4.

95 Ibid., §§205-6.

96 Ibid., §§210-20.

(a) The scope of the exemption for "taxation measures"

141. The term "taxation measures" is not defined in the BIT, although Article I(i) of the Treaty defines the term "measure" to include "any law, regulation, procedure, requirement or practice".

142. In the Tribunal's view, the term "taxation measures" should be given its normal meaning in the context of the Treaty. In particular, the Tribunal would make the following observations as to the meaning of the term.

(1) It is in the nature of a tax that it is imposed by law. Tax authorities are not robber barons writ large, and an arbitrary demand unsupported by any provision of the law of the host State would not qualify for exemption under Article XII. On the other hand, as the Respondent stressed, the Tribunal is not a court of appeal in Ecuadorian tax matters, and provided a matter is sufficiently clearly connected to a taxation law or regulation (or to a procedure, requirement or practice of the taxation authorities in apparent reliance on such a law or regulation), then its legality is a matter for the courts of the host State.

(2) There is no reason to limit the term "taxation" to direct taxation, nor did the Claimant suggest it should be so limited.[97] Thus indirect taxes such as VAT are included.

(3) Having regard to the breadth of the defined term "measure", there is no reason to limit Article XII(1) to the actual provisions of the law which impose a tax. All those aspects of the tax regime which go to determine how much tax is payable or refundable are part of the notion of "taxation measures". Thus tax deductions, allowances or rebates are caught by the term.

(4) The question whether something is a tax measure is primarily a question of its legal operation, not its economic effect. A taxation law is one which imposes a liability on classes of persons to pay money to the State for public purposes. The economic impacts or effects of tax measures may be unclear and debatable; nonetheless a measure is a taxation measure if it is part of the regime for the imposition of a tax. A measure providing relief from taxation is a taxation measure just as much as a measure imposing the tax in the first place. In the case of VAT, the Tribunal does not accept that the system of collection and recovery of VAT, even if it may be revenue-neutral for the intermediate manufacturer or producer, is any less a taxation measure at each stage of the process. A law imposing an obligation on a supplier to charge VAT is a taxation measure; likewise a law imposing an obligation to account for VAT received, a law entitling the supplier to offset VAT paid to those from whom it has purchased goods and services, as well as a law regulating the availability of refunds of VAT resulting from an imbalance between an individual's input and output VAT.

[97] In the *Occidental* arbitration, the claimant argued that the somewhat differently worded US provision was limited to direct taxation – an argument rejected by the Tribunal: *Occidental Award*, §69.

143. Thus even if it were the case that the position of an intermediate producer was in substance that of a tax collector or a tax conduit (the actual incidence of the tax being on the ultimate consumer), nonetheless the legal provisions dealing with the position of the intermediate producer and its rights and obligations in relation to the process of VAT accountability, including an entitlement to refunds, would still be "taxation measures" within Article XII(1). And if a law is a taxation measure, then any executive act apparently (and not merely colourably) implementing that law is equally a taxation measure.

144. Claimant argues that Ecuador is acting inconsistently: on the one hand SRI is refusing to allow a VAT rebate on the basis that all the costs of oil operations are covered by the participation factor in the Participation Contract; on the other hand, it is not the case that the participation factor does so. VAT recovery was never an issue at the time the participation factors were negotiated, and (despite the direction given by the President of Ecuador in his letter of 27 October 2003) Petroecuador has declined to renegotiate under the "economic balance" clause of the participation agreements on the basis that VAT refunds are a matter for SRI. The Tribunal will turn in due course to the question of renegotiation of the participation factors. For present purposes, however, the point is that even if the Claimant is right in its characterisation of the situation, the dispute about VAT refunds is still one concerning "taxation measures".

145. The same conclusion applies to the Respondent's characterisation of the issue. In the Respondent's view, whether oil companies can reclaim VAT has nothing to do with the participation factor; the question is whether they are engaged in "*fabricación*" within the meaning of the Ecuadorian law. That is self-evidently a matter covered by the phrase "taxation measures"; and this Tribunal is not a court of appeal in, and (subject to the two exceptions set out in Article XII) has no jurisdiction over taxation matters. It does not matter whether Ecuador is right or wrong about the "*fabricación*" argument. It is a question to be settled by the taxation courts of Ecuador in accordance with the law of Ecuador.

146. As noted above, EnCana argues that the SRI has been inconsistent in its application of the law, denying that oil producers are engaged in "*fabricación*" or manufacture while allowing VAT refunds to traders such as exporters of cut flowers or mineral exporters who do not alter the character or quality of their product through the process of extraction and transport. The Tribunal notes that at least one of the Ecuadorian tax officials who gave evidence admitted that it might well be necessary for SRI to examine such cases in the light of the interpretation now adopted.[98] But even if (as the Tribunal is inclined to conclude) SRI has not been consistent in its interpretation of Article 69A the essential point is that the obligations not to discriminate and to act in an equitable manner as between different classes of investors – obligations that may be derived from Articles II and IV of the BIT – do not apply to taxation measures. Even if SRI has applied the VAT rules in an "idiosyncratic" manner, this does not lead to the conclusion that its conduct falls outside the scope of the exclusion for taxation measures. The demands were made by authorised tax officials in purported compliance with the relevant law; they were subject to review by the tax courts and eventually by the Taxation Chamber of the Supreme Court. They bear all the marks of a

[98] Mr Venegas, Day 3: p. 5, lines 5-16; cf. Dr de Mena, Day 4, p. 70, lines 1-9.

taxation measure – whether a lawful one under Ecuadorian law it is not for the Tribunal to decide.

147. Similar considerations apply to EnCana's argument that SRI's denial of VAT refunds constitutes a breach of applicable Andean Community Law, or even of generally accepted international standards for the application of the destination principle in VAT laws. In *Occidental* the tribunal accepted the argument that Andean Community law at the relevant time required the adoption of a thorough-going version of the destination principle.[99] Even if this is so (the matter was earnestly re-debated before the present Tribunal), nonetheless a VAT law maintained in violation of Andean Community law would not cease to be a taxation measure for the purposes of Article XII(1). As to the argument about commonly accepted international standards (also extensively debated before it), the Tribunal has doubts as to the extent to which even widespread common practice in applying the destination principle would go to form a rule of customary international law in the absence of some articulated common sense of obligation to that effect (of which there is no evidence). But again the Tribunal need not decide the point: its jurisdiction does not extend beyond applying the BIT, and a taxation measure does not cease to qualify as such because it is arguably in breach of commonly accepted substantive standards for such measures.

148. In reaching this conclusion the Tribunal has not taken into consideration the Interpretative Law but has relied only on the legal situation as it existed previously. It notes but does not need to resolve the controversy as to the constitutional validity of the Interpretative Law published on 11 August 2004 and as to whether it has been given retrospective effect, e.g. by the decision of the District Tax Court of 26 April 2005.[100] In other contexts a retrospective change in the law, deeming some demand to be covered by a taxation law which was not so covered at the time, might well not attract immunity from scrutiny under Article XII(1). Thus conduct not involving a taxation measure which violated Article II of the BIT at the time it was committed would not acquire the character of a taxation measure for the purposes of the BIT by being retrospectively labelled as such.[101] But the Tribunal does not understand how an existing measure, in principle covered by the Article XII(1) exclusion, could cease to be so covered by reason of the passage of the Interpretative Law. Either the Interpretative Law is valid under the Constitution of Ecuador, in which case it partakes of the same character as the law it interprets; or it is not, in which case the previous law remains in place and has the same legal character in terms of the BIT.

149. For these reasons, the Tribunal concludes the EnCana's claim so far as it relates to the entitlement of the subsidiaries to VAT refunds is excluded from the scope of the BIT by Article XII as a "taxation measure", subject to the exception for expropriation.

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99 *Occidental Award*, §§145-152.

100 See *Petróleos Colombianos Ltd v. Director General of SRI* (No. 20115-2660 S-I-S-V), provided as an attachment to the letter sent by Counsel for the Respondent dated 16 May 2005 in response to the Tribunal's Questions of 4 April 2005.

101 The breach of the BIT having occurred could not be retrospectively excused, or responsibility for it excluded, by a provision of internal law: cf ILC Articles on Responsibility of States for Internationally Wrongful Acts, annexed to GA resolution 56/83, 12 December 2001, Articles 4, 32.

AWARD

For the foregoing reasons, the Tribunal:

(1) unanimously holds that the Claimant's claims, except as they relate to Article VIII of the BIT, are outside its jurisdiction by reason of Article XII of the BIT;

(2) by majority rejects EnCana's claim based on Article VIII of the BIT;

(3) unanimously holds that Ecuador shall be responsible for reimbursing EnCana the sums it has deposited with the LCIA as deposit-holder in connection with the costs of the arbitration, in the amount of $330,267.44, and that otherwise each party shall bear its own costs of representation in these proceedings.

Done at London in English and Spanish, both versions being equally authoritative.

Professor James Crawford
President of the Tribunal

Dr. Horacio Grigera Naón
Member

3 February 2006

Mr. Christopher Thomas
Member
10 February 2006

United Nations S/PV.6335

Security Council

Sixty-fifth year

Provisional

6335th meeting

Wednesday, 9 June 2010, 10 a.m.
New York

President:	Mr. Heller	(Mexico)
Members:	Austria	Mr. Mayr-Harting
	Bosnia and Herzegovina	Mr. Barbalić
	Brazil	Mrs. Viotti
	China	Mr. Li Baodong
	France	Mr. Araud
	Gabon	Mr. Issoze-Ngondet
	Japan	Mr. Takasu
	Lebanon	Mr. Salam
	Nigeria	Mr. Onemola
	Russian Federation	Mr. Churkin
	Turkey	Mr. Apakan
	Uganda	Mr. Rugunda
	United Kingdom of Great Britain and Northern Ireland	Sir Mark Lyall Grant
	United States of America	Ms. Rice

Agenda

Non-proliferation

10-39596 (E)

The meeting was called to order at 11.15 a.m.

Adoption of the agenda

The agenda was adopted.

Non-proliferation

The President (*spoke in Spanish*): I should like to inform the Council that I have received letters from the representatives of Germany and the Islamic Republic of Iran, in which they request to be invited to participate in the consideration of the item on the Council's agenda. In conformity with the usual practice, I propose, with the consent of the Council, to invite those representatives to participate in the consideration of the item, without the right to vote, in accordance with the relevant provisions of the Charter and rule 37 of the Council's provisional rules of procedure.

There being no objection, it is so decided.

At the invitation of the President, Mr. Khazaee (Islamic Republic of Iran) and Mr. Wittig (Germany) took the seats reserved for them at the side of the Council Chamber.

The President (*spoke in Spanish*): The Security Council will now begin its consideration of the item on its agenda. The Security Council is meeting in accordance with the understanding reached in its prior consultations.

Members of the Council have before them document S/2010/283, which contains the text of a draft resolution submitted by France, Germany, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

It is my understanding that the Council is ready to proceed to the vote on the draft resolution before it. Unless I hear any objection, I shall put the draft resolution to the vote now.

There being no objection, it is so decided.

I shall now give the floor to members of the Council wishing to make statements before the voting.

Mrs. Viotti (Brazil): Brazil will vote against the draft resolution. In doing so, we are honouring the purposes that inspired us in the efforts that resulted in the Tehran declaration of 17 May. We will do so because we do not see sanctions as an effective instrument in this case. Sanctions will most probably lead to the suffering of the people of Iran and will play into the hands of those on all sides who do not want dialogue to prevail. Past experiences in the United Nations, notably the case of Iraq, show that the spiral of sanctions, threats and isolation can result in tragic consequences.

We will vote against the draft resolution also because the adoption of sanctions at this juncture runs counter to the successful efforts of Brazil and Turkey to engage Iran in a negotiated solution with regard to its nuclear programme.

As Brazil has stated repeatedly, the Tehran declaration adopted on 17 May is a unique opportunity that should not be missed. It was approved by the highest levels of the Iranian leadership and endorsed by Iran's parliament. The Tehran declaration promoted a solution that would ensure the full exercise of Iran's right to the peaceful use of nuclear energy while providing full, verifiable assurances that Iran's nuclear programme has exclusively peaceful purposes. We are firmly convinced that the only possible way to achieve this collective goal is to secure Iran's cooperation through effective and action-oriented dialogue and negotiations.

The Tehran declaration showed that dialogue and persuasion can do more than punitive action. Its purpose and result were to build the confidence needed to address the whole set of aspects of Iran's nuclear programme. As we explained yesterday, the joint declaration removed political obstacles to the materialization of a proposal by the International Atomic Energy Agency in October 2009. Many Governments and highly respected institutions and individuals have come to acknowledge its value as an important step to a broader discussion on the Iranian nuclear programme.

The Brazilian Government deeply regrets, therefore, that the joint declaration has neither received the political recognition it deserves nor been given the time it needs to bear fruit. Brazil considers it unnatural to rush to sanctions before the parties concerned can sit and talk about the implementation of the declaration. The Vienna Group's replies to the Iranian letter of 24 May, which confirmed Iran's commitment to the content of the declaration, were received just hours ago. No time has been given for Iran to react to the

opinions of the Vienna Group, including to the proposal of a technical meeting to address details.

The adoption of sanctions in such circumstances sends the wrong signal to what could be the beginning of a constructive engagement in Vienna. Also of great concern was the way in which the permanent members, together with a country that is not a member of the Security Council, negotiated among themselves for months behind closed doors.

Brazil attaches the utmost importance to disarmament and non-proliferation, and our record in this domain is impeccable. We have also affirmed, and reaffirm now, the imperative for all nuclear activity to be conducted under the applicable safeguards of the International Atomic Energy Agency, and Iran's activities are no exception. We continue to believe that the Tehran declaration is sound policy and should be pursued. We hope that all parties involved will see the long-term wisdom of doing so.

In our view, the adoption of new sanctions by the Security Council will delay rather than accelerate or ensure progress in addressing the question. We should not miss the opportunity to start a process that can lead to a peaceful, negotiated solution to this question. The concerns regarding Iran's nuclear programme raised today will not be resolved until dialogue begins. By adopting sanctions, this Council is actually opting for one of the two tracks that were supposed to run in parallel — in our opinion, the wrong one.

Mr. Apakan (Turkey): Turkey is fully committed to its responsibilities in the field of non-proliferation, and as such is a party to all major international non-proliferation instruments and regimes. We do not want any country in our region to possess nuclear weapons. Such a development would make even more difficult the attainment of the goal of establishing a zone free of weapons of mass destruction in the Middle East, to which Turkey attaches great importance.

Turkey would like to see the restoration of confidence within the international community concerning the exclusively peaceful nature of Iran's nuclear programme. To that end, we see no viable alternative to a diplomatic and peaceful solution. It is in that understanding that, together with Brazil, we signed the Tehran declaration, which aims to implement the swap formula elaborated by the International Atomic Energy Agency in October last year with a view to providing nuclear fuel to the Tehran Research Reactor.

The Tehran declaration has created a new reality with respect to Iran's nuclear programme. The declaration, which was designed as a confidence-building measure, would, if implemented, contribute to the resolution of the substantive issues relating to Iran's nuclear programme in a positive and constructive atmosphere. The declaration in essence provides a first step in a broader road map that could lead to a comprehensive settlement of the problem. In other words, the Tehran declaration provides a new and important window of opportunity for diplomacy. Sufficient time and space should be allowed for its implementation. We are deeply concerned that the adoption of sanctions would negatively affect the momentum created by the declaration and the overall diplomatic process.

On the other hand, it was rather unhelpful that the response of the Vienna Group was received only a few hours ago. The fact that the response was of a negative nature and that it was sent on the day of the adoption of the draft resolution on sanctions had a determining effect on our position. Our position demonstrates our commitment to the Tehran declaration and to diplomatic efforts.

That said, our vote against the draft resolution today should not be construed as reflecting indifference to the problems emanating from Iran's nuclear programme. There are serious questions within the international community regarding the purpose and nature of Iran's nuclear programme, and those need to be clarified. We take this opportunity to call upon Iran to show absolute transparency about its nuclear programme and to demonstrate full cooperation with the International Atomic Energy Agency in order to restore confidence.

Turkey attaches great importance to the resolution of this problem through peaceful means and negotiations. The draft resolution on sanctions will be adopted today despite our active and unrelenting efforts in that direction. However, the adoption of the draft resolution should not be seen as representing an end to diplomatic efforts. We are of the firm opinion that, after the adoption of the draft resolution, efforts to find a peaceful solution to this problem will have to be continued even more resolutely.

On the other hand, we take note of the concerns of the international community regarding the uranium enriched by Iran at 20 per cent. We expect the Iranian authorities to take steps to dispel the concerns of the international community, which reflect certain question marks regarding the peaceful nature of Iran's nuclear programme. We now expect Iran to work towards the implementation of the Tehran declaration. The declaration must stay on the table. Iran should come to the negotiating table with the permanent five members of the Security Council plus Germany to take up its nuclear programme, including the suspension of enrichment. We will contribute to that process.

With those considerations, the Republic of Turkey shall thus vote against the draft resolution today.

The President (*spoke in Spanish*): The Council will now proceed to take a decision on the draft resolution (S/2010/283) before it.

A vote was taken by show of hands.

In favour:

Austria, Bosnia and Herzegovina, China, France, Gabon, Japan, Mexico, Nigeria, Russian Federation, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America

Against:

Brazil, Turkey

Abstaining:

Lebanon

The President (*spoke in Spanish*): The result of the voting is as follows: 12 votes in favour, 2 against and 1 abstention. The draft resolution has been adopted as resolution 1929 (2010).

I shall now give the floor to those members of the Council who wish to make statements after the voting.

Ms. Rice (United States of America): Today, the Security Council has responded decisively to the grave threat to international peace and security posed by Iran's failure to live up to its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). The Treaty is the principal international legal instrument for holding Member States accountable, discouraging the spread of nuclear weapons, and bringing the benefits of nuclear energy to all corners of the world. As President Obama has said, rules must be binding; violations must be punished; words must mean something.

The issue is straightforward. We are at this point because the Government of Iran has chosen clearly and wilfully to violate its commitments to the International Atomic Energy Agency (IAEA) and the resolutions of this Council. Despite consistent and long-standing demands by the international community, Iran has not suspended its uranium enrichment and other proliferation-related activities. The Security Council has passed a resolution today aimed at reinforcing the need for Iran to take these steps and comply with its obligations. These sanctions are not directed at the Iranian people, nor do they seek to stop Iran from the legitimate exercise of its rights under the NPT, in conformity with its obligations. Rather, the sanctions aim squarely at the nuclear ambitions of a Government that has chosen a path that will lead to increased isolation.

These sanctions are as tough as they are smart and precise. The resolution prohibits Iran from investing in sensitive nuclear activities abroad. It imposes binding new restrictions on Iran's import of conventional arms. It bans all Iranian activities related to ballistic missiles that could deliver a nuclear weapon. It imposes a comprehensive framework of cargo inspections to detect and stop Iran's smuggling and acquisition of illicit materials or nuclear items.

It creates important new tools to block Iran's use of the international financial system, particularly Iranian banks, to fund and facilitate nuclear proliferation. It highlights the potential links between Iran's energy sector and its nuclear ambitions. It targets the role of the Islamic Revolutionary Guard Corps in Iran's proliferation efforts. It establishes a United Nations panel of experts to help monitor and enforce the implementation of sanctions. And it imposes targeted new sanctions, including asset freezes and travel bans, on 40 entities and an individual linked to Iranian nuclear proliferation.

Since 2002, the International Atomic Energy Agency has sought to investigate serious concerns that Iran's nuclear programme might have military dimensions. In 2003, the IAEA Board of Governors expressed "grave concern" that Iran had still not enabled the IAEA to assure Member States that Iran had declared all of its nuclear material and activities. For our part, the United States launched a sustained

and serious effort, starting early last year, to engage with Iran on a range of issues of mutual concern, including these nuclear issues. The United States has made detailed and specific openings to the Iranians, including personal and direct outreach by President Obama.

The United States strongly supports the peaceful use of the atom for energy and innovation. Like every nation, Iran has rights; but it also has responsibilities, and the two are inextricably linked. Iran has shunned opportunity after opportunity to allow verification of the peaceful nature of its nuclear programme. In recent months, Iran has given us all more reason, not less, to suspect that its goal is to develop the ability to assemble a nuclear weapon. Last September, the world learned that Iran had secretly built another uranium enrichment facility at Qom, in clear violation of Security Council resolutions and Iran's IAEA obligations. Last November, Iran announced that it would build 10 more such facilities. In February, Iran said that it would begin to enrich uranium to nearly 20 per cent, moving closer to weapons-grade material. In May, the IAEA affirmed yet again that Iran is continuing its banned uranium enrichment, and warned that Iran has amassed more than 2,400 kilograms of low-enriched uranium.

The resolution we adopted today offers Iran a clear path towards the immediate suspension of these sanctions. The best way is also the easiest one. Iran must fulfil its international obligations, suspend its enrichment-related reprocessing and heavy-water-related activities, and cooperate fully with the IAEA. The United States reaffirms our commitment to engage in robust, principled and creative diplomacy. We will remain ready to continue diplomacy with Iran and its leaders in order to make clear how much they have to gain from acting responsibly and how much more they stand to lose from continued recklessness. Today's resolution does not replace those efforts, but it does support them.

Turkey and Brazil have worked hard to make progress on the Tehran Research Reactor proposal, efforts that reflect their leaders' good intentions to address the Iranian people's humanitarian needs while building more international confidence about the nature of Iran's nuclear programme. My Government will continue to discuss the Iranian revised proposal and our concerns about it, as appropriate.

But the Tehran Research Reactor proposal, then and now, does not respond to the fundamental, well-founded and unanswered concerns about Iran's nuclear programme. Today's resolution does. Until the world's concerns with Iran's nuclear defiance are fully resolved, we must work together to ensure that the sanctions in the resolution are fully and firmly implemented. We must ensure that the development of the most devastating weapons ever devised by human science is prescribed by the most responsible controls ever produced by human Government. Last month, 189 countries came together to strengthen the nuclear non-proliferation Treaty as a cornerstone of global security. Today's resolution is an important part of that work. The NPT must remain at the centre of our global effort to stop nuclear proliferation, even as we pursue the ultimate goal of a world without nuclear weapons.

Today, I am proud to say that this Council has risen to its responsibilities. Now Iran should choose a wiser course.

Sir Mark Lyall Grant (United Kingdom): I would like to begin by reading out the text of a statement that has been agreed on by the Foreign Ministers of China, France, Germany, Russia, the United Kingdom and the United States, with the support of the High Representative of the European Union. The statement reads as follows:

> "We, the Foreign Ministers of China, France, Germany, Russia, the United Kingdom and the United States, would like to take this opportunity to reaffirm our determination and commitment to seek an early negotiated solution to the Iranian nuclear issue.
>
> "The adoption of United Nations Security Council resolution 1929 (2010), while reflecting the international community's concern about the Iranian nuclear programme and reconfirming the need for Iran to comply with the United Nations Security Council and IAEA Board of Governors requirements, keeps the door open for continued engagement between the E3+3 and Iran. The aim of our efforts is to achieve a comprehensive and long-term settlement which would restore international confidence in the peaceful nature of Iran's nuclear programme, while respecting Iran's legitimate rights to the peaceful use of atomic energy. We are resolute in continuing our work for this purpose. We also welcome and commend

all diplomatic efforts in this regard, especially those recently made by Brazil and Turkey on the specific issue of the Tehran Research Reactor.

"We reaffirm our June 2008 proposals, which remain valid, as confirmed by resolution 1929 (2010). We believe these proposals provide a sound basis for future negotiations. We are prepared to continue dialogue and interaction with Iran in the context of implementing the understandings reached during the Geneva meeting of 1 October 2009. We have asked Baroness Ashton, the European Union High Representative for Foreign Affairs and Security Policy, to pursue this with Mr. Saheed Jalili, Secretary of Iran's Supreme National Security Council, at the earliest opportunity.

"We expect Iran to demonstrate a pragmatic attitude and to respond positively to our openness towards dialogue and negotiations."

That concludes the statement on behalf of the six Foreign Ministers.

I should now like to make some remarks in my national capacity.

Today, the Security Council adopted resolution 1929 (2010) as a result of the international community's ongoing serious concerns about the proliferation risks of the Iranian nuclear programme. Once again, the Security Council has sent a strong message of international resolve. It is a clear signal that Iran's continued failure to comply with its Security Council and IAEA Board requirements to cease its enrichment-related activities cannot be tolerated.

The Security Council last addressed this issue in September 2008 in a clear statement that we wish to resolve our serious concerns through dialogue and negotiation (see S/PV.5984). Since that time, we have made several efforts to achieve that. When E3+3 Foreign Ministers met in New York on 23 September 2009 they reiterated their wish to negotiate a comprehensive long-term agreement to resolve the Iranian nuclear issue. But they also made clear that this could only be achieved if both sides were willing to approach these matters in a spirit of mutual respect and were committed to looking for solutions going forward.

At last October's meeting in Geneva we reached agreement on three important issues. First, Iran agreed to hold a further meeting on its nuclear programme within one month. Iran also said that it would cooperate fully and immediately with the IAEA on the enrichment facility near Qom. It also agreed in principle to a deal to resupply its Tehran Research Reactor (TRR).

We welcomed those commitments and made clear that we hoped that it would be the start of a period of intense negotiation. We regret that that did not prove to be the case. Iran has stated repeatedly that it will not discuss its nuclear programme, claiming that our concerns are baseless. They are not. They are fully documented in reports from the IAEA Director General going back several years and the subject of Security Council resolutions since 2006. The purpose of the facility at Qom remains unestablished. The February 2010 IAEA report made clear once again that Iran had not answered a number of key questions.

On the TRR, three days of talks in Vienna produced a detailed proposal from the IAEA that all parties present agreed. Iran then withdrew its initial acceptance of the TRR proposal and in February started to enrich low-enriched uranium to 20 per cent, despite having neither the need to do so nor the means to fabricate the fuel for use in the reactor. Iran also announced the construction of further enrichment facilities.

We acknowledge the good-faith efforts of Turkey and Brazil to persuade Iran to engage with the IAEA on the Tehran Research Reactor. However, we cannot accept Iran's attempts to use these efforts to justify its continued defiance of successive Security Council resolutions that mandate a suspension of Iran's enrichment operations. We have said many times that we do not question Iran's right to peaceful nuclear energy. But with those rights come responsibilities.

Today's resolution has been made necessary by Iran's actions. Once again, the resolution restates our willingness to engage in dialogue to address the substance of our concerns. The measures adopted in this and previous resolutions can be suspended when Iran suspends its proscribed activities.

We remain ready to resume the talks on Iran's nuclear programme that we started in Geneva on 1 October 2009. We believe that such talks can lead to a solution as long as they are purposeful, discuss both sides' concerns and make swift progress. In extending our hand, we show our determination to resolve these matters through dialogue and diplomacy, and in

adopting this resolution we show equal determination to continue to respond robustly to Iran's refusal to comply with its international obligations.

Mr. Araud (France) (*spoke in French*): France welcomes the adoption of resolution 1929 (2010). The Council adopted it by a large majority, with the votes of countries of Africa, Asia, Europe and America, countries with or without a nuclear industry and countries with or without trade relations with Iran.

This unity has a clear reason, and all members know it. For 18 years, Iran has been developing a clandestine nuclear programme. Once that programme was discovered, Iran has unceasingly impeded the efforts of the International Atomic Energy Agency to uncover its objective. Iran continues to enrich uranium despite five Security Council resolutions and the lack of a credible nuclear power programme on its soil.

The facts are overwhelming; there is no room for doubt. It is sufficient to recall them. Iran has developed a programme for missiles capable of carrying nuclear warheads. Iran has worked on advanced military studies that are the missing link between enrichment and the ballistic missile programme, in particular on building a delivery vehicle in which a nuclear warhead can be placed, while rejecting all cooperation on that issue with the Agency.

More recently, Iran has built a clandestine enrichment facility at Qom, adapted to military use but far too small for civilian use. That facility would have to function 24 hours a day for 45 years to provide fuel for a civilian reactor. Finally, in February Iran started to enrich its uranium to 20 per cent, which brings it even closer to a military threshold.

It is no surprise, therefore, that the International Atomic Energy Agency (IAEA) has concluded in its Director General's report of 31 May that it was impossible for it to confirm that all nuclear material in Iran is in peaceful activities.

This, however, was not for lack of increased efforts to lead Iran, through dialogue, to prove its openness. Since 2003, the three European States — the Federal Republic of Germany, the United Kingdom and France — have been seeking to start a dialogue with Iran. That approach resulted in the first European cooperation proposal of August 2005, then the E3+3 proposal of 2006 and a new proposal of June 2008.

Significant incentives have been offered to Iran in the nuclear, security, commercial, agricultural and medical fields. A high-level delegation went to Tehran in June 2008 with a letter signed by the six Ministers, including the United States Secretary of State of that time. Countless meetings, ministerial exchanges and direct, indirect, multilateral and bilateral contacts took place with the Iranians. No effort was spared. However, those offers did not succeed, owing to the refusal of the Iranians to start negotiations, and for seven months Iran has refused to meet the European Union representative, Baroness Ashton, despite the commitment that it undertook last October.

In that context, my country gratefully welcomes the initiative of Turkey and Brazil on the Tehran Research Reactor as a confidence-building measure, and French authorities have indicated this at the highest level. We welcome the commitment of the two eminent leaders and wish them success. However, we note that Iran has already spared no effort to strip the agreement of its substance by continuing to enrich its uranium to 20 per cent and reaffirming its intention to continue to do so, which negates the main purpose of the agreement, and by playing for time to ensure that it would have to export only a fraction of its stockpile of uranium to enable it to rapidly rebuild the necessary quantity for a military device.

We have also noted Iran's biased reading of the agreement, choosing to view it as a justification for unlimited enrichment, a definitive rejection of sanctions and IAEA inspections, and an alibi to avoid discussing its nuclear programme with the E3+3.

Finally and most importantly, a satisfactory agreement on the Tehran Research Reactor, which we sincerely hope to achieve, could be a useful confidence-building measure although it would not address the heart of the problem. The heart of the problem is the nature of the Iranian nuclear programme, the discovery of the clandestine facility in Qom, enrichment to 20 per cent and Iran's obstruction of the IAEA's efforts. This problem remains unchanged, and Iran's refusal to resolve it forces us to be firm today.

For these reasons, the sanctions resolution that we have just adopted is an appropriate response. The resolution is robust, yet specific and targeted. It is not aimed at the Iranian people. Its measures will increase the cost to Iran of its proliferation policy. They will

slow down the progress of the nuclear programme and thereby give us more time for diplomacy. In fact, it was the very least we could do following the discovery of the clandestine facility in Qom and the beginning of enrichment to 20 per cent. It is our duty to protect the non-proliferation Treaty — a vessel that Iran believes it can board without a ticket.

If we did not react to such developments, the message we would send to potential followers of Iran would be: Go ahead. It is also our duty to prevent a regional arms race, which could be provoked by mere doubt concerning the aims of the Iranian programme. It is our duty, finally, to prevent a conflict leading to disastrous consequences in an unstable region.

That being said, the door of dialogue remains open. This includes discussions on the Tehran Research Reactor. Fully mindful of Brazil and Turkey's efforts, France, the United States and Russia have written to the IAEA Director General to share with him the problematic issues raised by the Tehran agreement. We will propose an experts meeting with Iran as soon as possible to reach agreement on these issues. We are also ready to consider other confidence-building measures, as spelled out in the resolution that we have just adopted.

However, this is a decision that we cannot take alone. It is now up to Iranian leaders to take the hand offered to them, as we have urged them to do for nearly seven years. It is up to them to consider the interests of their people, rather than to pursue a dangerous dream of power at the cost of regional stability. It is up to them to choose integration into international society, reaping its dividends rather than the growing isolation to which they are condemning themselves. If they are ready for this, we will be there to help them.

Mr. Rugunda (Uganda): Uganda voted in favour of resolution 1929 (2010) because we fully support the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). The resolution has a mechanism for review, including the suspension and removal of the measures imposed, provided that Iran complies with its obligations and the NPT. It is important that all nuclear activities of State parties to the NPT be verified for their compliance with the safeguards of the International Atomic Energy Agency (IAEA).

The Agency has raised a number of issues in its reports regarding the Iranian nuclear programme that require clarification by Iran so as to assure the international community that its nuclear programme is for peaceful purposes. Uganda commends and supports the diplomatic efforts of Brazil and Turkey that resulted in the Tehran declaration. We are convinced that such confidence-building initiatives are useful in the search for a peaceful solution to the Iranian nuclear issue.

Uganda reiterates that it is important to continue all efforts towards a negotiated solution that guarantees Iran's inalienable right to develop its nuclear energy, while at the same time assuring the international community that its programme is exclusively for peaceful purposes.

Mr. Churkin (Russian Federation) (*spoke in Russian*): Russia voted in favour of resolution 1929 (2010) on the basis of its consistent principled position regarding the Iranian nuclear issue. We have consistently advocated a resolution of all the international community's questions concerning Iran's nuclear programme through dialogue and constructive cooperation with Tehran.

We hope that Iran will view the resolution as a further signal of the need to respond positively to the numerous appeals of the E3+3 and the entire international community to fulfil its non-proliferation obligations and to launch substantial negotiations with the E3+3 to ensure full and transparent cooperation with the International Atomic Energy Agency (IAEA) in order to clarify all issues related to the Iranian nuclear programme.

Russia has made and will continue to make significant multilateral and independent efforts to convince Iran to cooperate constructively with the E3+3 and to fulfil in good faith all provisions of the relevant Security Council resolutions and IAEA decisions. In building the Bushehr nuclear power plant, Russia is reaffirming not just in words but in actions the fundamental right of Iran, as a party to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), to develop a peaceful nuclear energy programme. Unfortunately, the intensive efforts of Russia and our partners in the E3+3 have yet to receive an appropriate response from Iran. Tehran has yet to take the decisions necessary to pave the way to its full enjoyment of nuclear energy for peaceful purposes and the strengthening of the nuclear non-proliferation regime.

Under these conditions and in the context of the dual-path approach developed by the E3+3 and

approved by the Security Council, it has become inevitable that additional restrictive measures should be adopted to constrain development in those Iranian activities that run counter to the task of strengthening the non-proliferation regime.

The Security Council's adoption of sanctions is a forced step, and we approach their use in a balanced and proportional way. During the negotiation of the resolution, Russian delegation's efforts were targeted at ensuring that the Council's decision aimed exclusively at bolstering the non-proliferation regime and contained no provision that would harm the well-being of the Iranian people.

We are firmly convinced that there is no alternative to a peaceful, diplomatic settlement of the Iranian nuclear issue. This postulate was reflected in the text of the resolution. We expect that Tehran will ultimately signal its full readiness to engage in negotiations with the E3+3. In the framework of such dialogue, the critical discussion of the Iranian nuclear programme would also address the E3+3's proposed package of constructive incentives for our Iranian partners, in cooperation with the IAEA, to remove any lingering doubts about the programme. This package remains on the table, as reaffirmed by the resolution just adopted and the statement of the E3+3 Foreign Ministers at today's meeting.

We are convinced that the contents of the package fully demonstrate the benefits to Iran of cooperation with the international community in various fields, which is impossible in the context of its disregard for Security Council resolutions and IAEA decisions on its nuclear programme. We hope that Iran will see these clear benefits and initiate cooperation with the E3+3, including in implementing all the understandings reached in Geneva on 1 October 2009. Clarifying the nature of Iran's nuclear programme through Tehran's full and transparent cooperation with the IAEA could reverse the Security Council's sanctions against the country and afford it the opportunity to fully exercise all the rights enjoyed by non-nuclear parties to the NPT, including to uranium enrichment for nuclear power plant fuel production.

We hope that the fuel-swap mechanism for the Tehran Research Reactor, which Russia originated, will be implemented. We welcome Brazil and Turkey's efforts in that regard. Relevant work related to this initiative is continuing within the framework of the Vienna Group, with our active participation.

In conclusion, I should like again to underscore that we expect that Iran will act in a pragmatic and reasonable manner and respond positively to the six facilitators' openness to dialogue to effectively resolve the Iranian nuclear issue in the interest of the entire international community.

Mr. Takasu (Japan): Japan voted in favour of resolution 1929 (2010). I would like to explain the reasons for Japan's support for this important resolution.

The Iranian nuclear issue has been a source of serious concern to the international community since Iran's extensive nuclear activities were revealed in 2002. The International Atomic Energy Agency (IAEA) and the Security Council have been closely engaged and taken a series of decisions to resolve this issue of international concern. As a country strongly committed to the regime of the Treaty on the Non-Proliferation of Nuclear Weapons, Japan upholds the importance of nuclear non-proliferation and the peaceful use of nuclear energy. It should be stressed, however, that the right to the peaceful use of nuclear energy entails the responsibility to comply with requirements and obligations under the relevant IAEA and Security Council resolutions. The Council needs to squarely address the fact that Iran continues to violate its resolutions and fails to meet IAEA requirements.

The Tehran declaration on the exchange of Iranian low-enriched uranium and nuclear fuel for the Tehran Research Reactor would be a positive step if it were properly implemented. We pay tribute to the efforts of Brazil and Turkey to contribute to a diplomatic solution. However, this accord does not address the core issue of Iran's obligations under Security Council resolutions. That is to say that Iran is obliged to suspend all enrichment-related activities until it fully satisfies and clarifies the international community's concerns about the nuclear programme and thereby restores confidence. Even after the Tehran declaration, Iran continues to enrich and accumulate more low-enriched uranium, including activities to enrich up to 20 per cent, in violation of the relevant Security Council resolutions. The recent report of the IAEA Director General of 31 May once again states that Iran has not provided the necessary cooperation to

permit the IAEA to confirm that all nuclear material in Iran is for peaceful activities.

Japan supports the dual-track approach taken by the E3+3 group — and endorsed by the Security Council — to solve the Iranian nuclear issue through dialogue and the necessary pressure, since resolution 1929 (2010) contains a firm but targeted and balanced message urging Iran to change its policy. Iran should intensify its cooperation with the IAEA to fully clarify outstanding and new issues in order to prove that its extensive nuclear activities are exclusively for peaceful purposes. Iran should also faithfully implement the decisions of the relevant Security Council resolutions, including resolution 1929 (2010), so as to restore international trust and confidence.

Resolution 1929 (2010) is in line with the dual-track approach. In no way does it mean closing doors to continuing efforts to achieve diplomatic solutions through dialogue with Iran. I would like to underscore that the window for diplomatic efforts is open. Such thinking is well reflected in resolution 1929 (2010). On its part, Japan continues to seize every opportunity to urge Iran to take the strategic decision to seek a constructive solution to the nuclear issue.

Mr. Mayr-Harting (Austria): Austria voted in favour of resolution 1929 (2010). A decision of this kind is never one to be taken lightly. From the time that Iran's undeclared nuclear materials and activities were first confirmed by the International Atomic Energy Agency in June 2003, Austria had hoped that the matter could be resolved through negotiation. Insufficient cooperation on the part of Iran led to the transmission of the issue to the Security Council in March 2006. Since that time, the Council has adopted a presidential statement and five resolutions. Regrettably, Iran has failed to address the core concerns of the international community and to build confidence in the exclusively peaceful nature of its nuclear programme.

Indeed, since the adoption of the last Council resolution in September 2008, the existence of a new undeclared enrichment facility has come to light and Iran has begun to enrich uranium to 20 per cent, to mention but two of the more recent developments. This is all the more unfortunate as last month the Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) here in New York demonstrated a new constructive approach to non-proliferation issues. In the action plans adopted on that occasion, all NPT member States underscored, inter alia, the importance of cooperating with the International Atomic Energy Agency on questions of compliance.

As I indicated yesterday, Austria, in line with long-standing European Union policy, remains committed to the dual-track approach. In that context, we reiterate our call on Iran to take up the offer of talks with the High Representative of the European Union for Foreign Affairs and Security Policy, in line with paragraph 33 of the resolution just adopted.

While we believe that the additional measures adopted today are necessary, we continue to stand behind the two major incentive packages put forward in June 2006 and June 2008. We hope that Iran will take up the offer of China, France, Germany, the Russian Federation, the United Kingdom and the United States, as well as the High Representative of the European Union, to resume dialogue on the nuclear issue without preconditions, with a view to seeking a comprehensive solution to this issue. In that context, I wish to highlight in particular the commitment contained in paragraph 37 of today's resolution to suspend the implementation of measures if and for so long as Iran suspends all enrichment-related and reprocessing activities, as verified by the International Atomic Energy Agency, to allow for negotiations in good faith in order to reach an early and mutually acceptable outcome.

Mr. Li Baodong (China) (*spoke in Chinese*): The Security Council has just adopted a new resolution on the Iranian nuclear issue. This is the sixth resolution adopted by the Council on the matter since July 2006. Like the previous five, the new resolution not only reflects the concerns of the international community about the Iranian nuclear issue, but also expresses the aspiration of all parties to achieve an early and peaceful settlement of the issue through diplomatic negotiations. China calls on all members of the international community to implement the resolution comprehensively and in good faith. China has consistently maintained that the actions taken by the Security Council on the Iranian nuclear issue must adhere to the following three principles.

First, it should contribute to the maintenance of the international nuclear non-proliferation regime. As a State party to the Treaty on the Non-Proliferation of Nuclear Weapons, Iran should strictly fulfil its

obligations under the Treaty. In the meantime, its right to the peaceful use of nuclear energy should be fully respected and safeguarded. Secondly, the Security Council's actions should be conducive to peace and stability in the Middle East, especially the Gulf region. Thirdly, it should help to promote the current momentum towards global economic recovery and not affect the day-to-day lives of the Iranian people or normal international trade and transactions.

The action taken by the Security Council should be appropriate, incremental, clearly targeted and commensurate with the actual practices of Iran in the nuclear field. It should reinforce diplomatic efforts to resolve the Iranian nuclear issue.

China was earnestly and constructive engaged in the consultations on the draft resolution and worked vigorously to ensure that the text fully reflected the foregoing principles.

We are the view that sanctions can never fundamentally resolve the Iranian nuclear issue. To bring about a comprehensive and appropriate settlement of the issue, it is imperative to return to the track of dialogue and negotiation. The Security Council's adoption of this new resolution does not mean that the door to diplomatic efforts is closed. The new resolution is aimed at bringing Iran back to the negotiating table and at activating a new round of diplomatic efforts.

To that end, the sanctions mentioned in the new resolution are reversible. In other words, if Iran suspends uranium enrichment and reprocessing activities and complies with the relevant resolutions of the International Atomic Energy Agency and the Security Council, the Council will suspend or even lift its sanctions against Iran.

It has always been China's view that Security Council unity is essential to resolving the Iranian nuclear issue. We have always maintained that the importance of the unity of the Security Council, and we are not in favour of hasty action. We believe that we must make a greater effort to maintain the unity of the Security Council.

Over the years, China has been committed to peacefully resolving the Iranian nuclear issue through diplomatic negotiations and has made unremitting efforts in that regard. China welcomes and highly values the tripartite agreement between Brazil, Turkey and Iran on nuclear fuel exchange for the Tehran Research Reactor. We hope the parties concerned will make full use of the positive momentum created by the agreement and will spare no effort to resolve the Iranian nuclear issue peacefully through dialogue and negotiations.

As the Security Council adopted its new resolution on the Iranian nuclear issue, the E3+3 Foreign Ministers issued a joint statement reiterating their commitment to resolving the issue through diplomatic negotiations and expressing their readiness to redouble diplomatic efforts towards the resumption of negotiations. China hopes that the countries concerned will, on the basis of equality and mutual respect, strengthen contacts and dialogue, foster mutual trust, dispel misgivings, address one another's concerns and seek a solution acceptable to all parties to restart negotiations.

China will work along with all countries concerned and continue to make its own contribution to the peaceful settlement of the Iranian nuclear issue through diplomatic means.

Mr. Salam (Lebanon) (*spoke in Arabic*): Lebanon was among the first countries to accede to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). It is therefore important for Lebanon to reaffirm that the Treaty is extremely important in terms of the balance among and interdependence of its three pillars: disarmament, non-proliferation and the right to the peaceful use of nuclear energy. For both Lebanon and the Arab States in general, the Treaty is the cornerstone of our response to the expectation of our peoples for a world free of nuclear weapons.

On behalf of the Arab Group, Lebanon reaffirmed this principle during last month's NPT Review Conference in New York. There, the need to attain the universality of the Treaty was included among the core priorities of the international community. In line with our endeavour to attain the noble objective of freeing the entire world of nuclear weapons, our Arab peoples dream of the day when the people of the Middle East can enjoy living in a region free of nuclear weapons, as is the case with other regions and other peoples of the world.

In this regard, we stress the importance of the final document of the 2010 NPT Review Conference, which reaffirms the call to transform the Middle East into a zone free of nuclear weapons on the basis of the

decision of the 1995 Review and Extension Conference and to develop a mechanism for its implementation.

Israel is the only country in our region that possesses nuclear weapons. Israel should adhere to the Non-Proliferation Treaty as a non-nuclear State and subject all of its nuclear facilities to the comprehensive safeguards regime of the International Atomic Energy Agency.

It is very important for Lebanon to say that the approach to non-proliferation issues should be comprehensive and non-selective. However, a focus on nuclear non-proliferation should not overshadow the need to reaffirm the inherent and inalienable right of all States parties to the NPT, including the Islamic Republic of Iran, to the peaceful use of nuclear energy in accordance with the rules and criteria established by the International Atomic Energy Agency as well as its comprehensive safeguards regime.

Thus, Lebanon believes that the understanding reflected in the Tehran declaration on enriched uranium — reached in May at the excellent initiative of Brazil and Turkey — is a significant step towards a diplomatic solution to the Iranian nuclear issue. My delegation has reaffirmed several times before the Council that the Tehran understanding provides an important opportunity that we should all seize and deal with in a positive manner.

Although that understanding did not have the necessary support and was not given enough time to yield the expected results, its elements still provide a gateway for the required process of confidence building. Even if the understanding does not dispel the doubts and respond to the questions of many Council members, the most effective response to any concerns or questions about the Iranian nuclear issue will come through further dialogue, not through sanctions. That is Lebanon's firm and well-known position of principle.

My Government has studied the issue of today's vote, and we have not at this time reached a final position. For that reason, Lebanon abstained. However, Lebanon believes, on the basis of its unwavering positions, which I have just recalled, that today's new sanctions resolution is a sad setback for diplomatic efforts.

We refuse to give up in the face of this situation, and we call on all States, despite all the difficulties of this situation, to immediately resume and intensify international efforts, especially those of the E3+3. We appreciate all the efforts made by the E3+3 in recent years to reach, through responsible dialogue and due flexibility, a solution to all pending issues with regard to the Iranian nuclear programme on the basis of mutual respect, constructive cooperation and the right of all States parties to the Treaty on the Non-Proliferation of Nuclear Weapons to the peaceful use of nuclear energy, to have access to nuclear energy and to develop the relevant technologies in accordance with the IAEA comprehensive safeguards agreement.

Mr. Onemola (Nigeria): Our vote this morning was informed by respect for our unwavering commitment to the ideals of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). Adherence to the NPT does not preclude any country from optimizing its full use of nuclear technology for peaceful purposes; rather, it guarantees the inalienable right of parties to the peaceful use of nuclear technology. The NPT also remains the best framework for achieving disarmament and the non-proliferation of nuclear weapons. Indeed, Nigeria is pursuing a peaceful nuclear programme within the parameters of the NPT, including its safeguards agreement and additional protocol, in full cooperation and collaboration with the International Atomic Energy Agency (IAEA). Thus, we recognize Iran's right to pursue a peaceful nuclear programme.

Where, however, questions arise and evidence suggests that a country's nuclear programme and activities are inconsistent with the provisions of the NPT, it becomes a matter of great concern to us. Having followed very carefully the discussions on Iran's nuclear activities, Nigeria, like other countries, has been unable to fully understand whether Iran's nuclear programme is entirely and strictly for peaceful purposes. Therefore, it is incumbent on Iran dispel the doubts that surround its nuclear activities. Specifically, we are convinced that Iran, as a State party to the NPT, has clearly violated its obligations under the Treaty. Furthermore, Nigeria does not understand Iran's failure to cooperate with the IAEA. We are also troubled by Iran's failure to fully implement its safeguards agreement, including the additional protocol.

These worrisome failures have been compounded by the lack of clarity on the sudden spike in the building of nuclear sites, some of which were shrouded in secrecy. Moreover, the decision by Iran to enrich uranium to a higher level of 20 per cent and its

insistence on continuing its enrichment programme raise genuine doubt about the real direction of its nuclear activities.

Notwithstanding our misgivings, we believe that a dual-track approach that combines pressure with intense political and diplomatic activities is the best way to resolve the Iranian nuclear conundrum. We are satisfied that the resolution that we have just adopted recognizes this and commits all countries to pursue a dual-track approach regarding Iran. We welcome the explicit reaffirmation that outstanding issues can best be resolved and confidence built in the exclusively peaceful nature of Iran's nuclear programme by Iran responding positively to all the calls that the Council and the IAEA Board of Governors have made on Iran.

The emphasis on the importance of political and diplomatic efforts to find a negotiated solution guaranteeing that Iran's nuclear programme is exclusively for peaceful purposes gives hope that all the doors are not closed on Iran. In that regard, we applaud Brazil and Turkey for their exemplary initiative in signing with Iran at the highest political levels the joint Tehran declaration of 17 May 2010. We hope that it will still be possible to follow through on the joint declaration as a concrete confidence-building measure. Cooperation with the IAEA and the resumption of early dialogue with Baroness Ashton will give further impetus to a political settlement of the dispute.

Finally, I would like to echo the accent placed in the resolution on the fact that nothing compels States to take measures or actions exceeding the scope of the resolution, including the use of force or the threat of use of force in responding to Iran. Satisfied with the intent of the resolution and the recognition of the need for continued political and diplomatic efforts, Nigeria voted in favour of resolution 1929 (2010).

Mr. Barbalić (Bosnia and Herzegovina): I would like to stress once again that Bosnia and Herzegovina was among those who nourished the hope that the issue at stake could be resolved through negotiations and in a manner that would satisfy the concerns of all. However, we find ourselves confronted with further aggravation regarding a comprehensive solution to the issue of nuclear capacity development in the Islamic Republic of Iran.

As a State party to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), Bosnia and Herzegovina is fully committed to implementing the Treaty, which represents a unique and irreplaceable framework for the promotion of security and the prevention of proliferation of nuclear weapons in the world. It is our strong belief that only full implementation of NPT safeguards agreements can ensure that nuclear energy is used in a safe and responsible manner. The role of the International Atomic Energy Agency (IAEA) as the implementing agency remains the most reliable instrument to verify compliance with the provisions of the Treaty.

Furthermore, we consider that the right to the peaceful use of nuclear energy by all States is also important and must be fully respected and protected. Iran is no exception to that rule. It should be made clear, nevertheless, that the scope and objectives of any nuclear programme, including the Iranian programme, have to remain in accordance with the international rules and must be subjected to the verifiable and transparent inspection regime of the IAEA.

The Security Council has adopted resolutions calling on Iran to comply with the provisions of the NPT and to extend its full cooperation to IAEA inspections. However, according to the most recent reports, the international community did not get a clear and unequivocal answer from Iran, which has put the Security Council in the position of looking for additional measures to address this issue of utmost importance.

Bearing in mind the importance of restoring confidence in the strictly peaceful nature of the Iranian nuclear programme, Bosnia and Herzegovina urges Iran to comply with all resolutions of the Security Council and the IAEA Board of Governors, and to implement the additional protocol. We firmly believe that a negotiated settlement, based on mutual trust and respect, is the best option. In that regard, we welcome the recent efforts by Turkey and Brazil as a significant confidence-building measure.

The resolution adopted today by the Security Council is tough. However, Bosnia and Herzegovina is of the view that the resolution does not close the way to further diplomatic efforts and an ultimate negotiated solution. We believe that additional efforts and support from various parties could contribute to the creation of an environment conducive to readdressing the current situation and finding a satisfactory negotiated solution, which is our ultimate goal.

Therefore, once again, we call upon the parties directly involved to explore all possible means that could pave the way to a peaceful solution of this issue of particular importance. Such an undertaking would be beneficial first and foremost for the people of Iran and would open new avenues for cooperation between Iran and the international community.

The President (*spoke in Spanish*): I shall now make a statement in my national capacity.

Mexico is deeply commited to nuclear disarmament, non-proliferation and the peaceful use of nuclear energy — the three pillars of the Treaty on the Non-Proliferation of Nuclear Weapons. We are concerned by any actions that could undermine the non-proliferation regime that the international community itself has adopted, particularly when they represent new threats to international peace and security in regions where tension, conflict and distrust among States prevail.

The case of Iran is not a new one for the Security Council, and unfortunately it is difficult to dissociate the debate on its controversial nuclear programme from its foreign policy pronouncements which run counter to the Charter of the United Nations and which give rise to concern and mistrust among a large portion of the international community.

The peaceful use of nuclear energy must be accompanied by a commitment — freely undertaken by each State — to respect the legal obligation not to carry out any activity related to a nuclear programme that has purposes other than peaceful ones. Iran must comply more transparently with the decisions of the International Atomic Energy Agency (IAEA), responding to all requests for information on its nuclear programme. And Iran must also comply with the resolutions of the Security Council, with an express and above all verifiable renunciation of the possession of nuclear weapons. The Iranian Government must make every effort to redress the shortfall of confidence that a large portion of the international community feels with respect to the lack of transparency in the development of Iran's nuclear programme. This would unquestionably contribute to dialogue and cooperation as a way of resolving disputes in the region. It is Iran, not the Security Council, that must earn the trust of the international community.

We reaffirm the importance of continuing to deal with the Iranian nuclear case through dialogue and the importance of Iran continuing to cooperate with the IAEA to clarify pending questions about its nuclear programme in conformity with Security Council resolutions.

Today, we voted in favour of a resolution imposing sanctions on specific individuals and entities, sanctions that do not seek to harm the general population. These sanctions target nuclear proliferation activities and are completely reversible if the Government of Iran meets the requests of the Security Council. We urge the Government of Iran to meet those requests.

In our view, recent diplomatic initiatives on this matter are insufficient because they do not include a clear commitment to putting an end to nuclear-material enrichment activities and do not address the concerns of the international community. It is spurious to say that we are faced with an ultimatum or a dilemma between a peaceful solution and the use of force. In fact, after three rounds of sanctions, the path of dialogue with Iran remains open. A diplomatic solution is not incompatible with the adoption of sanctions, when the situation calls for it, and sanctions in no way close off dialogue and negotiation.

Mexico considers that the agreement we have reached is balanced. It puts greater pressure on Iran to fulfil its obligations under previous Security Council resolutions and the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), while leaving open the path by which Iran can return to the negotiating table and reach a diplomatic outcome if it meets its obligations under Council resolutions and the NPT.

In that context, Mexico is convinced that the creation of a nuclear-weapon-free zone in the Middle East, as emphasized at this year's NPT Review Conference, should be part of a broader political understanding guaranteeing peaceful coexistence among the sovereign States of the region, including a future Palestinian State, and addressing the legitimate security concerns of those States.

In line with our pacifist outlook and our tradition of devotion to international law, we believe in the negotiated resolution of disputes. Mexico will continue to be committed to dialogue, peaceful means and the rejection of the use of force to resolve this issue.

I now resume my functions as President of the Security Council.

I now invite the representative of the Islamic Republic of Iran to take a seat at the Council table and to make his statement.

Mr. Khazaee (Islamic Republic of Iran): I have never seen this Chamber as crowded as I see it today, so I must welcome all my colleagues who are here to watch this debate. It reminds me of the football game between the United States and Iran at the World Cup in 1998: the whole world was watching it.

Before entering this Chamber, I was refreshing my memory of history. History is indeed a wonderful instructor, especially when it follows us to this very moment. A wise man used to say that it is not history that repeats itself; it is we who repeat the same mistakes. A review of our bitter past memories, together with a close look at how this Council still acts today, proves that we are still dealing with a biased and unjust international system that is based on the hegemony of the most powerful.

In order to place them on record for the conscience of all peace-loving people around the world, I would like to say a few words about the unfair pressures that our nation has endured due to the aggression and intervention of some of the same countries whose representatives are sitting around this table today and are pushing for the imposition of more pressure against the Iranian nation. Let me talk about our own historical experiences.

This is not, of course, accidental or spontaneous. Comparisons in this case are amazingly instructive. The case that members of the Security Council have considered today has characteristics that are identical to those of the case against my country in 1951. The key words are quite similar: energy, independence and big-Power intervention. In the early 1950s, the United Kingdom was arguing exactly the same way as today, saying that "nationalization of Iran's oil industry is putting in danger the peace and security of the region and the world". Just replace the phrase "oil nationalization" from accusations against Iran at that time with today's phrase "nuclear activities" and the result will be quite workable statements for diplomats who are repeating history.

It is worth remembering, however, that when Iran won the case regarding its oil nationalization in The Hague, the United Kingdom sold a trumped-up anti-communist story to President Eisenhower and a United States-led coup reinstated and supported the Shah's dictatorship in Iran. Needless to say, the coup d'état was organized and implemented under the false pretext of maintaining international peace and security and respect for democracy and freedom — qualifications which were later used to justify many other, similar subversive actions against other developing nations in order to preserve or expand the interests of international cartels and consortia. The message was clear: No one should be allowed to endanger the vital interests of the capitalist world.

Yet again, history will not forget the stark similarity and sharp contrast that exist between the efforts to impose anti-Iranian sanctions at the present time and those of the 1950s against the nationalization of the Iranian oil industry. The stark similarity is that the axis of the United Kingdom and United States has been, at both times, at work to deprive the Iranian nation of its absolute right to achieve self sufficiency in energy production, whether through hydrocarbons or peaceful nuclear energy.

The difference, however, is that the Islamic Republic of Iran today is more powerful than ever, supported by its people — who now have three decades of political experience, a scientific and industrial renaissance and a rich cultural heritage — and enjoys the support of the overwhelming majority of nations.

The hostile actions of these few Powers against our nation are not new. The United States and its allies even intervened on behalf of Saddam in his aggression against Iran, providing him with chemical weapons and other military support. That deadly support included increasing supplies of chemical and biological agents even after the first United Nations report was issued on the use of these lethal weapons by Saddam against civilian Kurds in northern Iraq and against Iranian troops. The first reaction of these Powers was to deny the accounts. The second reaction was to declare any response to the attacks to be premature. The third response was to sharply escalate the delivery of arms and chemical and biological agents. Again, no action was taken by the Security Council against this brutal use of chemical weapons because of the threat of veto by the very providers of these inhumane weapons. They are the same Powers that imposed this resolution on the Security Council today.

As soon as the United States saw that the victory of Iran was imminent in the war, it entered into direct confrontation with Iran by, among other things,

shooting down an Iranian passenger aircraft. The inaction of the Security Council was again outrageous.

I will not dwell on the abuse of this body and the greatest lies of modern history articulated here by yet again the same Powers when they attempted to justify their invasion of Iraq. The United States and the United Kingdom again forged their own coalition and invaded Iraq under the false pretext of searching for weapons of mass destruction.

The Islamic Republic of Iran is determined to exercise its inalienable right to nuclear technology for peaceful purposes and to build on its own scientific advances in developing various peaceful aspects of this technology. At the same time, as a victim of the use of weapons of mass destruction in the recent past, Iran has rejected and opposed the development and use of all such inhumane weapons on religious as well as security grounds. The Leader of the Islamic Republic of Iran has on several occasions, including in his message to the Tehran international conference on nuclear disarmament and non-proliferation, held in April 2010 in Tehran, declared that nuclear weapons are forbidden. I brought that message to the attention of this body in my letter circulated as document S/2010/203, in which he stated:

> "We consider the use of such weapons as *haram* (religiously forbidden) and believe that it is everyone's duty to make efforts to secure humanity against this great disaster." (*S/2010/203, annex, p. 4*)

Furthermore, the presence and statement of the President of the Islamic Republic of Iran at the Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) also underlined Iran's fundamental rejection of nuclear weapons, as well as the need to strengthen and revitalize the non-proliferation Treaty. This is yet another indication of our great commitment to NPT issues and our concern about the dangers of nuclear weapons and the urgent need for their total eradication from the face of the Earth.

Iran indeed has maintained close collaboration with the International Atomic Energy Agency (IAEA), and indeed went even beyond its legal obligations in this cooperation. On many other occasions, I have already elaborated upon numerous examples of Iran's robust cooperation with the Agency; here, I shall limit myself to saying that, since February 2003, the Agency has conducted over 4,500 person-days of inspections in Iran, which represent unprecedented verification activities in a State party since the creation of the Agency.

However, despite this unprecedented, robust and proactive cooperation with the IAEA, a few western countries continue their unfair and provocative behaviour and hostile attitudes against my country by getting the Security Council unnecessarily involved in this issue and pursuing such politically motivated resolutions. The Council has heard many false allegations against Iran, including that Lady Ashton was approached to meet with Mr. Jalili. I am not going to elaborate any further on that one.

A striking example of the lack of sincerity of those countries that make false accusations against Iran on the nuclear issue was manifest in connection with the deal on the supply of fuel for the Tehran Research Reactor, which was in fact put on the table after our request for the Agency's assistance in purchasing 20 per cent-enriched fuel specifically for the Tehran Research Reactor, which produces radioisotopes for medical purposes for more than 800,000 cancer-affected patients. While we have proved our ability to enrich uranium to higher levels for the production of the fuel needed for the Tehran Reactor, we preferred, in a gesture of good will, to exchange our low-enriched fuel of 3.5 per cent for fuel enriched to the 20 per cent level needed for the Reactor. However, a few countries, in a miscalculated and politically motivated action, tabled a resolution at the IAEA Board of Governors in November 2009, immediately following the discussion that we had in October. The same thing is happening here following Brazil and Turkey's deal with Iran. Again, something has happened to thwart the goodwill of those countries, which I hope will not occur.

In addition to that, provocative remarks made by some American and European officials have raised serious suspicions among the Iranian people and officials regarding the American and European officials' real intentions with respect to the uranium exchange proposal, damaged the atmosphere and deepened the sense of mistrust.

Despite this, we responded positively to the efforts of two members of the Council, Turkey and Brazil, which sincerely and at the highest level tried to pursue a deal that was actually what the Vienna Group had wished them to achieve. We displayed our good

will and seriousness by agreeing to that initiative, which led to the Tehran declaration on the exchange of fuel. Here, I should like to express the gratitude of the Iranian Government and nation for the sincere efforts made by the Governments of Brazil and Turkey, which opened a new window of opportunity for further cooperation. But instead of welcoming the Tehran declaration, unfortunately — and to the great surprise of the international community, which had overwhelmingly supported the declaration — the same few Powers immediately introduced this politically motivated resolution.

Those who unfairly accused the Islamic Republic of Iran of a lack of cooperation are today showing no respect for what they initially encouraged these two members of the Council to do. This yet again highlights the bitter fact that what matters to these few Powers is their narrow political interests. It shows that they will break their promises whenever they so wish and that they have respect neither for other members of the Council nor for the pledges they have themselves made. What is at stake today is the credibility of the Security Council, which has been turned into a tool in the toolbox of a few countries that do not hesitate to abuse it when and where their interests require.

One day, there should be an end to the unrestrained and rampant application of double standards that is unfortunately being practiced by this Council. Some powerful members of the Council should provide answers to the many legitimate questions of international public opinion with regard to their behaviour in this Council. They should explain why they have incapacitated this body to react to the threats of resort to the use of force, and even of nuclear weapons, against Iran, uttered so vividly at the highest levels by the United States and as reflected in the United States Nuclear Posture Review, which exempts Iran from negative security assurances. They should respond to the question of why they have never allowed the Council to take any action with regard to the threats made on a daily basis by the criminal Israeli regime against Iran in violation of the United Nations Charter.

Indeed, they should also explain to the international community why they are pushing the Council to take action against a nation that is only trying to exercise its legal and inalienable rights, while at the same time the same few countries resort to every possible effort to prevent the Security Council from taking action against the Israeli regime's violations of the most basic principles of international law and international humanitarian law, as documented by the Goldstone report (A/HRC/12/48), and have repeatedly prevented this body from moving to stop the massive aggression of the Zionist regime against the Palestinian and Lebanese peoples. There should be an answer on the part of those who prevented this body from adopting a strong resolution in condemnation of the massacre on board the freedom flotilla ship and forced the Council to limit its action to adopting a mere presidential statement on that grave, brutal and criminal act, which was a clear example of State terrorism. There should also be an answer as to why this Council has not been given the slightest chance to address the issue of the Israeli regime's nuclear arsenal, despite its compulsive propensity to engage in aggression and carnage.

I wish to conclude by stressing that no amount of pressure or mischief will be able to break our nation's determination to pursue and defend its legal and inalienable rights. Iran, as one of the most powerful and stable countries in the region, has never bowed and will never bow to the hostile actions and pressures of these few Powers, and will continue to defend its rights.

I have again to express my sincere thanks to the delegations of Turkey and Brazil for voting against today's resolution, and to the Permanent Representative of Lebanon for not supporting it. History will commemorate those actions taken today in this Council.

The President (*spoke in Spanish*): The representative of the United Kingdom has asked to take the floor a second time.

Sir Mark Lyall Grant (United Kingdom): I regret the need to rebut some of the comments made by the Permanent Representative of Iran, but his distorted account of history — including personal attacks on my country — simply demean him and seem designed as an excuse for Iran not to respond to international concerns about its nuclear programme.

The attacks on the integrity of the Security Council are an insult to my colleagues here now and over the past four years. I hope that, on more sober reflection, Iran will respond honestly to the concerns that are expressed in the resolution that has just been adopted and that have been expressed by this Council

over the past four years on Iran's nuclear programme, and that it will engage seriously in negotiations on that programme.

The President (*spoke in Spanish*): There are no further speakers inscribed on my list. The Security Council has thus concluded the present stage of its consideration of the item on its agenda. The Council will remain seized of the matter.

The meeting rose at 1 p.m.

Federal Register

Friday,
July 1, 2005

Part V

The President

Executive Order 13382—Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters

Federal Register
Vol. 70, No. 126
Friday, July 1, 2005

Presidential Documents

Title 3—

The President

Executive Order 13382 of June 28, 2005

Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), and section 301 of title 3, United States Code,

I, George W. Bush, President of the United States of America, in order to take additional steps with respect to the national emergency described and declared in Executive Order 12938 of November 14, 1994, regarding the proliferation of weapons of mass destruction and the means of delivering them, and the measures imposed by that order, as expanded by Executive Order 13094 of July 28, 1998, hereby order:

Section 1. (a) Except to the extent provided in section 203(b)(1), (3), and (4) of IEEPA (50 U.S.C. 1702(b)(1), (3), and (4)), or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order, all property and interests in property of the following persons, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(i) the persons listed in the Annex to this order;

(ii) any foreign person determined by the Secretary of State, in consultation with the Secretary of the Treasury, the Attorney General, and other relevant agencies, 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), including any efforts to manufacture, acquire, possess, develop, transport, transfer or use such items, by any person or foreign country of proliferation concern;

(iii) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to have provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, any activity or transaction described in paragraph (a)(ii) of this section, or any person whose property and interests in property are blocked pursuant to this order; and

(iv) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

(b) Any transaction or dealing by a United States person or within the United States in property or interests in property blocked pursuant to this order is prohibited, including, but not limited to, (i) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of, any person whose property and interests in property are blocked

pursuant to this order, and (ii) the receipt of any contribution or provision of funds, goods, or services from any such person.

(c) Any transaction by a United States person or within the United States that evades or avoids, has the purpose of evading or avoiding, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(d) Any conspiracy formed to violate the prohibitions set forth in this order is prohibited.

Sec. 2. For purposes of this order:

(a) the term ''person'' means an individual or entity;

(b) the term ''entity'' means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization; and

(c) the term ''United States person'' means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.

Sec. 3. I hereby determine that the making of donations of the type of articles specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by, to, or for the benefit of, any person whose property and interests in property are blocked pursuant to this order would seriously impair my ability to deal with the national emergency declared in Executive Order 12938, and I hereby prohibit such donations as provided by section 1 of this order.

Sec. 4. Section 4(a) of Executive Order 12938, as amended, is further amended to read as follows:

''**Sec. 4.** *Measures Against Foreign Persons.*

(a) Determination by Secretary of State; Imposition of Measures. Except to the extent provided in section 203(b) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)), where applicable, if the Secretary of State, in consultation with the Secretary of the Treasury, determines that a foreign person, on or after November 16, 1990, the effective date of Executive Order 12735, the predecessor order to Executive Order 12938, has 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), including any efforts to manufacture, acquire, possess, develop, transport, transfer, or use such items, by any person or foreign country of proliferation concern, the measures set forth in subsections (b), (c), and (d) of this section shall be imposed on that foreign person to the extent determined by the Secretary of State, in consultation with the implementing agency and other relevant agencies. Nothing in this section is intended to preclude the imposition on that foreign person of other measures or sanctions available under this order or under other authorities.''

Sec. 5. For those persons whose property and interests in property are blocked pursuant to section 1 of this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render these measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in Executive Order 12938, as amended, there need be no prior notice of a listing or determination made pursuant to section 1 of this order.

Sec. 6. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA as may be necessary to carry out the purposes of this order. The Secretary of the Treasury may redelegate any of these functions to other officers and agencies of the United States Government, consistent with applicable law. All agencies of the United States Government are

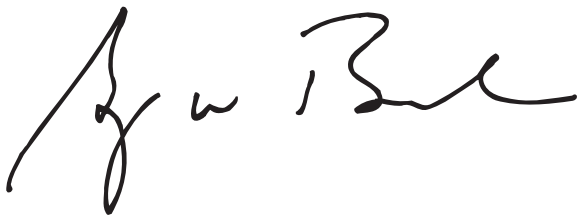
hereby directed to take all appropriate measures within their authority to carry out the provisions of this order and, where appropriate, to advise the Secretary of the Treasury in a timely manner of the measures taken.

Sec. 7. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to determine, subsequent to the issuance of this order, that circumstances no longer warrant the inclusion of a person in the Annex to this order and that the property and interests in property of that person are therefore no longer blocked pursuant to section 1 of this order.

Sec. 8. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.

Sec. 9. (a) This order is effective at 12:01 a.m. eastern daylight time on June 29, 2005.

(b) This order shall be transmitted to the Congress and published in the **Federal Register**.



THE WHITE HOUSE,
June 28, 2005.

Billing code 3195–01–P

ANNEX

Korea Mining Development Trading Corporation
Tanchon Commercial Bank
Korea Ryonbong General Corporation
Aerospace Industries Organization
Shahid Hemmat Industrial Group
Shahid Bakeri Industrial Group
Atomic Energy Organization of Iran
Scientific Studies and Research Center

[FR Doc. 05–13214
Filed 6–30–05; 9:31 am]
Billing code 4810–25–P

COMPREHENSIVE IRAN SANCTIONS, ACCOUNTABILITY, AND DIVESTMENT ACT OF 2010

Public Law 111–195
111th Congress

An Act

July 1, 2010
[H.R. 2194]

To amend the Iran Sanctions Act of 1996 to enhance United States diplomatic efforts with respect to Iran by expanding economic sanctions against Iran.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010.
22 USC 8501 note.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

SEC. 2. FINDINGS. 22 USC 8501.

Congress makes the following findings:

(1) The illicit nuclear activities of the Government of Iran, combined with its development of unconventional weapons and ballistic missiles and its support for international terrorism, represent a threat to the security of the United States, its strong ally Israel, and other allies of the United States around the world.

(2) The United States and other responsible countries have a vital interest in working together to prevent the Government of Iran from acquiring a nuclear weapons capability.

(3) The International Atomic Energy Agency has repeatedly called attention to Iran's illicit nuclear activities and, as a result, the United Nations Security Council has adopted a range of sanctions designed to encourage the Government of Iran to suspend those activities and comply with its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, done at Washington, London, and Moscow July 1, 1968, and entered into force March 5, 1970 (commonly known as the "Nuclear Non-Proliferation Treaty").

(4) The serious and urgent nature of the threat from Iran demands that the United States work together with its allies to do everything possible—diplomatically, politically, and economically—to prevent Iran from acquiring a nuclear weapons capability.

(5) The United States and its major European allies, including the United Kingdom, France, and Germany, have advocated that sanctions be strengthened should international diplomatic efforts fail to achieve verifiable suspension of Iran's uranium enrichment program and an end to its nuclear weapons program and other illicit nuclear activities.

(6) The Government of Iran continues to engage in serious, systematic, and ongoing violations of human rights, including suppression of freedom of expression and religious freedom, illegitimately prolonged detention, torture, and executions. Such violations have increased in the aftermath of the fraudulent presidential election in Iran on June 12, 2009.

(7) The Government of Iran has been unresponsive to President Obama's unprecedented and serious efforts at engagement, revealing that the Government of Iran is not interested in a diplomatic resolution, as made clear, for example, by the following:

(A) Iran's apparent rejection of the Tehran Research Reactor plan, generously offered by the United States and its partners, of potentially great benefit to the people of Iran, and endorsed by Iran's own negotiators in October 2009.

(B) Iran's ongoing clandestine nuclear program, as evidenced by its work on the secret uranium enrichment facility at Qom, its subsequent refusal to cooperate fully with inspectors from the International Atomic Energy Agency, and its announcement that it would build 10 new uranium enrichment facilities.

(C) Iran's official notification to the International Atomic Energy Agency that it would enrich uranium to the 20 percent level, followed soon thereafter by its providing to that Agency a laboratory result showing that Iran had indeed enriched some uranium to 19.8 percent.

(D) A February 18, 2010, report by the International Atomic Energy Agency expressing "concerns about the possible existence in Iran of past or current undisclosed activities related to the development of a nuclear payload for a missile. These alleged activities consist of a number of projects and sub-projects, covering nuclear and missile related aspects, run by military-related organizations.".

(E) A May 31, 2010, report by the International Atomic Energy Agency expressing continuing strong concerns about Iran's lack of cooperation with the Agency's verification efforts and Iran's ongoing enrichment activities, which are contrary to the longstanding demands of the Agency and the United Nations Security Council.

(F) Iran's announcement in April 2010 that it had developed a new, faster generation of centrifuges for enriching uranium.

(G) Iran's ongoing arms exports to, and support for, terrorists in direct contravention of United Nations Security Council resolutions.

(H) Iran's July 31, 2009, arrest of 3 young citizens of the United States on spying charges.

(8) There is an increasing interest by State governments, local governments, educational institutions, and private institutions, business firms, and other investors to disassociate themselves from companies that conduct business activities in the energy sector of Iran, since such business activities may directly or indirectly support the efforts of the Government of Iran to achieve a nuclear weapons capability.

(9) Black market proliferation networks continue to flourish in the Middle East, allowing countries like Iran to gain access to sensitive dual-use technologies.

(10) Economic sanctions imposed pursuant to the provisions of this Act, the Iran Sanctions Act of 1996, as amended by this Act, and the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), and other authorities available to the United States to impose economic sanctions to prevent Iran from developing nuclear weapons, are necessary to protect the essential security interests of the United States.

SEC. 3. SENSE OF CONGRESS REGARDING THE NEED TO IMPOSE ADDITIONAL SANCTIONS WITH RESPECT TO IRAN.

It is the sense of Congress that—

(1) international diplomatic efforts to address Iran's illicit nuclear efforts and support for international terrorism are more likely to be effective if strong additional sanctions are imposed on the Government of Iran;

(2) the concerns of the United States regarding Iran are strictly the result of the actions of the Government of Iran;

(3) the revelation in September 2009 that Iran is developing a secret uranium enrichment site on a base of Iran's Revolutionary Guard Corps near Qom, which appears to have no civilian application, highlights the urgency that Iran—

(A) disclose the full nature of its nuclear program, including any other secret locations; and

(B) provide the International Atomic Energy Agency unfettered access to its facilities pursuant to Iran's legal obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, done at Washington, London, and Moscow July 1, 1968, and entered into force March 5, 1970 (commonly known as the "Nuclear Non-Proliferation Treaty") and Iran's safeguards agreement with the International Atomic Energy Agency;

(4) because of the involvement of Iran's Revolutionary Guard Corps in Iran's nuclear program, international terrorism, and domestic human rights abuses, the President should impose the full range of applicable sanctions on—

(A) any individual or entity that is an agent, alias, front, instrumentality, representative, official, or affiliate of Iran's Revolutionary Guard Corps; and

(B) any individual or entity that has conducted any commercial transaction or financial transaction with an individual or entity described in subparagraph (A);

(5) additional measures should be adopted by the United States to prevent the diversion of sensitive dual-use technologies to Iran;

(6) the President should—

(A) continue to urge the Government of Iran to respect the internationally recognized human rights and religious freedoms of its citizens;

(B) identify the officials of the Government of Iran and other individuals who are responsible for continuing and severe violations of human rights and religious freedom in Iran; and

(C) take appropriate measures to respond to such violations, including by—

(i) prohibiting officials and other individuals the President identifies as being responsible for such violations from entry into the United States; and

(ii) freezing the assets of the officials and other individuals described in clause (i);

(7) additional funding should be provided to the Secretary of State to document, collect, and disseminate information about human rights abuses in Iran, including serious abuses that have taken place since the presidential election in Iran on June 12, 2009;

(8) with respect to nongovernmental organizations based in the United States—

(A) many of such organizations are essential to promoting human rights and humanitarian goals around the world;

(B) it is in the national interest of the United States to allow responsible nongovernmental organizations based in the United States to establish and carry out operations

in Iran to promote civil society and foster humanitarian goodwill among the people of Iran; and

(C) the United States should ensure that the organizations described in subparagraph (B) are not unnecessarily hindered from working in Iran to provide humanitarian, human rights, and people-to-people assistance, as appropriate, to the people of Iran;

(9) the United States should not issue a license pursuant to an agreement for cooperation (as defined in section 11 b. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(b))) for the export of nuclear material, facilities, components, or other goods, services, or technology that are or would be subject to such an agreement to a country that is providing similar nuclear material, facilities, components, or other goods, services, or technology to another country that is not in full compliance with its obligations under the Nuclear Non-Proliferation Treaty, including its obligations under the safeguards agreement between that country and the International Atomic Energy Agency, unless the President determines that the provision of such similar nuclear material, facilities, components, or other goods, services, or technology to such other country does not undermine the nonproliferation policies and objectives of the United States; and

(10) the people of the United States—

(A) have feelings of friendship for the people of Iran;

(B) regret that developments in recent decades have created impediments to that friendship; and

(C) hold the people of Iran, their culture, and their ancient and rich history in the highest esteem.

TITLE I—SANCTIONS

22 USC 8511.

SEC. 101. DEFINITIONS.

In this title:

(1) AGRICULTURAL COMMODITY.—The term "agricultural commodity" has the meaning given that term in section 102 of the Agricultural Trade Act of 1978 (7 U.S.C. 5602).

(2) APPROPRIATE CONGRESSIONAL COMMITTEES.—The term "appropriate congressional committees" has the meaning given that term in section 14 of the Iran Sanctions Act of 1996 (Public Law 104–172; 50 U.S.C. 1701 note), as amended by section 102 of this Act.

(3) EXECUTIVE AGENCY.—The term "executive agency" has the meaning given that term in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403).

(4) FAMILY MEMBER.—The term "family member" means, with respect to an individual, a spouse, child, parent, sibling, grandchild, or grandparent of the individual.

(5) IRANIAN DIPLOMATS AND REPRESENTATIVES OF OTHER GOVERNMENT AND MILITARY OR QUASI-GOVERNMENTAL INSTITUTIONS OF IRAN.—The term "Iranian diplomat or representative of another government or military or quasi-governmental institution of Iran" means any of the Iranian diplomats and representatives of other government and military or quasi-governmental institutions of Iran (as that term is defined in

section 14 of the Iran Sanctions Act of 1996 (Public Law 104–172; 50 U.S.C. 1701 note)).

(6) KNOWINGLY.—The term "knowingly", with respect to conduct, a circumstance, or a result, means that a person has actual knowledge, or should have known, of the conduct, the circumstance, or the result.

(7) MEDICAL DEVICE.—The term "medical device" has the meaning given the term "device" in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321).

(8) MEDICINE.—The term "medicine" has the meaning given the term "drug" in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321).

(9) STATE.—The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the United States Virgin Islands, and any other territory or possession of the United States.

(10) UNITED STATES PERSON.—The term "United States person" means—

(A) a natural person who is a citizen or resident of the United States or a national of the United States (as defined in section 101(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)); and

(B) an entity that is organized under the laws of the United States or any State.

SEC. 102. EXPANSION OF SANCTIONS UNDER THE IRAN SANCTIONS ACT OF 1996.

President. Determinations.

(a) IN GENERAL.—Section 5 of the Iran Sanctions Act of 1996 (Public Law 104–172; 50 U.S.C. 1701 note) is amended—

(1) by striking subsection (a) and inserting the following:

"(a) SANCTIONS WITH RESPECT TO THE DEVELOPMENT OF PETROLEUM RESOURCES OF IRAN, PRODUCTION OF REFINED PETROLEUM PRODUCTS IN IRAN, AND EXPORTATION OF REFINED PETROLEUM PRODUCTS TO IRAN.—

"(1) DEVELOPMENT OF PETROLEUM RESOURCES OF IRAN.—

"(A) IN GENERAL.—Except as provided in subsection (f), the President shall impose 3 or more of the sanctions described in section 6(a) with respect to a person if the President determines that the person knowingly, on or after the date of the enactment of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010—

"(i) makes an investment described in subparagraph (B) of $20,000,000 or more; or

"(ii) makes a combination of investments described in subparagraph (B) in a 12-month period if each such investment is of at least $5,000,000 and such investments equal or exceed $20,000,000 in the aggregate.

"(B) INVESTMENT DESCRIBED.—An investment described in this subparagraph is an investment that directly and significantly contributes to the enhancement of Iran's ability to develop petroleum resources.

"(2) PRODUCTION OF REFINED PETROLEUM PRODUCTS.—

"(A) IN GENERAL.—Except as provided in subsection (f), the President shall impose 3 or more of the sanctions described in section 6(a) with respect to a person if the President determines that the person knowingly, on or

after the date of the enactment of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, sells, leases, or provides to Iran goods, services, technology, information, or support described in subparagraph (B)—

"(i) any of which has a fair market value of $1,000,000 or more; or

"(ii) that, during a 12-month period, have an aggregate fair market value of $5,000,000 or more.

"(B) GOODS, SERVICES, TECHNOLOGY, INFORMATION, OR SUPPORT DESCRIBED.—Goods, services, technology, information, or support described in this subparagraph are goods, services, technology, information, or support that could directly and significantly facilitate the maintenance or expansion of Iran's domestic production of refined petroleum products, including any direct and significant assistance with respect to the construction, modernization, or repair of petroleum refineries.

"(3) EXPORTATION OF REFINED PETROLEUM PRODUCTS TO IRAN.—

"(A) IN GENERAL.—Except as provided in subsection (f), the President shall impose 3 or more of the sanctions described in section 6(a) with respect to a person if the President determines that the person knowingly, on or after the date of the enactment of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010—

"(i) sells or provides to Iran refined petroleum products—

"(I) that have a fair market value of $1,000,000 or more; or

"(II) that, during a 12-month period, have an aggregate fair market value of $5,000,000 or more; or

"(ii) sells, leases, or provides to Iran goods, services, technology, information, or support described in subparagraph (B)—

"(I) any of which has a fair market value of $1,000,000 or more; or

"(II) that, during a 12-month period, have an aggregate fair market value of $5,000,000 or more.

"(B) GOODS, SERVICES, TECHNOLOGY, INFORMATION, OR SUPPORT DESCRIBED.—Goods, services, technology, information, or support described in this subparagraph are goods, services, technology, information, or support that could directly and significantly contribute to the enhancement of Iran's ability to import refined petroleum products, including—

"(i) except as provided in subparagraph (C), underwriting or entering into a contract to provide insurance or reinsurance for the sale, lease, or provision of such goods, services, technology, information, or support;

"(ii) financing or brokering such sale, lease, or provision; or

"(iii) providing ships or shipping services to deliver refined petroleum products to Iran.

"(C) EXCEPTION FOR UNDERWRITERS AND INSURANCE PROVIDERS EXERCISING DUE DILIGENCE.—The President may not impose sanctions under this paragraph with respect

to a person that provides underwriting services or insurance or reinsurance if the President determines that the person has exercised due diligence in establishing and enforcing official policies, procedures, and controls to ensure that the person does not underwrite or enter into a contract to provide insurance or reinsurance for the sale, lease, or provision of goods, services, technology, information, or support described in subparagraph (B).";

(2) in subsection (b)—

(A) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively, and moving such subparagraphs, as so redesignated, 2 ems to the right;

(B) by striking "The President shall impose" and inserting the following:

"(1) IN GENERAL.—The President shall impose"; and

(C) in paragraph (1), as redesignated by subparagraph (B) of this paragraph, by striking "two or more" and all that follows through "of this Act" and inserting "3 or more of the sanctions described in section 6(a) if the President determines that a person has, on or after the date of the enactment of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010"; and

(D) by adding at the end the following:

"(2) ADDITIONAL MANDATORY SANCTIONS RELATING TO TRANSFER OF NUCLEAR TECHNOLOGY.—

"(A) IN GENERAL.—Except as provided in subparagraphs (B) and (C), in any case in which a person is subject to sanctions under paragraph (1) because of an activity described in that paragraph that relates to the acquisition or development of nuclear weapons or related technology or of missiles or advanced conventional weapons that are designed or modified to deliver a nuclear weapon, no license may be issued for the export, and no approval may be given for the transfer or retransfer, directly or indirectly, to the country the government of which has primary jurisdiction over the person, of any nuclear material, facilities, components, or other goods, services, or technology that are or would be subject to an agreement for cooperation between the United States and that government.

"(B) EXCEPTION.—The sanctions described in subparagraph (A) shall not apply with respect to a country the government of which has primary jurisdiction over a person that engages in an activity described in that subparagraph if the President determines and notifies the appropriate congressional committees that the government of the country— Notification.

"(i) does not know or have reason to know about the activity; or

"(ii) has taken, or is taking, all reasonable steps necessary to prevent a recurrence of the activity and to penalize the person for the activity.

"(C) INDIVIDUAL APPROVAL.—Notwithstanding subparagraph (A), the President may, on a case-by-case basis, approve the issuance of a license for the export, or approve the transfer or retransfer, of any nuclear material, facilities, components, or other goods, services, or technology

that are or would be subject to an agreement for cooperation, to a person in a country to which subparagraph (A) applies (other than a person that is subject to the sanctions under paragraph (1)) if the President—

"(i) determines that such approval is vital to the national security interests of the United States; and

Deadline.

"(ii) not later than 15 days before issuing such license or approving such transfer or retransfer, submits to the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate the justification for approving such license, transfer, or retransfer.

Applicability.

"(D) CONSTRUCTION.—The restrictions in subparagraph (A) shall apply in addition to all other applicable procedures, requirements, and restrictions contained in the Atomic Energy Act of 1954 and other related laws.

"(E) DEFINITION.—In this paragraph, the term 'agreement for cooperation' has the meaning given that term in section 11 b. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(b)).

"(F) APPLICABILITY.—The sanctions under subparagraph (A) shall apply only in a case in which a person is subject to sanctions under paragraph (1) because of an activity described in that paragraph in which the person engages on or after the date of the enactment of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010.";

(3) in subsection (c)—

(A) by striking "(b)" each place it appears and inserting "(b)(1)"; and

(B) by striking paragraph (2) and inserting the following:

"(2) any person that—

"(A) is a successor entity to the person referred to in paragraph (1);

"(B) owns or controls the person referred to in paragraph (1), if the person that owns or controls the person referred to in paragraph (1) had actual knowledge or should have known that the person referred to in paragraph (1) engaged in the activities referred to in that paragraph; or

"(C) is owned or controlled by, or under common ownership or control with, the person referred to in paragraph (1), if the person owned or controlled by, or under common ownership or control with (as the case may be), the person referred to in paragraph (1) knowingly engaged in the activities referred to in that paragraph."; and

(4) in subsection (f)—

(A) in the matter preceding paragraph (1), by striking "(b)" and inserting "(b)(1)"; and

(B) in paragraph (2), by striking "section 301(b)(1) of that Act (19 U.S.C. 2511(b)(1))" and inserting "section 301(b) of that Act (19 U.S.C. 2511(b))".

50 USC 1701 note.

(b) DESCRIPTION OF SANCTIONS.—Section 6 of such Act is amended—

(1) by striking "The sanctions to be imposed" and inserting the following:

"(a) IN GENERAL.—The sanctions to be imposed";

(2) in subsection (a), as redesignated by paragraph (1)—

(A) by redesignating paragraph (6) as paragraph (9); and

(B) by inserting after paragraph (5) the following:

"(6) FOREIGN EXCHANGE.—The President may, pursuant to such regulations as the President may prescribe, prohibit any transactions in foreign exchange that are subject to the jurisdiction of the United States and in which the sanctioned person has any interest.

"(7) BANKING TRANSACTIONS.—The President may, pursuant to such regulations as the President may prescribe, prohibit any transfers of credit or payments between financial institutions or by, through, or to any financial institution, to the extent that such transfers or payments are subject to the jurisdiction of the United States and involve any interest of the sanctioned person.

"(8) PROPERTY TRANSACTIONS.—The President may, pursuant to such regulations as the President may prescribe, prohibit any person from—

"(A) acquiring, holding, withholding, using, transferring, withdrawing, transporting, importing, or exporting any property that is subject to the jurisdiction of the United States and with respect to which the sanctioned person has any interest;

"(B) dealing in or exercising any right, power, or privilege with respect to such property; or

"(C) conducting any transaction involving such property."; and

(3) by adding at the end the following:

"(b) ADDITIONAL MEASURE RELATING TO GOVERNMENT CONTRACTS.—

"(1) MODIFICATION OF FEDERAL ACQUISITION REGULATION.—Not later than 90 days after the date of the enactment of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, the Federal Acquisition Regulation issued pursuant to section 25 of the Office of Federal Procurement Policy Act (41 U.S.C. 421) shall be revised to require a certification from each person that is a prospective contractor that the person, and any person owned or controlled by the person, does not engage in any activity for which sanctions may be imposed under section 5. Deadline.

"(2) REMEDIES.—

"(A) IN GENERAL.—If the head of an executive agency determines that a person has submitted a false certification under paragraph (1) on or after the date on which the revision of the Federal Acquisition Regulation required by this subsection becomes effective, the head of that executive agency shall terminate a contract with such person or debar or suspend such person from eligibility for Federal contracts for a period of not more than 3 years. Any such debarment or suspension shall be subject to the procedures that apply to debarment and suspension under the Federal Acquisition Regulation under subpart 9.4 of part 9 of title 48, Code of Federal Regulations. Applicability.

"(B) INCLUSION ON LIST OF PARTIES EXCLUDED FROM FEDERAL PROCUREMENT AND NONPROCUREMENT PROGRAMS.—The Administrator of General Services shall include on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs maintained by the Administrator under part 9 of the Federal Acquisition Regulation issued pursuant to section 25 of the Office of Federal Procurement Policy Act (41 U.S.C. 421) each person that is debarred, suspended, or proposed for debarment or suspension by the head of an executive agency on the basis of a determination of a false certification under subparagraph (A).

"(3) CLARIFICATION REGARDING CERTAIN PRODUCTS.—The remedies set forth in paragraph (2) shall not apply with respect to the procurement of eligible products, as defined in section 308(4) of the Trade Agreements Act of 1974 (19 U.S.C. 2518(4)), of any foreign country or instrumentality designated under section 301(b) of that Act (19 U.S.C. 2511(b)).

"(4) RULE OF CONSTRUCTION.—This subsection shall not be construed to limit the use of other remedies available to the head of an executive agency or any other official of the Federal Government on the basis of a determination of a false certification under paragraph (1).

Certification.

"(5) WAIVERS.—The President may on a case-by-case basis waive the requirement that a person make a certification under paragraph (1) if the President determines and certifies in writing to the appropriate congressional committees, the Committee on Armed Services of the Senate, and the Committee on Armed Services of the House of Representatives, that it is in the national interest of the United States to do so.

"(6) EXECUTIVE AGENCY DEFINED.—In this subsection, the term 'executive agency' has the meaning given that term in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403).

"(7) APPLICABILITY.—The revisions to the Federal Acquisition Regulation required under paragraph (1) shall apply with respect to contracts for which solicitations are issued on or after the date that is 90 days after the date of the enactment of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010.".

50 USC 1701 note.

(c) PRESIDENTIAL WAIVER.—Section 9 of such Act is amended—

(1) in subsection (a), by striking "5(b)" each place it appears and inserting "5(b)(1)"; and

(2) in subsection (c)—

(A) by striking "section 5(a) or (b)" each place it appears and inserting "section 5(a) or 5(b)(1)";

(B) in paragraph (1), by striking "important to the national interest" and inserting "necessary to the national interest"; and

(C) in paragraph (2), by striking subparagraph (C) and inserting the following:

"(C) an estimate of the significance of the conduct of the person in contributing to the ability of Iran to, as the case may be—

"(i) develop petroleum resources, produce refined petroleum products, or import refined petroleum products; or

"(ii) acquire or develop—

"(I) chemical, biological, or nuclear weapons or related technologies; or

"(II) destabilizing numbers and types of advanced conventional weapons; and".

(d) REPORTS ON GLOBAL TRADE RELATING TO IRAN.—Section 10 of such Act is amended by adding at the end the following: 50 USC 1701 note.

"(d) REPORTS ON GLOBAL TRADE RELATING TO IRAN.—Not later than 90 days after the date of the enactment of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, and annually thereafter, the President shall submit to the appropriate congressional committees a report, with respect to the most recent 12-month period for which data are available, on the dollar value amount of trade, including in the energy sector, between Iran and each country maintaining membership in the Group of 20 Finance Ministers and Central Bank Governors.".

(e) EXTENSION OF IRAN SANCTIONS ACT OF 1996.—Section 13(b) of such Act is amended by striking "December 31, 2011" and inserting "December 31, 2016". 50 USC 1701 note.

(f) CLARIFICATION AND EXPANSION OF DEFINITIONS.—Section 14 of such Act is amended— 50 USC 1701 note.

(1) in paragraph (2), by striking "the Committee on Banking and Financial Services, and the Committee on International Relations" and inserting "the Committee on Financial Services, and the Committee on Foreign Affairs";

(2) in paragraph (9), in the flush text following subparagraph (C), by striking "The term 'investment' does not include" and all that follows through "technology.";

(3) by redesignating paragraphs (12), (13), (14), (15), and (16) as paragraphs (13), (14), (15), (17), and (18), respectively;

(4) by inserting after paragraph (11) the following:

"(12) KNOWINGLY.—The term 'knowingly', with respect to conduct, a circumstance, or a result, means that a person has actual knowledge, or should have known, of the conduct, the circumstance, or the result."; Definition.

(5) in paragraph (14), as redesignated by paragraph (3) of this subsection—

(A) by redesignating subparagraphs (A), (B), and (C) as clauses (i), (ii), and (iii), respectively, and moving such clauses, as so redesignated, 2 ems to the right;

(B) by striking "The term 'person' means—" and inserting the following:

"(A) IN GENERAL.—The term 'person' means—";

(C) in subparagraph (A), as redesignated by this paragraph—

(i) in clause (ii), by inserting "financial institution, insurer, underwriter, guarantor, and any other business organization," after "trust,"; and

(ii) in clause (iii), by striking "subparagraph (B)" and inserting "clause (ii)"; and

(D) by adding at the end the following:

"(B) APPLICATION TO GOVERNMENTAL ENTITIES.—The term 'person' does not include a government or governmental entity that is not operating as a business enterprise.";

(6) in paragraph (15), as redesignated by paragraph (3) of this subsection, by striking "petroleum and natural gas

resources" and inserting "petroleum, refined petroleum products, oil or liquefied natural gas, natural gas resources, oil or liquefied natural gas tankers, and products used to construct or maintain pipelines used to transport oil or liquefied natural gas"; and

(7) by inserting after paragraph (15), as so redesignated, the following:

Definition.

"(16) REFINED PETROLEUM PRODUCTS.—The term 'refined petroleum products' means diesel, gasoline, jet fuel (including naphtha-type and kerosene-type jet fuel), and aviation gasoline.".

(g) WAIVER FOR CERTAIN PERSONS IN CERTAIN COUNTRIES; MANDATORY INVESTIGATIONS AND REPORTING; CONFORMING AMENDMENTS.—Section 4 of such Act is amended—

50 USC 1701 note.

(1) in subsection (b)(2), by striking "(in addition to that provided in subsection (d))";

(2) in subsection (c)—

(A) in paragraph (1)—

(i) by striking "The President may" and inserting the following:

"(A) GENERAL WAIVER.—The President may"; and

(ii) by adding at the end the following:

"(B) WAIVER WITH RESPECT TO PERSONS IN COUNTRIES THAT COOPERATE IN MULTILATERAL EFFORTS WITH RESPECT TO IRAN.—The President may, on a case by case basis, waive for a period of not more than 12 months the application of section 5(a) with respect to a person if the President, at least 30 days before the waiver is to take effect—

Certification.

"(i) certifies to the appropriate congressional committees that—

"(I) the government with primary jurisdiction over the person is closely cooperating with the United States in multilateral efforts to prevent Iran from—

"(aa) acquiring or developing chemical, biological, or nuclear weapons or related technologies; or

"(bb) acquiring or developing destabilizing numbers and types of advanced conventional weapons; and

"(II) such a waiver is vital to the national security interests of the United States; and

"(ii) submits to the appropriate congressional committees a report identifying—

"(I) the person with respect to which the President waives the application of sanctions; and

"(II) the actions taken by the government described in clause (i)(I) to cooperate in multilateral efforts described in that clause."; and

(B) by striking paragraph (2) and inserting the following:

"(2) SUBSEQUENT RENEWAL OF WAIVER.—At the conclusion of the period of a waiver under subparagraph (A) or (B) of paragraph (1), the President may renew the waiver—

"(A) if the President determines, in accordance with subparagraph (A) or (B) of that paragraph (as the case may be), that the waiver is appropriate; and

"(B)(i) in the case of a waiver under subparagraph (A) of paragraph (1), for subsequent periods of not more than six months each; and

"(ii) in the case of a waiver under subparagraph (B) of paragraph (1), for subsequent periods of not more than 12 months each.";

(3) by striking subsection (d);

(4) by redesignating subsections (e) and (f) as subsections (d) and (e), respectively; and

(5) in subsection (e), as redesignated by paragraph (4) of this subsection—

(A) in paragraph (1)—

(i) by striking "should initiate" and inserting "shall initiate"; and

(ii) by striking "investment activity in Iran as" and inserting "an activity";

(B) in paragraph (2)—

(i) by striking "should determine" and inserting "shall (unless paragraph (3) applies) determine"; and

(ii) by striking "investment activity in Iran as" and inserting "an activity"; and

(C) by adding at the end the following:

"(3) SPECIAL RULE.—The President need not initiate an investigation, and may terminate an investigation, under this subsection if the President certifies in writing to the appropriate congressional committees that— Certification.

"(A) the person whose activity was the basis for the investigation is no longer engaging in the activity or has taken significant verifiable steps toward stopping the activity; and

"(B) the President has received reliable assurances that the person will not knowingly engage in an activity described in section 5(a) in the future.".

(h) EFFECTIVE DATE.— 50 USC 1701 note.

(1) IN GENERAL.—The amendments made by this section shall—

(A) take effect on the date of the enactment of this Act; and

(B) except as provided in this subsection or section 6(b)(7) of the Iran Sanctions Act of 1996, as amended by subsection (b) of this section, apply with respect to an investment or activity described in subsection (a) or (b) of section 5 of the Iran Sanctions Act of 1996, as amended by this section, that is commenced on or after such date of enactment.

(2) APPLICABILITY TO ONGOING INVESTMENTS PROHIBITED UNDER PRIOR LAW.—A person that makes an investment described in section 5(a) of the Iran Sanctions Act of 1996, as in effect on the day before the date of the enactment of this Act, that is commenced before such date of enactment and continues on or after such date of enactment, shall, except as provided in paragraph (4), be subject to the provisions of the Iran Sanctions Act of 1996, as in effect on the day before such date of enactment.

(3) APPLICABILITY TO ONGOING ACTIVITIES RELATING TO CHEMICAL, BIOLOGICAL, OR NUCLEAR WEAPONS OR RELATED

TECHNOLOGIES.—A person that, before the date of the enactment of this Act, commenced an activity described in section 5(b) of the Iran Sanctions Act of 1996, as in effect on the day before such date of enactment, and continues the activity on or after such date of enactment, shall be subject to the provisions of the Iran Sanctions Act of 1996, as amended by this Act.

(4) APPLICABILITY OF MANDATORY INVESTIGATIONS TO INVESTMENTS.—The amendments made by subsection (g)(5) of this section shall apply on and after the date of the enactment of this Act—

(A) with respect to an investment described in section 5(a)(1) of the Iran Sanctions Act of 1996, as amended by subsection (a) of this section, that is commenced on or after such date of enactment; and

(B) with respect to an investment described in section 5(a) of the Iran Sanctions Act of 1996, as in effect on the day before the date of the enactment of this Act, that is commenced before such date of enactment and continues on or after such date of enactment.

(5) APPLICABILITY OF MANDATORY INVESTIGATIONS TO ACTIVITIES RELATING TO PETROLEUM.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the amendments made by subsection (g)(5) of this section shall apply on and after the date that is 1 year after the date of the enactment of this Act with respect to an activity described in paragraph (2) or (3) of section 5(a) of the Iran Sanctions Act of 1996, as amended by subsection (a) of this section, that is commenced on or after the date that is 1 year after the date of the enactment of this Act or the date on which the President fails to submit a certification that is required under subparagraph (B) (whichever is applicable).

(B) SPECIAL RULE FOR DELAY OF EFFECTIVE DATE.—

(i) REPORTING REQUIREMENT.—Not later than 30 days before the date that is 1 year after the date of the enactment of this Act, the President shall submit to the appropriate congressional committees a report describing—

(I) the diplomatic and other efforts of the President—

(aa) to dissuade foreign persons from engaging in activities described in paragraph (2) or (3) of section 5(a) of the Iran Sanctions Act of 1996, as amended by subsection (a) of this section; and

(bb) to encourage other governments to dissuade persons over which those governments have jurisdiction from engaging in such activities;

(II) the successes and failures of the efforts described in subclause (I); and

(III) each investigation under section 4(e) of the Iran Sanctions Act of 1996, as amended by subsection (g)(5) of this section and as in effect pursuant to subparagraph (C) of this paragraph, or any other review of an activity described in

paragraph (2) or (3) of section 5(a) of the Iran Sanctions Act of 1996, as amended by subsection (a) of this section, that is initiated or ongoing during the period beginning on the date of the enactment of this Act and ending on the date on which the President is required to submit the report.

(ii) CERTIFICATION.—If the President submits to the appropriate congressional committees, with the report required by clause (i), a certification that there was a substantial reduction in activities described in paragraphs (2) and (3) of section 5(a) of the Iran Sanctions Act of 1996, as amended by subsection (a) of this section, during the period described in clause (i)(III), the effective date provided for in subparagraph (A) shall be delayed for a 180-day period beginning after the date provided for in that subparagraph. Time period.

(iii) SUBSEQUENT REPORTS AND DELAYS.—The effective date provided for in subparagraph (A) shall be delayed for additional 180-day periods occurring after the end of the 180-day period provided for under clause (ii), if, not later than 30 days before the 180-day period preceding such additional 180-day period expires, the President submits to the appropriate congressional committees— Time period.

(I) a report containing the matters required in the report under clause (i) for the period beginning on the date on which the preceding report was required to be submitted under clause (i) or this clause (as the case may be) and ending on the date on which the President is required to submit the most recent report under this clause; and

(II) a certification that, during the period described in subclause (I), there was (as compared to the period for which the preceding report was submitted under this subparagraph) a progressive reduction in activities described in paragraphs (2) and (3) of section 5(a) of the Iran Sanctions Act of 1996, as amended by subsection (a) of this section.

(iv) CONSEQUENCE OF FAILURE TO CERTIFY.—If the President does not make a certification at a time required by this subparagraph—

(I) the amendments made by subsection (g)(5) of this section shall apply on and after the date on which the certification was required to be submitted by this subparagraph, with respect to an activity described in paragraph (2) or (3) of section 5(a) of the Iran Sanctions Act of 1996, as amended by subsection (a) of this section, that—

(aa) is referenced in the most recent report required to be submitted under this subparagraph; or

(bb) is commenced on or after the date on which such most recent report is required to be submitted; and

(II) not later than 45 days after the date on which the certification was required to be submitted by this subparagraph, the President shall make a determination under paragraph (2) or (3) of section 5(a) of the Iran Sanctions Act of 1996 (as the case may be), as amended by subsection (a) of this section, with respect to relevant activities described in subclause (I)(aa).

Time periods.

(C) APPLICABILITY OF PERMISSIVE INVESTIGATIONS.—During the 1-year period beginning on the date of the enactment of this Act and during any 180-day period during which the effective date provided for in subparagraph (A) is delayed pursuant to subparagraph (B), section 4(e) of the Iran Sanctions Act of 1996, as amended by subsection (g)(5) of this section, shall be applied, with respect to an activity described in paragraph (2) or (3) of section 5(a) of the Iran Sanctions Act of 1996, as amended by subsection (a) of this section, by substituting "should" for "shall" each place it appears.

(6) WAIVER AUTHORITY.—The amendments made by subsection (c) shall not be construed to affect any exercise of the authority under section 9(c) of the Iran Sanctions Act of 1996, as in effect on the day before the date of the enactment of this Act.

22 USC 8512.

SEC. 103. ECONOMIC SANCTIONS RELATING TO IRAN.

Effective date. Applicability.

(a) IN GENERAL.—Notwithstanding section 101 of the Iran Freedom Support Act (Public Law 109–293; 120 Stat. 1344), and in addition to any other sanction in effect, beginning on the date that is 90 days after the date of the enactment of this Act, the economic sanctions described in subsection (b) shall apply with respect to Iran.

(b) SANCTIONS.—The sanctions described in this subsection are the following:

(1) PROHIBITION ON IMPORTS.—

(A) IN GENERAL.—Except as provided in subparagraph (B), no good or service of Iranian origin may be imported directly or indirectly into the United States.

(B) EXCEPTIONS.—The exceptions provided for in section 203(b) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)), including the exception for information and informational materials, shall apply to the prohibition in subparagraph (A) of this paragraph to the same extent that such exceptions apply to the authority provided under section 203(a) of that Act.

(2) PROHIBITION ON EXPORTS.—

(A) IN GENERAL.—Except as provided in subparagraph (B), no good, service, or technology of United States origin may be exported to Iran from the United States or by a United States person, wherever located.

(B) EXCEPTIONS.—

Applicability.

(i) PERSONAL COMMUNICATIONS; ARTICLES TO RELIEVE HUMAN SUFFERING; INFORMATION AND INFORMATIONAL MATERIALS; TRANSACTIONS INCIDENT TO TRAVEL.—The exceptions provided for in section 203(b) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)), including the exception for

information and informational materials, shall apply to the prohibition in subparagraph (A) of this paragraph to the same extent that such exceptions apply to the authority provided under section 203(a) of that Act.

(ii) FOOD; MEDICINE; HUMANITARIAN ASSISTANCE.—The prohibition in subparagraph (A) shall not apply to the exportation of—

(I) agricultural commodities, food, medicine, or medical devices; or

(II) articles exported to Iran to provide humanitarian assistance to the people of Iran.

(iii) INTERNET COMMUNICATIONS.—The prohibition in subparagraph (A) shall not apply to the exportation of—

(I) services incident to the exchange of personal communications over the Internet or software necessary to enable such services, as provided for in section 560.540 of title 31, Code of Federal Regulations (or any corresponding similar regulation or ruling);

(II) hardware necessary to enable such services; or

(III) hardware, software, or technology necessary for access to the Internet.

(iv) GOODS, SERVICES, OR TECHNOLOGIES NECESSARY TO ENSURE THE SAFE OPERATION OF COMMERCIAL AIRCRAFT.—The prohibition in subparagraph (A) shall not apply to the exportation of goods, services, or technologies necessary to ensure the safe operation of commercial aircraft produced in the United States or commercial aircraft into which aircraft components produced in the United States are incorporated, if the exportation of such goods, services, or technologies is approved by the Secretary of the Treasury, in consultation with the Secretary of Commerce, pursuant to regulations issued by the Secretary of the Treasury regarding the exportation of such goods, services, or technologies, if appropriate.

(v) GOODS, SERVICES, OR TECHNOLOGIES EXPORTED TO SUPPORT INTERNATIONAL ORGANIZATIONS.—The prohibition in subparagraph (A) shall not apply to the exportation of goods, services, or technologies that—

(I) are provided to the International Atomic Energy Agency and are necessary to support activities of that Agency in Iran; or

(II) are necessary to support activities, including the activities of nongovernmental organizations, relating to promoting democracy in Iran.

(vi) EXPORTS IN THE NATIONAL INTEREST.—The prohibition in subparagraph (A) shall not apply to the exportation of goods, services, or technologies if the President determines the exportation of such goods, services, or technologies to be in the national interest of the United States.

President. Determination.

(3) FREEZING ASSETS.—

President.

(A) IN GENERAL.—At such time as the President determines that a person in Iran, including an Iranian diplomat or representative of another government or military or quasi-governmental institution of Iran (including Iran's Revolutionary Guard Corps and its affiliates), satisfies the criteria for designation with respect to the imposition of sanctions under the authority of the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), the President shall take such action as may be necessary to freeze, as soon as possible—

(i) the funds and other assets belonging to that person; and

(ii) any funds or other assets that person transfers, on or after the date on which the President determines the person satisfies such criteria, to any family member or associate acting for or on behalf of the person.

(B) REPORTS TO THE OFFICE OF FOREIGN ASSETS CONTROL.—The action described in subparagraph (A) includes requiring any United States financial institution that holds funds or assets of a person described in that subparagraph or funds or assets that person transfers to a family member or associate described in that subparagraph to report promptly to the Office of Foreign Assets Control information regarding such funds and assets.

(C) REPORTS TO CONGRESS.—Not later than 14 days after a decision is made to freeze the funds or assets of any person under subparagraph (A), the President shall report the name of the person to the appropriate congressional committees. Such a report may contain a classified annex.

(D) TERMINATION.—The President shall release assets or funds frozen under subparagraph (A) if the person to which the assets or funds belong or the person that transfers the assets or funds as described in subparagraph (A)(ii) (as the case may be) no longer satisfies the criteria for designation with respect to the imposition of sanctions under the authority of the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.).

(E) UNITED STATES FINANCIAL INSTITUTION DEFINED.—In this paragraph, the term "United States financial institution" means a financial institution (as defined in section 14 of the Iran Sanctions Act of 1996 (Public Law 104–172; 50 U.S.C. 1701 note)) that is a United States person.

Applicability.

(c) PENALTIES.—The penalties provided for in subsections (b) and (c) of section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705) shall apply to a person that violates, attempts to violate, conspires to violate, or causes a violation of this section or regulations prescribed under this section to the same extent that such penalties apply to a person that commits an unlawful act described in section 206(a) of that Act.

(d) REGULATORY AUTHORITY.—

(1) IN GENERAL.—The President shall prescribe regulations to carry out this section, which may include regulatory exceptions to the sanctions described in subsection (b).

(2) APPLICABILITY OF CERTAIN REGULATIONS.—No exception to the prohibition under subsection (b)(1) may be made for

the commercial importation of an Iranian origin good described in section 560.534(a) of title 31, Code of Federal Regulations (as in effect on the day before the date of the enactment of this Act), unless the President—

(A) prescribes a regulation providing for such an exception on or after the date of the enactment of this Act; and

(B) submits to the appropriate congressional committees—

(i) a certification in writing that the exception is in the national interest of the United States; and Certification.

(ii) a report describing the reasons for the exception. Reports.

SEC. 104. MANDATORY SANCTIONS WITH RESPECT TO FINANCIAL INSTITUTIONS THAT ENGAGE IN CERTAIN TRANSACTIONS. 22 USC 8513.

(a) FINDINGS.—Congress makes the following findings:

(1) The Financial Action Task Force is an intergovernmental body whose purpose is to develop and promote national and international policies to combat money laundering and terrorist financing.

(2) Thirty-three countries, plus the European Commission and the Cooperation Council for the Arab States of the Gulf, belong to the Financial Action Task Force. The member countries of the Financial Action Task Force include the United States, Canada, most countries in western Europe, Russia, the People's Republic of China, Japan, South Korea, Argentina, and Brazil.

(3) In 2008 the Financial Action Task Force extended its mandate to include addressing "new and emerging threats such as proliferation financing", meaning the financing of the proliferation of weapons of mass destruction, and published "guidance papers" for members to assist them in implementing various United Nations Security Council resolutions dealing with weapons of mass destruction, including United Nations Security Council Resolutions 1737 (2006) and 1803 (2008), which deal specifically with proliferation by Iran.

(4) The Financial Action Task Force has repeatedly called on members—

(A) to advise financial institutions in their jurisdictions to give special attention to business relationships and transactions with Iran, including Iranian companies and financial institutions;

(B) to apply effective countermeasures to protect their financial sectors from risks relating to money laundering and financing of terrorism that emanate from Iran;

(C) to protect against correspondent relationships being used by Iran and Iranian companies and financial institutions to bypass or evade countermeasures and risk-mitigation practices; and

(D) to take into account risks relating to money laundering and financing of terrorism when considering requests by Iranian financial institutions to open branches and subsidiaries in their jurisdictions.

(5) At a February 2010 meeting of the Financial Action Task Force, the Task Force called on members to apply countermeasures "to protect the international financial system from

the ongoing and substantial money laundering and terrorist financing (ML/TF) risks" emanating from Iran.

(b) SENSE OF CONGRESS REGARDING THE IMPOSITION OF SANCTIONS ON THE CENTRAL BANK OF IRAN.—Congress—

(1) acknowledges the efforts of the United Nations Security Council to impose limitations on transactions involving Iranian financial institutions, including the Central Bank of Iran; and

(2) urges the President, in the strongest terms, to consider immediately using the authority of the President to impose sanctions on the Central Bank of Iran and any other Iranian financial institution engaged in proliferation activities or support of terrorist groups.

(c) PROHIBITIONS AND CONDITIONS WITH RESPECT TO CERTAIN ACCOUNTS HELD BY FOREIGN FINANCIAL INSTITUTIONS.—

Deadline. Regulations.

(1) IN GENERAL.—Not later than 90 days after the date of the enactment of this Act, the Secretary of the Treasury shall prescribe regulations to prohibit, or impose strict conditions on, the opening or maintaining in the United States of a correspondent account or a payable-through account by a foreign financial institution that the Secretary finds knowingly engages in an activity described in paragraph (2).

(2) ACTIVITIES DESCRIBED.—A foreign financial institution engages in an activity described in this paragraph if the foreign financial institution—

(A) facilitates the efforts of the Government of Iran (including efforts of Iran's Revolutionary Guard Corps or any of its agents or affiliates)—

(i) to acquire or develop weapons of mass destruction or delivery systems for weapons of mass destruction; or

(ii) to provide support for organizations designated as foreign terrorist organizations under section 219(a) of the Immigration and Nationality Act (8 U.S.C. 1189(a)) or support for acts of international terrorism (as defined in section 14 of the Iran Sanctions Act of 1996 (Public Law 104–172; 50 U.S.C. 1701 note));

(B) facilitates the activities of a person subject to financial sanctions pursuant to United Nations Security Council Resolution 1737 (2006), 1747 (2007), 1803 (2008), or 1929 (2010), or any other resolution that is agreed to by the Security Council and imposes sanctions with respect to Iran;

(C) engages in money laundering to carry out an activity described in subparagraph (A) or (B);

(D) facilitates efforts by the Central Bank of Iran or any other Iranian financial institution to carry out an activity described in subparagraph (A) or (B); or

(E) facilitates a significant transaction or transactions or provides significant financial services for—

(i) Iran's Revolutionary Guard Corps or any of its agents or affiliates whose property or interests in property are blocked pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.); or

(ii) a financial institution whose property or interests in property are blocked pursuant to that Act in connection with—

(I) Iran's proliferation of weapons of mass destruction or delivery systems for weapons of mass destruction; or

(II) Iran's support for international terrorism.

(3) PENALTIES.—The penalties provided for in subsections (b) and (c) of section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705) shall apply to a person that violates, attempts to violate, conspires to violate, or causes a violation of regulations prescribed under paragraph (1) of this subsection to the same extent that such penalties apply to a person that commits an unlawful act described in section 206(a) of that Act. Applicability.

(d) PENALTIES FOR DOMESTIC FINANCIAL INSTITUTIONS FOR ACTIONS OF PERSONS OWNED OR CONTROLLED BY SUCH FINANCIAL INSTITUTIONS.—

(1) IN GENERAL.—Not later than 90 days after the date of the enactment of this Act, the Secretary of the Treasury shall prescribe regulations to prohibit any person owned or controlled by a domestic financial institution from knowingly engaging in a transaction or transactions with or benefitting Iran's Revolutionary Guard Corps or any of its agents or affiliates whose property or interests in property are blocked pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.). Deadline. Regulations.

(2) PENALTIES.—The penalties provided for in section 206(b) of the International Emergency Economic Powers Act (50 U.S.C. 1705(b)) shall apply to a domestic financial institution to the same extent that such penalties apply to a person that commits an unlawful act described in section 206(a) of that Act if— Applicability.

(A) a person owned or controlled by the domestic financial institution violates, attempts to violate, conspires to violate, or causes a violation of regulations prescribed under paragraph (1) of this subsection; and

(B) the domestic financial institution knew or should have known that the person violated, attempted to violate, conspired to violate, or caused a violation of such regulations.

(e) REQUIREMENTS FOR FINANCIAL INSTITUTIONS MAINTAINING ACCOUNTS FOR FOREIGN FINANCIAL INSTITUTIONS.—

(1) IN GENERAL.—The Secretary of the Treasury shall prescribe regulations to require a domestic financial institution maintaining a correspondent account or payable-through account in the United States for a foreign financial institution to do one or more of the following: Regulations.

(A) Perform an audit of activities described in subsection (c)(2) that may be carried out by the foreign financial institution.

(B) Report to the Department of the Treasury with respect to transactions or other financial services provided with respect to any such activity.

(C) Certify, to the best of the knowledge of the domestic financial institution, that the foreign financial institution is not knowingly engaging in any such activity.

(D) Establish due diligence policies, procedures, and controls, such as the due diligence policies, procedures, and controls described in section 5318(i) of title 31, United States Code, reasonably designed to detect whether the

Secretary of the Treasury has found the foreign financial institution to knowingly engage in any such activity.

Applicability.

(2) PENALTIES.—The penalties provided for in sections 5321(a) and 5322 of title 31, United States Code, shall apply to a person that violates a regulation prescribed under paragraph (1) of this subsection, in the same manner and to the same extent as such penalties would apply to any person that is otherwise subject to such section 5321(a) or 5322.

Effective date.

(f) WAIVER.—The Secretary of the Treasury may waive the application of a prohibition or condition imposed with respect to a foreign financial institution pursuant to subsection (c) or the imposition of a penalty under subsection (d) with respect to a domestic financial institution on and after the date that is 30 days after the Secretary—

Determination.

(1) determines that such a waiver is necessary to the national interest of the United States; and

Reports.

(2) submits to the appropriate congressional committees a report describing the reasons for the determination.

(g) PROCEDURES FOR JUDICIAL REVIEW OF CLASSIFIED INFORMATION.—

(1) IN GENERAL.—If a finding under subsection (c)(1), a prohibition, condition, or penalty imposed as a result of any such finding, or a penalty imposed under subsection (d), is based on classified information (as defined in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.)) and a court reviews the finding or the imposition of the prohibition, condition, or penalty, the Secretary of the Treasury may submit such information to the court ex parte and in camera.

(2) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to confer or imply any right to judicial review of any finding under subsection (c)(1), any prohibition, condition, or penalty imposed as a result of any such finding, or any penalty imposed under subsection (d).

(h) CONSULTATIONS IN IMPLEMENTATION OF REGULATIONS.—In implementing this section and the regulations prescribed under this section, the Secretary of the Treasury—

(1) shall consult with the Secretary of State; and

(2) may, in the sole discretion of the Secretary of the Treasury, consult with such other agencies and departments and such other interested parties as the Secretary considers appropriate.

(i) DEFINITIONS.—

(1) IN GENERAL.—In this section:

(A) ACCOUNT; CORRESPONDENT ACCOUNT; PAYABLE-THROUGH ACCOUNT.—The terms "account", "correspondent account", and "payable-through account" have the meanings given those terms in section 5318A of title 31, United States Code.

(B) AGENT.—The term "agent" includes an entity established by a person for purposes of conducting transactions on behalf of the person in order to conceal the identity of the person.

(C) FINANCIAL INSTITUTION.—The term "financial institution" means a financial institution specified in subparagraph (A), (B), (C), (D), (E), (F), (G), (H), (I), (J), (M), or (Y) of section 5312(a)(2) of title 31, United States Code.

(D) FOREIGN FINANCIAL INSTITUTION; DOMESTIC FINANCIAL INSTITUTION.—The terms "foreign financial institution" and "domestic financial institution" shall have the meanings of those terms as determined by the Secretary of the Treasury.

(E) MONEY LAUNDERING.—The term "money laundering" means the movement of illicit cash or cash equivalent proceeds into, out of, or through a country, or into, out of, or through a financial institution.

(2) OTHER DEFINITIONS.—The Secretary of the Treasury may further define the terms used in this section in the regulations prescribed under this section.

SEC. 105. IMPOSITION OF SANCTIONS ON CERTAIN PERSONS WHO ARE RESPONSIBLE FOR OR COMPLICIT IN HUMAN RIGHTS ABUSES COMMITTED AGAINST CITIZENS OF IRAN OR THEIR FAMILY MEMBERS AFTER THE JUNE 12, 2009, ELECTIONS IN IRAN.

President.
22 USC 8514.

(a) IN GENERAL.—The President shall impose sanctions described in subsection (c) with respect to each person on the list required by subsection (b).

(b) LIST OF PERSONS WHO ARE RESPONSIBLE FOR OR COMPLICIT IN CERTAIN HUMAN RIGHTS ABUSES.—

(1) IN GENERAL.—Not later than 90 days after the date of the enactment of this Act, the President shall submit to the appropriate congressional committees a list of persons who are officials of the Government of Iran or persons acting on behalf of that Government (including members of paramilitary organizations such as Ansar-e-Hezbollah and Basij-e Mostaz'afin), that the President determines, based on credible evidence, are responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, the commission of serious human rights abuses against citizens of Iran or their family members on or after June 12, 2009, regardless of whether such abuses occurred in Iran.

Deadline.

(2) UPDATES OF LIST.—The President shall submit to the appropriate congressional committees an updated list under paragraph (1)—

(A) not later than 270 days after the date of the enactment of this Act and every 180 days thereafter; and

Deadlines.

(B) as new information becomes available.

(3) FORM OF REPORT; PUBLIC AVAILABILITY.—

(A) FORM.—The list required by paragraph (1) shall be submitted in unclassified form but may contain a classified annex.

(B) PUBLIC AVAILABILITY.—The unclassified portion of the list required by paragraph (1) shall be made available to the public and posted on the websites of the Department of the Treasury and the Department of State.

Web posting.

(4) CONSIDERATION OF DATA FROM OTHER COUNTRIES AND NONGOVERNMENTAL ORGANIZATIONS.—In preparing the list required by paragraph (1), the President shall consider credible data already obtained by other countries and nongovernmental organizations, including organizations in Iran, that monitor the human rights abuses of the Government of Iran.

(c) SANCTIONS DESCRIBED.—The sanctions described in this subsection are ineligibility for a visa to enter the United States and

sanctions pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), including blocking of property and restrictions or prohibitions on financial transactions and the exportation and importation of property, subject to such regulations as the President may prescribe, including regulatory exceptions to permit the United States to comply with the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, signed June 26, 1947, and entered into force November 21, 1947, and other applicable international obligations.

Determination. Certification.

(d) TERMINATION OF SANCTIONS.—The provisions of this section shall terminate on the date on which the President determines and certifies to the appropriate congressional committees that the Government of Iran has—

(1) unconditionally released all political prisoners, including the citizens of Iran detained in the aftermath of the June 12, 2009, presidential election in Iran;

(2) ceased its practices of violence, unlawful detention, torture, and abuse of citizens of Iran while engaging in peaceful political activity;

(3) conducted a transparent investigation into the killings, arrests, and abuse of peaceful political activists that occurred in the aftermath of the June 12, 2009, presidential election in Iran and prosecuted the individuals responsible for such killings, arrests, and abuse; and

(4) made public commitments to, and is making demonstrable progress toward—

(A) establishing an independent judiciary; and

(B) respecting the human rights and basic freedoms recognized in the Universal Declaration of Human Rights.

22 USC 8515.

SEC. 106. PROHIBITION ON PROCUREMENT CONTRACTS WITH PERSONS THAT EXPORT SENSITIVE TECHNOLOGY TO IRAN.

(a) IN GENERAL.—Except as provided in subsection (b), and pursuant to such regulations as the President may prescribe, the head of an executive agency may not enter into or renew a contract, on or after the date that is 90 days after the date of the enactment of this Act, for the procurement of goods or services with a person that exports sensitive technology to Iran.

President.

(b) AUTHORIZATION TO EXEMPT CERTAIN PRODUCTS.—The President is authorized to exempt from the prohibition under subsection (a) only eligible products, as defined in section 308(4) of the Trade Agreements Act of 1979 (19 U.S.C. 2518(4)), of any foreign country or instrumentality designated under section 301(b) of that Act (19 U.S.C. 2511(b)).

(c) SENSITIVE TECHNOLOGY DEFINED.—

(1) IN GENERAL.—The term "sensitive technology" means hardware, software, telecommunications equipment, or any other technology, that the President determines is to be used specifically—

(A) to restrict the free flow of unbiased information in Iran; or

(B) to disrupt, monitor, or otherwise restrict speech of the people of Iran.

(2) EXCEPTION.—The term "sensitive technology" does not include information or informational materials the exportation of which the President does not have the authority to regulate

or prohibit pursuant to section 203(b)(3) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)(3)).

(d) GOVERNMENT ACCOUNTABILITY OFFICE REPORT ON EFFECT OF PROCUREMENT PROHIBITION.—Not later than 1 year after the date of the enactment of this Act, the Comptroller General of the United States shall submit to the appropriate congressional committees, the Committee on Armed Services of the Senate, and the Committee on Armed Services of the House of Representatives, a report assessing the extent to which executive agencies would have entered into or renewed contracts for the procurement of goods or services with persons that export sensitive technology to Iran if the prohibition under subsection (a) were not in effect.

SEC. 107. HARMONIZATION OF CRIMINAL PENALTIES FOR VIOLATIONS OF SANCTIONS.

(a) IN GENERAL.—

(1) VIOLATIONS OF UNITED NATIONS SECURITY COUNCIL RESOLUTIONS IMPOSING SANCTIONS.—Section 5(b) of the United Nations Participation Act of 1945 (22 U.S.C. 287c(b)) is amended—

(A) by striking "find not more than $10,000" and inserting "fined not more than $1,000,000"; and

(B) by striking "ten years" and all that follows and inserting "20 years, or both.".

(2) VIOLATIONS OF CONTROLS ON EXPORTS AND IMPORTS OF DEFENSE ARTICLES AND DEFENSE SERVICES.—Section 38(c) of the Arms Export Control Act (22 U.S.C. 2778(c)) is amended by striking "ten years" and inserting "20 years".

(3) VIOLATIONS OF PROHIBITION ON TRANSACTIONS WITH COUNTRIES THAT SUPPORT ACTS OF INTERNATIONAL TERRORISM.—Section 40(j) of the Arms Export Control Act (22 U.S.C. 2780(j)) is amended by striking "10 years" and inserting "20 years".

(4) VIOLATIONS OF THE TRADING WITH THE ENEMY ACT.—Section 16(a) of the Trading with the enemy Act (50 U.S.C. App. 16(a)) is amended by striking "if a natural person" and all that follows and inserting "if a natural person, be imprisoned for not more than 20 years, or both.".

(b) STUDY BY UNITED STATES SENTENCING COMMISSION.—Not later than 1 year after the date of the enactment of this Act, the United States Sentencing Commission, pursuant to the authority under sections 994 and 995 of title 28, United States Code, and the responsibility of the United States Sentencing Commission to advise Congress on sentencing policy under section 995(a)(20) of title 28, United States Code, shall study and submit to Congress a report on the impact and advisability of imposing a mandatory minimum sentence for violations of— Deadline. Reports.

(1) section 5(a) of the United Nations Participation Act of 1945 (22 U.S.C. 287c(a));

(2) sections 38, 39, and 40 of the Arms Export Control Act (22 U.S.C. 2778, 2779, and 2780); and

(3) the Trading with the enemy Act (50 U.S.C. App. 1 et seq.).

SEC. 108. AUTHORITY TO IMPLEMENT UNITED NATIONS SECURITY COUNCIL RESOLUTIONS IMPOSING SANCTIONS WITH RESPECT TO IRAN. 22 USC 8516.

In addition to any other authority of the President with respect to implementing resolutions of the United Nations Security Council,

the President may prescribe such regulations as may be necessary to implement a resolution that is agreed to by the United Nations Security Council and imposes sanctions with respect to Iran.

22 USC 8517.

SEC. 109. INCREASED CAPACITY FOR EFFORTS TO COMBAT UNLAWFUL OR TERRORIST FINANCING.

(a) FINDINGS.—Congress finds the following:

(1) The work of the Office of Terrorism and Financial Intelligence of the Department of the Treasury, which includes the Office of Foreign Assets Control and the Financial Crimes Enforcement Network, is critical to ensuring that the international financial system is not used for purposes of supporting terrorism and developing weapons of mass destruction.

(2) The Secretary of the Treasury has designated, including most recently on June 16, 2010, various Iranian individuals and banking, military, energy, and shipping entities as proliferators of weapons of mass destruction pursuant to Executive Order 13382 (50 U.S.C. 1701 note), thereby blocking transactions subject to the jurisdiction of the United States by those individuals and entities and their supporters.

(3) The Secretary of the Treasury has also identified an array of entities in the insurance, petroleum, and petrochemicals industries that the Secretary has determined to be owned or controlled by the Government of Iran and added those entities to the list contained in Appendix A to part 560 of title 31, Code of Federal Regulations (commonly known as the "Iranian Transactions Regulations"), thereby prohibiting transactions between United States persons and those entities.

(b) AUTHORIZATION OF APPROPRIATIONS FOR OFFICE OF TERRORISM AND FINANCIAL INTELLIGENCE.—There are authorized to be appropriated to the Secretary of the Treasury for the Office of Terrorism and Financial Intelligence—

(1) $102,613,000 for fiscal year 2011; and

(2) such sums as may be necessary for each of the fiscal years 2012 and 2013.

(c) AUTHORIZATION OF APPROPRIATIONS FOR THE FINANCIAL CRIMES ENFORCEMENT NETWORK.—Section 310(d)(1) of title 31, United States Code, is amended by striking "such sums as may be necessary for fiscal years 2002, 2003, 2004, and 2005" and inserting "$100,419,000 for fiscal year 2011 and such sums as may be necessary for each of the fiscal years 2012 and 2013".

(d) AUTHORIZATION OF APPROPRIATIONS FOR BUREAU OF INDUSTRY AND SECURITY OF THE DEPARTMENT OF COMMERCE.—There are authorized to be appropriated to the Secretary of Commerce for the Bureau of Industry and Security of the Department of Commerce—

(1) $113,000,000 for fiscal year 2011; and

(2) such sums as may be necessary for each of the fiscal years 2012 and 2013.

President.
22 USC 8518.

SEC. 110. REPORTS ON INVESTMENTS IN THE ENERGY SECTOR OF IRAN.

(a) INITIAL REPORT.—

(1) IN GENERAL.—Not later than 90 days after the date of the enactment of this Act, the President shall submit to the appropriate congressional committees a report—

(A) on investments in the energy sector of Iran that were made during the period described in paragraph (2); and

(B) that contains—

(i) an estimate of the volume of energy-related resources (other than refined petroleum), including ethanol, that Iran imported during the period described in paragraph (2); and

(ii) a list of all significant known energy-related joint ventures, investments, and partnerships located outside Iran that involve Iranian entities in partnership with entities from other countries, including an identification of the entities from other countries; and

(iii) an estimate of—

(I) the total value of each such joint venture, investment, and partnership; and

(II) the percentage of each such joint venture, investment, and partnership owned by an Iranian entity.

(2) PERIOD DESCRIBED.—The period described in this paragraph is the period beginning on January 1, 2006, and ending on the date that is 60 days after the date of the enactment of this Act.

(b) UPDATED REPORTS.—Not later than 180 days after submitting the report required by subsection (a), and every 180 days thereafter, the President shall submit to the appropriate congressional committees a report containing the matters required in the report under subsection (a)(1) for the 180-day period beginning on the date that is 30 days before the date on which the preceding report was required to be submitted by this section. Time period.

SEC. 111. REPORTS ON CERTAIN ACTIVITIES OF FOREIGN EXPORT CREDIT AGENCIES AND OF THE EXPORT-IMPORT BANK OF THE UNITED STATES. 22 USC 8519.

(a) REPORT ON CERTAIN ACTIVITIES OF EXPORT CREDIT AGENCIES OF FOREIGN COUNTRIES.— President.

(1) IN GENERAL.—Not later than 90 days after the date of the enactment of this Act, the President shall submit to the appropriate congressional committees a report on any activity of an export credit agency of a foreign country that is an activity comparable to an activity described in subsection (a) or (b) of section 5 of the Iran Sanctions Act of 1996, as amended by section 102 of this Act.

(2) UPDATES.—The President shall update the report required by paragraph (1) as new information becomes available with respect to the activities of export credit agencies of foreign countries.

(b) REPORT ON CERTAIN FINANCING BY THE EXPORT-IMPORT BANK OF THE UNITED STATES.—Not later than 30 days (or, in extraordinary circumstances, not later than 15 days) before the Export-Import Bank of the United States approves cofinancing (including loans, guarantees, other credits, insurance, and reinsurance) in which an export credit agency of a foreign country identified in the report required by subsection (a) will participate, the President shall submit to the appropriate congressional committees a report identifying—

(1) the export credit agency of the foreign country; and

(2) the beneficiaries of the financing.

SEC. 112. SENSE OF CONGRESS REGARDING IRAN'S REVOLUTIONARY GUARD CORPS AND ITS AFFILIATES.

It is the sense of Congress that the United States should—

(1) persistently target Iran's Revolutionary Guard Corps and its affiliates with economic sanctions for its support for terrorism, its role in proliferation, and its oppressive activities against the people of Iran;

(2) identify, as soon as possible—

(A) any foreign individual or entity that is an agent, alias, front, instrumentality, official, or affiliate of Iran's Revolutionary Guard Corps;

(B) any individual or entity that—

(i) has provided material support to any individual or entity described in subparagraph (A); or

(ii) has conducted any financial or commercial transaction with any such individual or entity; and

(C) any foreign government that—

(i) provides material support to any such individual or entity; or

(ii) conducts any commercial transaction or financial transaction with any such individual or entity; and

(3) immediately impose sanctions, including travel restrictions, sanctions authorized pursuant to this Act or the Iran Sanctions Act of 1996, as amended by section 102 of this Act, and the full range of sanctions available to the President under the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), on the individuals, entities, and governments described in paragraph (2).

SEC. 113. SENSE OF CONGRESS REGARDING IRAN AND HEZBOLLAH.

It is the sense of Congress that the United States should—

(1) continue to counter support received by Hezbollah from the Government of Iran and other foreign governments in response to Hezbollah's terrorist activities and the threat Hezbollah poses to Israel, the democratic sovereignty of Lebanon, and the national security interests of the United States;

(2) impose the full range of sanctions available to the President under the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) on Hezbollah, affiliates and supporters of Hezbollah designated for the imposition of sanctions under that Act, and persons providing Hezbollah with commercial, financial, or other services;

(3) urge the European Union, individual countries in Europe, and other countries to classify Hezbollah as a terrorist organization to facilitate the disruption of Hezbollah's operations; and

(4) renew international efforts to disarm Hezbollah and disband its militias in Lebanon, as called for by United Nations Security Council Resolutions 1559 (2004) and 1701 (2006).

SEC. 114. SENSE OF CONGRESS REGARDING THE IMPOSITION OF MULTILATERAL SANCTIONS WITH RESPECT TO IRAN.

It is the sense of Congress that—

(1) in general, effective multilateral sanctions are preferable to unilateral sanctions in order to achieve desired results from countries such as Iran; and

(2) the President should continue to work with allies of the United States to impose such sanctions as may be necessary to prevent the Government of Iran from acquiring a nuclear weapons capability.

SEC. 115. REPORT ON PROVIDING COMPENSATION FOR VICTIMS OF INTERNATIONAL TERRORISM.

Not later than 180 days after the date of the enactment of this Act, the President shall submit to the appropriate congressional committees a report on equitable methods for providing compensation on a comprehensive basis to victims of acts of international terrorism who are citizens or residents of the United States or nationals of the United States (as defined in section 101(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)).

TITLE II—DIVESTMENT FROM CERTAIN COMPANIES THAT INVEST IN IRAN

SEC. 201. DEFINITIONS. 22 USC 8531.

In this title:

(1) ENERGY SECTOR OF IRAN.—The term "energy sector of Iran" refers to activities to develop petroleum or natural gas resources or nuclear power in Iran.

(2) FINANCIAL INSTITUTION.—The term "financial institution" has the meaning given that term in section 14 of the Iran Sanctions Act of 1996 (Public Law 104–172; 50 U.S.C. 1701 note).

(3) IRAN.—The term "Iran" includes the Government of Iran and any agency or instrumentality of Iran.

(4) PERSON.—The term "person" means—

(A) a natural person, corporation, company, business association, partnership, society, trust, or any other nongovernmental entity, organization, or group;

(B) any governmental entity or instrumentality of a government, including a multilateral development institution (as defined in section 1701(c)(3) of the International Financial Institutions Act (22 U.S.C. 262r(c)(3))); and

(C) any successor, subunit, parent entity, or subsidiary of, or any entity under common ownership or control with, any entity described in subparagraph (A) or (B).

(5) STATE.—The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the United States Virgin Islands, and any other territory or possession of the United States.

(6) STATE OR LOCAL GOVERNMENT.—The term "State or local government" includes—

(A) any State and any agency or instrumentality thereof;

(B) any local government within a State, and any agency or instrumentality thereof;

(C) any other governmental instrumentality of a State or locality; and

(D) any public institution of higher education within the meaning of the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.).

22 USC 8532.

SEC. 202. AUTHORITY OF STATE AND LOCAL GOVERNMENTS TO DIVEST FROM CERTAIN COMPANIES THAT INVEST IN IRAN.

(a) SENSE OF CONGRESS.—It is the sense of Congress that the United States should support the decision of any State or local government that for moral, prudential, or reputational reasons divests from, or prohibits the investment of assets of the State or local government in, a person that engages in investment activities in the energy sector of Iran, as long as Iran is subject to economic sanctions imposed by the United States.

(b) AUTHORITY TO DIVEST.—Notwithstanding any other provision of law, a State or local government may adopt and enforce measures that meet the requirements of subsection (d) to divest the assets of the State or local government from, or prohibit investment of the assets of the State or local government in, any person that the State or local government determines, using credible information available to the public, engages in investment activities in Iran described in subsection (c).

(c) INVESTMENT ACTIVITIES DESCRIBED.—A person engages in investment activities in Iran described in this subsection if the person—

(1) has an investment of $20,000,000 or more in the energy sector of Iran, including in a person that provides oil or liquified natural gas tankers, or products used to construct or maintain pipelines used to transport oil or liquified natural gas, for the energy sector of Iran; or

(2) is a financial institution that extends $20,000,000 or more in credit to another person, for 45 days or more, if that person will use the credit for investment in the energy sector of Iran.

(d) REQUIREMENTS.—Any measure taken by a State or local government under subsection (b) shall meet the following requirements:

(1) NOTICE.—The State or local government shall provide written notice to each person to which a measure is to be applied.

Applicability. Effective date.

(2) TIMING.—The measure shall apply to a person not earlier than the date that is 90 days after the date on which written notice is provided to the person under paragraph (1).

(3) OPPORTUNITY FOR HEARING.—The State or local government shall provide an opportunity to comment in writing to each person to which a measure is to be applied. If the person demonstrates to the State or local government that the person does not engage in investment activities in Iran described in subsection (c), the measure shall not apply to the person.

(4) SENSE OF CONGRESS ON AVOIDING ERRONEOUS TARGETING.—It is the sense of Congress that a State or local government should not adopt a measure under subsection (b) with respect to a person unless the State or local government has made every effort to avoid erroneously targeting the person and has verified that the person engages in investment activities in Iran described in subsection (c).

Deadline.

(e) NOTICE TO DEPARTMENT OF JUSTICE.—Not later than 30 days after adopting a measure pursuant to subsection (b), a State

or local government shall submit written notice to the Attorney General describing the measure.

(f) NONPREEMPTION.—A measure of a State or local government authorized under subsection (b) or (i) is not preempted by any Federal law or regulation.

(g) DEFINITIONS.—In this section:

(1) ASSETS.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the term "assets" refers to public monies and includes any pension, retirement, annuity, or endowment fund, or similar instrument, that is controlled by a State or local government.

(B) EXCEPTION.—The term "assets" does not include employee benefit plans covered by title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.).

(2) INVESTMENT.—The "investment" includes—

(A) a commitment or contribution of funds or property;

(B) a loan or other extension of credit; and

(C) the entry into or renewal of a contract for goods or services.

(h) EFFECTIVE DATE.— Applicability.

(1) IN GENERAL.—Except as provided in paragraph (2) or subsection (i), this section applies to measures adopted by a State or local government before, on, or after the date of the enactment of this Act.

(2) NOTICE REQUIREMENTS.—Except as provided in subsection (i), subsections (d) and (e) apply to measures adopted by a State or local government on or after the date of the enactment of this Act.

(i) AUTHORIZATION FOR PRIOR ENACTED MEASURES.—

(1) IN GENERAL.—Notwithstanding any other provision of this section or any other provision of law, a State or local government may enforce a measure (without regard to the requirements of subsection (d), except as provided in paragraph (2)) adopted by the State or local government before the date of the enactment of this Act that provides for the divestment of assets of the State or local government from, or prohibits the investment of the assets of the State or local government in, any person that the State or local government determines, using credible information available to the public, engages in investment activities in Iran (determined without regard to subsection (c)) or other business activities in Iran that are identified in the measure.

(2) APPLICATION OF NOTICE REQUIREMENTS.—A measure described in paragraph (1) shall be subject to the requirements of paragraphs (1) and (2) and the first sentence of paragraph (3) of subsection (d) on and after the date that is 2 years after the date of the enactment of this Act. Effective date.

SEC. 203. SAFE HARBOR FOR CHANGES OF INVESTMENT POLICIES BY ASSET MANAGERS.

(a) IN GENERAL.—Section 13(c)(1) of the Investment Company Act of 1940 (15 U.S.C. 80a–13(c)(1)) is amended to read as follows:

"(1) IN GENERAL.—Notwithstanding any other provision of Federal or State law, no person may bring any civil, criminal,

or administrative action against any registered investment company, or any employee, officer, director, or investment adviser thereof, based solely upon the investment company divesting from, or avoiding investing in, securities issued by persons that the investment company determines, using credible information available to the public—

"(A) conduct or have direct investments in business operations in Sudan described in section 3(d) of the Sudan Accountability and Divestment Act of 2007 (50 U.S.C. 1701 note); or

"(B) engage in investment activities in Iran described in section 202(c) of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010.".

Deadline. 15 USC 80a–13 note.

(b) SEC REGULATIONS.—Not later than 120 days after the date of the enactment of this Act, the Securities and Exchange Commission shall issue any revisions the Commission determines to be necessary to the regulations requiring disclosure by each registered investment company that divests itself of securities in accordance with section 13(c) of the Investment Company Act of 1940 to include divestments of securities in accordance with paragraph (1)(B) of such section, as added by subsection (a) of this section.

SEC. 204. SENSE OF CONGRESS REGARDING CERTAIN ERISA PLAN INVESTMENTS.

It is the sense of Congress that a fiduciary of an employee benefit plan, as defined in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)), may divest plan assets from, or avoid investing plan assets in, any person the fiduciary determines engages in investment activities in Iran described in section 202(c) of this Act, without breaching the responsibilities, obligations, or duties imposed upon the fiduciary by subparagraph (A) or (B) of section 404(a)(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1104(a)(1)), if—

(1) the fiduciary makes such determination using credible information that is available to the public; and

(2) the fiduciary prudently determines that the result of such divestment or avoidance of investment would not be expected to provide the employee benefit plan with—

(A) a lower rate of return than alternative investments with commensurate degrees of risk; or

(B) a higher degree of risk than alternative investments with commensurate rates of return.

SEC. 205. TECHNICAL CORRECTIONS TO SUDAN ACCOUNTABILITY AND DIVESTMENT ACT OF 2007.

(a) ERISA PLAN INVESTMENTS.—Section 5 of the Sudan Accountability and Divestment Act of 2007 (Public Law 110–174; 50 U.S.C. 1701 note) is amended—

(1) by striking "section 404 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1104)" and inserting "subparagraph (A) or (B) of section 404(a)(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1104(a)(1))"; and

(2) by striking paragraph (2) and inserting the following:

"(2) the fiduciary prudently determines that the result of such divestment or avoidance of investment would not be expected to provide the employee benefit plan with—

"(A) a lower rate of return than alternative investments with commensurate degrees of risk; or

"(B) a higher degree of risk than alternative investments with commensurate rates of return.".

(b) SAFE HARBOR FOR CHANGES OF INVESTMENT POLICIES BY ASSET MANAGERS.—

(1) IN GENERAL.—Section 13(c)(2)(A) of the Investment Company Act of 1940 (15 U.S.C. 80a–13(c)(2)(A)) is amended to read as follows:

"(A) RULE OF CONSTRUCTION.—Nothing in paragraph (1) shall be construed to create, imply, diminish, change, or affect in any way whether or not a private right of action exists under subsection (a) or any other provision of this Act.".

(2) APPLICABILITY.—The amendment made by paragraph (1) shall apply as if included in the Sudan Accountability and Divestment Act of 2007 (Public Law 110–174; 50 U.S.C. 1701 note). 15 USC 80a–13 note.

TITLE III—PREVENTION OF DIVERSION OF CERTAIN GOODS, SERVICES, AND TECHNOLOGIES TO IRAN

SEC. 301. DEFINITIONS. 15 USC 8541.

In this title:

(1) ALLOW.—The term "allow", with respect to the diversion through a country of goods, services, or technologies, means the government of the country knows or has reason to know that the territory of the country is being used for such diversion.

(2) APPROPRIATE CONGRESSIONAL COMMITTEES.—The term "appropriate congressional committees" means—

(A) the Committee on Banking, Housing, and Urban Affairs, the Committee on Foreign Relations, and the Select Committee on Intelligence of the Senate; and

(B) the Committee on Foreign Affairs and the Permanent Select Committee on Intelligence of the House of Representatives.

(3) COMMERCE CONTROL LIST.—The term "Commerce Control List" means the list maintained pursuant to part 774 of the Export Administration Regulations (or any corresponding similar regulation or ruling).

(4) DIVERT; DIVERSION.—The terms "divert" and "diversion" refer to the transfer or release, directly or indirectly, of a good, service, or technology to an end-user or an intermediary that is not an authorized recipient of the good, service, or technology.

(5) END-USER.—The term "end-user", with respect to a good, service, or technology, means the person that receives and ultimately uses the good, service, or technology.

(6) EXPORT ADMINISTRATION REGULATIONS.—The term "Export Administration Regulations" means subchapter C of chapter VII of title 15, Code of Federal Regulations (or any corresponding similar regulation or ruling).

(7) GOVERNMENT.—The term "government" includes any agency or instrumentality of a government.

(8) INTERMEDIARY.—The term "intermediary" means a person that receives a good, service, or technology while the good, service, or technology is in transit to the end-user of the good, service, or technology.

(9) INTERNATIONAL TRAFFIC IN ARMS REGULATIONS.—The term "International Traffic in Arms Regulations" means subchapter M of chapter I of title 22, Code of Federal Regulations (or any corresponding similar regulation or ruling).

(10) IRAN.—The term "Iran" includes the Government of Iran and any agency or instrumentality of Iran.

(11) IRANIAN END-USER.—The term "Iranian end-user" means an end-user that is the Government of Iran or a person in, or an agency or instrumentality of, Iran.

(12) IRANIAN INTERMEDIARY.—The term "Iranian intermediary" means an intermediary that is the Government of Iran or a person in, or an agency or instrumentality of, Iran.

(13) STATE SPONSOR OF TERRORISM.—The term "state sponsor of terrorism" means any country the government of which the Secretary of State has determined has repeatedly provided support for acts of international terrorism pursuant to—

(A) section 6(j)(1)(A) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)(1)(A)) (or any successor thereto);

(B) section 40(d) of the Arms Export Control Act (22 U.S.C. 2780(d)); or

(C) section 620A(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2371(a)).

(14) UNITED STATES MUNITIONS LIST.—The term "United States Munitions List" means the list maintained pursuant to part 121 of the International Traffic in Arms Regulations (or any corresponding similar regulation or ruling).

22 USC 8542.

SEC. 302. IDENTIFICATION OF COUNTRIES OF CONCERN WITH RESPECT TO THE DIVERSION OF CERTAIN GOODS, SERVICES, AND TECHNOLOGIES TO OR THROUGH IRAN.

Deadline. Reports.

(a) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the Director of National Intelligence shall submit to the President, the Secretary of Defense, the Secretary of Commerce, the Secretary of State, the Secretary of the Treasury, and the appropriate congressional committees a report that identifies each country the government of which the Director believes, based on all information available to the Director, is allowing the diversion through the country of goods, services, or technologies described in subsection (b) to Iranian end-users or Iranian intermediaries.

(b) GOODS, SERVICES, AND TECHNOLOGIES DESCRIBED.—Goods, services, or technologies described in this subsection are goods, services, or technologies—

(1) that—

(A) originated in the United States;

(B) would make a material contribution to Iran's—

(i) development of nuclear, chemical, or biological weapons;

(ii) ballistic missile or advanced conventional weapons capabilities; or

(iii) support for international terrorism; and

(C) are—

(i) items on the Commerce Control List or services related to those items; or

(ii) defense articles or defense services on the United States Munitions List; or

(2) that are prohibited for export to Iran under a resolution of the United Nations Security Council.

(c) UPDATES.—The Director of National Intelligence shall update the report required by subsection (a)—

(1) as new information becomes available; and

(2) not less frequently than annually.

(d) FORM.—The report required by subsection (a) and the updates required by subsection (c) may be submitted in classified form.

SEC. 303. DESTINATIONS OF DIVERSION CONCERN.

President. 22 USC 8543.

(a) DESIGNATION.—

(1) IN GENERAL.—The President shall designate a country as a Destination of Diversion Concern if the President determines that the government of the country allows substantial diversion of goods, services, or technologies described in section 302(b) through the country to Iranian end-users or Iranian intermediaries.

(2) DETERMINATION OF SUBSTANTIAL.—For purposes of paragraph (1), the President shall determine whether the government of a country allows substantial diversion of goods, services, or technologies described in section 302(b) through the country to Iranian end-users or Iranian intermediaries based on criteria that include—

(A) the volume of such goods, services, and technologies that are diverted through the country to such end-users or intermediaries;

(B) the inadequacy of the export controls of the country;

(C) the unwillingness or demonstrated inability of the government of the country to control the diversion of such goods, services, and technologies to such end-users or intermediaries; and

(D) the unwillingness or inability of the government of the country to cooperate with the United States in efforts to interdict the diversion of such goods, services, or technologies to such end-users or intermediaries.

(b) REPORT ON DESIGNATION.—Upon designating a country as a Destination of Diversion Concern under subsection (a), the President shall submit to the appropriate congressional committees a report—

(1) notifying those committees of the designation of the country; and

(2) containing a list of the goods, services, and technologies described in section 302(b) that the President determines are diverted through the country to Iranian end-users or Iranian intermediaries.

(c) LICENSING REQUIREMENT.—Not later than 45 days after submitting a report required by subsection (b) with respect to a country designated as a Destination of Diversion Concern under subsection (a), the President shall require a license under the Export Administration Regulations or the International Traffic in Arms Regulations (whichever is applicable) to export to that country

Deadline.

a good, service, or technology on the list required under subsection (b)(2), with the presumption that any application for such a license will be denied.

(d) DELAY OF IMPOSITION OF LICENSING REQUIREMENT.—

Time period. Determination.

(1) IN GENERAL.—The President may delay the imposition of the licensing requirement under subsection (c) with respect to a country designated as a Destination of Diversion Concern under subsection (a) for a 12-month period if the President—

(A) determines that the government of the country is taking steps—

(i) to institute an export control system or strengthen the export control system of the country;

(ii) to interdict the diversion of goods, services, or technologies described in section 302(b) through the country to Iranian end-users or Iranian intermediaries; and

(iii) to comply with and enforce United Nations Security Council Resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), and 1929 (2010), and any other resolution that is agreed to by the Security Council and imposes sanctions with respect to Iran;

(B) determines that it is appropriate to carry out government-to-government activities to strengthen the export control system of the country; and

Reports.

(C) submits to the appropriate congressional committees a report describing the steps specified in subparagraph (A) being taken by the government of the country.

(2) ADDITIONAL 12-MONTH PERIODS.—The President may delay the imposition of the licensing requirement under subsection (c) with respect to a country designated as a Destination of Diversion Concern under subsection (a) for additional 12-month periods after the 12-month period referred to in paragraph (1) if the President, for each such 12-month period—

(A) makes the determinations described in subparagraphs (A) and (B) of paragraph (1) with respect to the country; and

(B) submits to the appropriate congressional committees an updated version of the report required by subparagraph (C) of paragraph (1).

Determination.

(3) STRENGTHENING EXPORT CONTROL SYSTEMS.—If the President determines under paragraph (1)(B) that is it appropriate to carry out government-to-government activities to strengthen the export control system of a country designated as a Destination of Diversion Concern under subsection (a), the United States shall initiate government-to-government activities that may include—

(A) cooperation by agencies and departments of the United States with counterpart agencies and departments in the country—

(i) to develop or strengthen the export control system of the country;

(ii) to strengthen cooperation among agencies of the country and with the United States and facilitate enforcement of the export control system of the country; and

(iii) to promote information and data exchanges among agencies of the country and with the United States;

(B) training officials of the country to strengthen the export control systems of the country—

(i) to facilitate legitimate trade in goods, services, and technologies; and

(ii) to prevent terrorists and state sponsors of terrorism, including Iran, from obtaining nuclear, biological, and chemical weapons, defense technologies, components for improvised explosive devices, and other defense articles; and

(C) encouraging the government of the country to participate in the Proliferation Security Initiative, such as by entering into a ship boarding agreement pursuant to the Initiative.

(e) TERMINATION OF DESIGNATION.—The designation of a country as a Destination of Diversion Concern under subsection (a) shall terminate on the date on which the President determines, and certifies to the appropriate congressional committees, that the country has adequately strengthened the export control system of the country to prevent the diversion of goods, services, and technologies described in section 302(b) to Iranian end-users or Iranian intermediaries. Determination. Certification.

(f) FORM OF REPORTS.—A report required by subsection (b) or (d) may be submitted in classified form.

SEC. 304. REPORT ON EXPANDING DIVERSION CONCERN SYSTEM TO ADDRESS THE DIVERSION OF UNITED STATES ORIGIN GOODS, SERVICES, AND TECHNOLOGIES TO CERTAIN COUNTRIES OTHER THAN IRAN.

(a) IN GENERAL.—Not later than 1 year after the date of the enactment of this Act, the President shall submit to the appropriate congressional committees a report that— President.

(1) identifies any country that the President determines is allowing the diversion, in violation of United States law, of items on the Commerce Control List or services related to those items, or defense articles or defense services on the United States Munitions List, that originated in the United States to another country if such other country— Determination.

(A) is seeking to obtain nuclear, biological, or chemical weapons, or ballistic missiles; or

(B) provides support for acts of international terrorism; and

(2) assesses the feasability and advisability of expanding the system established under section 303 for designating countries as Destinations of Diversion Concern to include countries identified under paragraph (1).

(b) FORM.—The report required by subsection (a) may be submitted in classified form.

SEC. 305. ENFORCEMENT AUTHORITY. 22 USC 8544.

The Secretary of Commerce may designate any employee of the Office of Export Enforcement of the Department of Commerce to conduct activities specified in clauses (i), (ii), and (iii) of section 12(a)(3)(B) of the Export Administration Act of 1979 (50 U.S.C. App. 2411(a)(3)(B)) when the employee is carrying out activities to enforce—

(1) the provisions of the Export Administration Act of 1979 (50 U.S.C. App. 2401 et seq.) (as in effect pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.));

(2) the provisions of this title, or any other provision of law relating to export controls, with respect to which the Secretary of Commerce has enforcement responsibility; or

(3) any license, order, or regulation issued under—

(A) the Export Administration Act of 1979 (50 U.S.C. App. 2401 et seq.) (as in effect pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.)); or

(B) a provision of law referred to in paragraph (2).

TITLE IV—GENERAL PROVISIONS

22 USC 8551.

SEC. 401. GENERAL PROVISIONS.

President. Certification.

(a) SUNSET.—The provisions of this Act (other than sections 105 and 305 and the amendments made by sections 102, 107, 109, and 205) shall terminate, and section 13(c)(1)(B) of the Investment Company Act of 1940, as added by section 203(a), shall cease to be effective, on the date that is 30 days after the date on which the President certifies to Congress that—

(1) the Government of Iran has ceased providing support for acts of international terrorism and no longer satisfies the requirements for designation as a state sponsor of terrorism (as defined in section 301) under—

(A) section 6(j)(1)(A) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)(1)(A)) (or any successor thereto);

(B) section 40(d) of the Arms Export Control Act (22 U.S.C. 2780(d)); or

(C) section 620A(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2371(a)); and

(2) Iran has ceased the pursuit, acquisition, and development of nuclear, biological, and chemical weapons and ballistic missiles and ballistic missile launch technology.

(b) PRESIDENTIAL WAIVERS.—

Determination.

(1) IN GENERAL.—The President may waive the application of sanctions under section 103(b), the requirement to impose or maintain sanctions with respect to a person under section 105(a), the requirement to include a person on the list required by section 105(b), the application of the prohibition under section 106(a), or the imposition of the licensing requirement under section 303(c) with respect to a country designated as a Destination of Diversion Concern under section 303(a), if the President determines that such a waiver is in the national interest of the United States.

(2) REPORTS.—

(A) IN GENERAL.—If the President waives the application of a provision pursuant to paragraph (1), the President shall submit to the appropriate congressional committees a report describing the reasons for the waiver.

(B) SPECIAL RULE FOR REPORT ON WAIVING IMPOSITION OF LICENSING REQUIREMENT UNDER SECTION 303(c).—In any case in which the President waives, pursuant to paragraph

(1), the imposition of the licensing requirement under section 303(c) with respect to a country designated as a Destination of Diversion Concern under section 303(a), the President shall include in the report required by subparagraph (A) of this paragraph an assessment of whether the government of the country is taking the steps described in subparagraph (A) of section 303(d)(1).

(c) AUTHORIZATIONS OF APPROPRIATIONS.—

(1) AUTHORIZATION OF APPROPRIATIONS FOR THE DEPARTMENT OF STATE AND THE DEPARTMENT OF THE TREASURY.—There are authorized to be appropriated to the Secretary of State and to the Secretary of the Treasury such sums as may be necessary to implement the provisions of, and amendments made by, titles I and III of this Act.

(2) AUTHORIZATION OF APPROPRIATIONS FOR THE DEPARTMENT OF COMMERCE.—There are authorized to be appropriated to the Secretary of Commerce such sums as may be necessary to carry out title III.

SEC. 402. DETERMINATION OF BUDGETARY EFFECTS.

The budgetary effects of this Act, for the purpose of complying with the Statutory Pay-As-You-Go-Act of 2010, shall be determined by reference to the latest statement titled "Budgetary Effects of PAYGO Legislation" for this Act, jointly submitted for printing in the Congressional Record by the Chairmen of the House and Senate Budget Committees, provided that such statement has been submitted prior to the vote on passage in the House acting first on this conference report or amendment between the Houses.

Approved July 1, 2010.

LEGISLATIVE HISTORY—H.R. 2194:

HOUSE REPORTS: Nos. 111–342, Pt. 1 (Comm. on Foreign Affairs) and 111–512 (Comm. of Conference).

CONGRESSIONAL RECORD:

Vol. 155 (2009): Dec. 15, considered and passed House.

Vol. 156 (2010): Mar. 11, considered and passed Senate, amended.

June 24, Senate and House agreed to conference report.

DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS (2010):

July 1, Presidential remarks.

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United Nations S/RES/1989 (2011)*

Security Council

Distr.: General
17 June 2011

Resolution 1989 (2011)

Adopted by the Security Council at its 6557th meeting, on 17 June 2011

The Security Council,

Recalling its resolutions 1267 (1999), 1333 (2000), 1363 (2001), 1373 (2001), 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004), 1566 (2004), 1617 (2005), 1624 (2005), 1699 (2006), 1730 (2006), 1735 (2006), 1822 (2008), 1904 (2009) and 1988 (2011), and the relevant statements of its President,

Reaffirming that terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed, and *reiterating* its unequivocal condemnation of Al-Qaida and other individuals, groups, undertakings and entities associated with it, for ongoing and multiple criminal terrorist acts aimed at causing the deaths of innocent civilians and other victims, destruction of property and greatly undermining stability,

Reaffirming that terrorism cannot and should not be associated with any religion, nationality or civilization,

Recalling the Presidential Statement of the Security Council (S/PRST/2011/9) of 2 May 2011 which notes that Usama bin Laden will no longer be able to perpetrate acts of terrorism,

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations and international law, including applicable international human rights, refugee and humanitarian law, threats to international peace and security caused by terrorist acts, stressing in this regard the important role the United Nations plays in leading and coordinating this effort,

Expressing concern at the increase in incidents of kidnapping and hostage-taking by terrorist groups with the aim of raising funds, or gaining political concessions, and *expressing* the need for this issue to be addressed,

Stressing that terrorism can only be defeated by a sustained and comprehensive approach involving the active participation and collaboration of all States, and

* Reissued for technical reasons on 1 July 2011.

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international and regional organizations to impede, impair, isolate and incapacitate the terrorist threat,

Emphasizing that sanctions are an important tool under the Charter of the United Nations in the maintenance and restoration of international peace and security, and stressing in this regard the need for robust implementation of the measures in paragraph 1 of this resolution as a significant tool in combating terrorist activity,

Urging all Member States to participate actively in maintaining and updating the list created pursuant to resolutions 1267 (1999) and 1333 (2000) ("the Consolidated List") by contributing additional information pertinent to current listings, submitting delisting requests when appropriate, and by identifying and nominating for listing additional individuals, groups, undertakings and entities which should be subject to the measures referred to in paragraph 1 of this resolution,

Reminding the Committee established pursuant to resolution 1267 (1999) ("the Committee") to remove expeditiously and on a case-by-case basis individuals and entities that no longer meet the criteria for listing outlined in this resolution,

Recognizing the challenges, both legal and otherwise, to the measures implemented by Member States under paragraph 1 of this resolution, *welcoming* improvements to the Committee's procedures and the quality of the Consolidated List, and *expressing* its intent to continue efforts to ensure that procedures are fair and clear,

Welcoming in particular the successful completion of the review of all names on the Consolidated List pursuant to paragraph 25 of resolution 1822 (2008) and the significant progress made to enhance the integrity of the Consolidated List,

Welcoming the establishment of the Office of the Ombudsperson pursuant to resolution 1904 (2009) and the role it has performed since its establishment, *noting* the Ombudsperson's important role in improving fairness and transparency, *recalling* the Security Council's firm commitment to ensuring that the Office of the Ombudsperson is able to continue to carry out its role effectively, in accordance with its mandate, and *recalling also* the Presidential Statement of the Security Council (S/PRST/2011/5) of 28 February 2011,

Reiterating that the measures referred to in paragraph 1 of this resolution are preventative in nature and are not reliant upon criminal standards set out under national law,

Welcoming the second review in September 2010 by the General Assembly of the United Nations Global Counter-Terrorism Strategy (A/RES/60/288) of 8 September 2006 and the creation of the Counter-Terrorism Implementation Task Force (CTITF) to ensure overall coordination and coherence in the counter-terrorism efforts of the United Nations system,

Welcoming the continuing cooperation between the Committee and INTERPOL, the United Nations Office on Drugs and Crime, in particular on technical assistance and capacity building, and all other UN bodies, and *encouraging* further engagement with the CTITF to ensure overall coordination and coherence in the counter-terrorism efforts of the UN system,

Recognizing the need to take measures to prevent and suppress the financing of terrorism and terrorist organizations, including from the proceeds of organized crime, inter alia, the illicit production and trafficking of drugs and their chemical precursors, and the importance of continued international cooperation to that aim,

Noting with concern the continued threat posed to international peace and security by Al-Qaida and other individuals, groups, undertakings and entities associated with it, *reaffirming* its resolve to address all aspects of that threat, and *considering* the 1267 Committee's deliberations on the recommendation of the 1267 Monitoring Team in its Eleventh Report to the 1267 Committee that Member States treat listed Taliban and listed individuals and entities of Al-Qaida and its affiliates differently,

Noting that, in some instances, certain individuals, groups, undertakings and entities that meet the criteria for listing set forth in paragraph 3 of resolution 1988 (2011) may also meet the criteria for listing set forth in paragraph 4 of this resolution,

Acting under Chapter VII of the Charter of the United Nations,

Measures

1. *Decides* that all States shall take the measures as previously imposed by paragraph 8 (c) of resolution 1333 (2000), and paragraphs 1 and 2 of resolution 1390 (2002), with respect to Al-Qaida and other individuals, groups, undertakings and entities associated with them, including those referred to in section C ("Individuals associated with Al-Qaida") and section D ("Entities and other groups and undertakings associated with Al-Qaida") of the Consolidated List established pursuant to resolutions 1267 (1999) and 1333 (2000), as well as those designated after the date of adoption of this resolution, which shall henceforth be known as the Al-Qaida Sanctions List"):

(a) Freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly for such persons' benefit, by their nationals or by persons within their territory;

(b) Prevent the entry into or transit through their territories of these individuals, provided that nothing in this paragraph shall oblige any State to deny entry or require the departure from its territories of its own nationals and this paragraph shall not apply where entry or transit is necessary for the fulfilment of a judicial process or the Committee determines on a case-by-case basis only that entry or transit is justified;

(c) Prevent the direct or indirect supply, sale, or transfer to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical advice, assistance or training related to military activities;

2. *Notes* that, pursuant to resolution 1988 (2011), the Taliban, and other individuals, groups, undertakings and entities associated with them, as previously included in section A ("Individuals associated with the Taliban) and section B ("Entities and other groups and undertaking associated with the Taliban") of the Consolidated List established pursuant to resolutions 1267 (1999) and 1333 (2000) are not governed by this resolution and *decides* that henceforth the Al-Qaida Sanctions List shall include only the names of those individuals, groups, undertakings and entities associated with Al-Qaida;

3. *Directs* the Committee to transmit to the Committee established pursuant to resolution 1988 (2011) all listing submissions, delisting requests and proposed updates to the existing information relevant to section A ("Individuals associated with the Taliban") and section B ("entities and other groups and undertakings associated with the Taliban") of the Consolidated List that were pending before the Committee as of the date of adoption of this resolution, so that the Committee established pursuant to resolution 1988 (2011) can consider those matters in accordance with resolution 1988 (2011);

4. *Reaffirms* that acts or activities indicating that an individual, group, undertaking or entity is associated with Al-Qaida include:

(a) participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;

(b) supplying, selling or transferring arms and related materiel to;

(c) recruiting for; or otherwise supporting acts or activities of Al-Qaida or any cell, affiliate, splinter group or derivative thereof;

5. *Further reaffirms* that any undertaking or entity owned or controlled, directly or indirectly, by, or otherwise supporting, such an individual, group, undertaking or entity associated with Al-Qaida shall be eligible for designation;

6. *Confirms* that the requirements in paragraph 1 (a) above apply to financial and economic resources of every kind, including but not limited to those used for the provision of Internet hosting or related services, used for the support of Al-Qaida and other individuals, groups, undertakings or entities associated with it;

7. *Notes* that such means of financing or support include but are not limited to the use of proceeds derived from crime, including the illicit cultivation, production and trafficking of narcotic drugs and their precursors;

8. *Confirms* further that the requirements in paragraph 1 (a) above shall also apply to the payment of ransoms to individuals, groups, undertakings or entities on the Al-Qaida Sanctions List;

9. *Decides* that Member States may permit the addition to accounts frozen pursuant to the provisions of paragraph 1 above of any payment in favour of listed individuals, groups, undertakings or entities, provided that any such payments continue to be subject to the provisions in paragraph 1 above and are frozen;

10. *Encourages* Member States to make use of the provisions regarding available exemptions to the measures in paragraph 1 (a) above, set out in paragraphs 1 and 2 of resolution 1452 (2002), as amended by resolution 1735 (2006), and *directs* the Committee to review the procedures for exemptions as set out in the Committee's

guidelines to facilitate their use by Member States and to continue to ensure that exemptions are granted expeditiously and transparently;

11. *Directs* the Committee to cooperate with other relevant Security Council Sanctions Committees, in particular that established pursuant to resolution 1988 (2011);

Listing

12. *Encourages* all Member States to submit to the Committee for inclusion on the Al-Qaida Sanctions List names of individuals, groups, undertakings and entities participating, by any means, in the financing or support of acts or activities of Al-Qaida, and other individuals, groups, undertakings and entities associated with it, as described in paragraph 2 of resolution 1617 (2005) and reaffirmed in paragraph 4 above;

13. *Reaffirms* that, when proposing names to the Committee for inclusion on the Al-Qaida Sanctions List, Member States shall act in accordance with paragraph 5 of resolution 1735 (2006) and paragraph 12 of resolution 1822 (2008), and provide a detailed statement of case, and *decides further* that the statement of case shall be releasable, upon request, except for the parts a Member State identifies as being confidential to the Committee, and may be used to develop the narrative summary of reasons for listing described in paragraph 16 below;

14. *Decides* that Member States proposing a new designation, as well as Member States that have proposed names for inclusion on the Al-Qaida Sanctions List before the adoption of this resolution, shall specify whether the Committee, or the Ombudsperson, or the Secretariat or Monitoring Team on the Committee's behalf, may make known the Member State's status as a designating State; and *strongly encourages* designating States to respond positively to such a request;

15. *Decides* that Member States, when proposing names to the Committee for inclusion on the Al-Qaida Sanctions List shall use the standard form for listing, and provide the Committee with as much relevant information as possible on the proposed name, in particular sufficient identifying information to allow for the accurate and positive identification of individuals, groups, undertakings and entities, and to the extent possible, the information required by Interpol to issue a Special Notice, and *directs* the Committee to update, as necessary, the standard form for listing in accordance with the provisions of this resolution; and *further directs* the Monitoring Team to report to the Committee on further steps that could be taken to improve identifying information;

16. *Welcomes* efforts by the Committee, with the assistance of the Monitoring Team and in coordination with the relevant designating States, to make accessible on the Committee's website, at the same time a name is added to the Al-Qaida Sanctions List, a narrative summary of reasons for listing for the corresponding entry, and *directs* the Committee, with the assistance of the Monitoring Team and in coordination with the relevant designating States, to continue its efforts to make accessible on the Committee's website narrative summaries of reasons for all listings;

17. *Encourages* Member States and relevant international organizations and bodies to inform the Committee of any relevant court decisions and proceedings so

that the Committee can consider them when it reviews a corresponding listing or updates a narrative summary of reasons for listing;

18. *Calls upon* all members of the Committee and the Monitoring Team to share with the Committee any information they may have available regarding a listing request from a Member State so that this information may help inform the Committee's decision on designation and provide additional material for the narrative summary of reasons for listing described in paragraph 16;

19. *Reaffirms* that the Secretariat shall, after publication but within 3 working days after a name is added to the Al-Qaida Sanctions List, notify the Permanent Mission of the country or countries where the individual or entity is believed to be located and, in the case of individuals, the country of which the person is a national (to the extent this information is known), in accordance with paragraph 10 of resolution 1735 (2006), *requests* the Secretariat to publish on the Committee's website all relevant publicly releasable information, including the narrative summary of reasons for listing, immediately after a name is added to the Al-Qaida Sanctions List, and *highlights* the importance of making the narrative summary of reasons for listing available in all official languages of the United Nations in a timely manner;

20. *Reaffirms* further the provisions in paragraph 17 of resolution 1822 (2008) regarding the requirement that Member States take all possible measures, in accordance with their domestic laws and practices, to notify or inform in a timely manner the listed individual or entity of the designation and to include with this notification the narrative summary of reasons for listing, a description of the effects of designation, as provided in the relevant resolutions, the Committee's procedures for considering delisting requests, including the possibility of submitting such a request to the Ombudsperson in accordance with paragraph 21 and Annex II of this resolution, and the provisions of resolution 1452 (2002) regarding available exemptions;

Delisting/Ombudsperson

21. *Decides* to extend the mandate of the Office of the Ombudsperson, established by resolution 1904 (2009), as reflected in the procedures outlined in Annex II of this resolution, for a period of 18 months from the date of adoption of this resolution, *decides* that the Ombudsperson shall continue to receive requests from individuals, groups, undertakings or entities seeking to be removed from the Al-Qaida Sanctions List in an independent and impartial manner and shall neither seek nor receive instructions from any government, and *decides* that the Ombudsperson shall present to the Committee observations and a recommendation on the delisting of those individuals, groups, undertakings or entities that have requested removal from the Al-Qaida Sanctions List through the Office of the Ombudsperson, either a recommendation to retain the listing or a recommendation that the Committee consider delisting;

22. *Decides* that the requirement for States to take the measures described in paragraph 1 of this resolution shall remain in place with respect to that individual, group, undertaking or entity, where the Ombudsperson recommends retaining the listing in the Comprehensive Report of the Ombudsperson on a delisting request pursuant to annex II;

23. *Decides* that the requirement for States to take the measures described in paragraph 1 of this resolution shall terminate with respect to that individual, group, undertaking or entity 60 days after the Committee completes consideration of a Comprehensive Report of the Ombudsperson, in accordance with annex II of this resolution, including paragraph 6 (h) thereof, where the Ombudsperson recommends that the Committee consider delisting, unless the Committee decides by consensus before the end of that 60 day period that the requirement shall remain in place with respect to that individual, group, undertaking or entity; *provided* that, in cases where consensus does not exist, the Chair shall, on the request of a Committee Member, submit the question of whether to delist that individual, group, undertaking or entity to the Security Council for a decision within a period of 60 days; and *provided further* that, in the event of such a request, the requirement for States to take the measures described in paragraph 1 of this resolution shall remain in force for that period with respect to that individual, group, undertaking or entity until the question is decided by the Security Council;

24. *Requests* the Secretary General to strengthen the capacity of the Office of the Ombudsperson to ensure its continued ability to carry out its mandate in an effective and timely manner;

25. *Strongly urges* Member States to provide all relevant information to the Ombudsperson, including providing any relevant confidential information, where appropriate, and *confirms* that the Ombudsperson must comply with any confidentiality restrictions that are placed on such information by Member States providing it;

26. *Requests* that Member States and relevant international organizations and bodies encourage individuals and entities that are considering challenging or are already in the process of challenging their listing through national and regional courts to seek removal from the Al-Qaida Sanctions List by submitting delisting petitions to the Office of the Ombudsperson;

27. *Decides* that when the designating State submits a delisting request, the requirement for States to take the measures described in paragraph 1 of this resolution shall terminate with respect to that individual, group, undertaking or entity after 60 days unless the Committee decides by consensus before the end of that 60 day period that the measures shall remain in place with respect to that individual, group, undertaking or entity; *provided* that, in cases where consensus does not exist, the Chair shall, on the request of a Committee Member, submit the question of whether to delist that individual, group, undertaking or entity to the Security Council for a decision within a period of 60 days; and *provided further* that, in the event of such a request, the requirement for States to take the measures described in paragraph 1 of this resolution shall remain in force for that period with respect to that individual, group, undertaking or entity until the question is decided by the Security Council;

28. *Decides* that, for purposes of submitting a delisting request in paragraph 27, consensus must exist between or among all designating States in cases where there are multiple designating States; and *decides further* that co-sponsors of listing requests shall not be considered designating States for purposes of paragraph 27;

29. *Strongly urges* designating States to allow the Ombudsperson to reveal their identities as designating States, to those listed individuals and entities that have submitted delisting petitions to the Ombudsperson;

30. *Directs* the Committee to continue to work, in accordance with its guidelines, to consider delisting requests of Member States for the removal from the Al-Qaida Sanctions List of individuals, groups, undertakings and entities that are alleged to no longer meet the criteria established in the relevant resolutions, and set out in paragraph 4 of the present resolution, which shall be placed on the Committee's agenda upon request of a member of the Committee, and *encourages* Member States to provide reasons for submitting their delisting requests;

31. *Encourages* States to submit delisting requests for individuals that are officially confirmed to be dead, particularly where no assets are identified, and for entities reported or confirmed to have ceased to exist, while at the same time taking all reasonable measures to ensure that the assets that had belonged to these individuals or entities have not been or will not be transferred or distributed to other individuals, groups, undertakings and entities on the Al-Qaida Sanctions List;

32. *Encourages* Member States, when unfreezing the assets of a deceased individual or an entity that is reported or confirmed to have ceased to exist as a result of a delisting, to recall the obligations set forth in resolution 1373 (2001) and, particularly, to prevent unfrozen assets from being used for terrorist purposes;

33. *Calls upon* the Committee when considering delisting requests to give due consideration to the opinions of designating State(s), State(s) of residence, nationality, location or incorporation, and other relevant States as determined by the Committee, *directs* Committee members to provide their reasons for objecting to delisting requests at the time the request is objected to, and *calls upon* the Committee to share its reasons with relevant Member States and national and regional courts and bodies, where appropriate;

34. *Encourages* all Member States, including designating States and States of residence and nationality, to provide all information to the Committee relevant to the Committee's review of delisting petitions, and to meet with the Committee, if requested, to convey their views on delisting requests, and further *encourages* the Committee, where appropriate, to meet with representatives of national or regional organizations and bodies that have relevant information on delisting petitions;

35. *Confirms* that the Secretariat shall, within 3 days after a name is removed from the Al-Qaida Sanctions List, notify the Permanent Mission of the State(s) of residence, nationality, location or incorporation (to the extent this information is known), and *decides* that States receiving such notification shall take measures, in accordance with their domestic laws and practices, to notify or inform the concerned individual or entity of the delisting in a timely manner;

Review and maintenance of the Al-Qaida Sanctions List

36. *Encourages* all Member States, in particular designating States and States of residence or nationality, to submit to the Committee additional identifying and other information, along with supporting documentation, on listed individuals, groups, undertakings and entities, including updates on the operating status of listed entities, groups and undertakings, the movement, incarceration or death of listed individuals and other significant events, as such information becomes available;

37. *Requests* the Monitoring Team to circulate to the Committee every six months a list of individuals and entities on the Al-Qaida Sanctions List whose entries lack identifiers necessary to ensure effective implementation of the measures imposed upon them, and *directs* the Committee to review these listings to decide whether they remain appropriate;

38. *Reaffirms* that the Monitoring Team should circulate to the Committee every six months a list of individuals on the Al-Qaida Sanctions List who are reportedly deceased, along with an assessment of relevant information such as the certification of death, and to the extent possible, the status and location of frozen assets and the names of any individuals or entities who would be in a position to receive any unfrozen assets, *directs* the Committee to review these listings to decide whether they remain appropriate, and *calls upon* the Committee to remove listings of deceased individuals, where credible information regarding death is available;

39. *Reaffirms* that the Monitoring Team should circulate to the Committee every six months a list of entities on the Al-Qaida Sanctions List that are reported or confirmed to have ceased to exist, along with an assessment of any relevant information, *directs* the Committee to review these listings to decide whether they remain appropriate, and *calls upon* the Committee to remove such listings where credible information is available;

40. *Further directs* the Committee, in light of the completion of the review described in paragraph 25 of resolution 1822 (2008), to conduct an annual review of all names on the Al-Qaida Sanctions List that have not been reviewed in three or more years ("the triennial review"), in which the relevant names are circulated to the designating States and States of residence, nationality, location or incorporation, where known, pursuant to the procedures set forth in the Committee guidelines, to ensure the Al-Qaida Sanctions List is as updated and accurate as possible through identifying listings that no longer remain appropriate and confirming listings that remain appropriate, and *notes* that the Committee's consideration of a delisting request after the date of adoption of this resolution, pursuant to the procedures set out in Annex II of this resolution, should be considered equivalent to a review conducted pursuant to paragraph 26 of resolution 1822 (2008);

Measures implementation

41. *Reiterates* the importance of all States identifying, and if necessary introducing, adequate procedures to implement fully all aspects of the measures described in paragraph 1 above; and recalling paragraph 7 of resolution 1617 (2005), strongly *urges* all Member States to implement the comprehensive international standards embodied in the Financial Action Task Force's (FATF) Forty Recommendations on Money Laundering and the FATF Nine Special Recommendations on Terrorist Financing, and *encourages* Member States to utilize the guidance provided by Special Recommendation III for effective implementation of targeted counter-terrorism sanctions;

42. *Directs* the Committee to continue to ensure that fair and clear procedures exist for placing individuals and entities on the Al-Qaida List and for removing them as well as for granting exemptions per resolution 1452 (2002), and *directs* the Committee to keep its guidelines under active review in support of these objectives;

43. *Directs* the Committee, as a matter of priority, to review its guidelines with respect to the provisions of this resolution, in particular paragraphs 10, 12, 14, 15, 17, 21, 23, 27, 28, 30, 33, 37, and 40;

44. *Encourages* Member States, including through their permanent missions, and relevant international organizations to meet the Committee for in-depth discussion on any relevant issues;

45. *Requests* the Committee to report to the Council on its findings regarding Member States' implementation efforts, and identify and recommend steps necessary to improve implementation;

46. *Directs* the Committee to identify possible cases of non-compliance with the measures pursuant to paragraph 1 above and to determine the appropriate course of action on each case, and *requests* the Chair, in periodic reports to the Council pursuant to paragraph 55 below, to provide progress reports on the Committee's work on this issue;

47. *Urges* all Member States, in their implementation of the measures set out in paragraph 1 above, to ensure that fraudulent, counterfeit, stolen and lost passports and other travel documents are invalidated and removed from circulation, in accordance with domestic laws and practices, as soon as possible, and to share information on those documents with other Member States through the INTERPOL database;

48. *Encourages* Member States to share, in accordance with their domestic laws and practices, with the private sector information in their national databases related to fraudulent, counterfeit, stolen and lost identity or travel documents pertaining to their own jurisdictions, and, if a listed party is found to be using a false identity including to secure credit or fraudulent travel documents, to provide the Committee with information in this regard;

49. *Confirms* that no matter should be left pending before the Committee for a period longer than six months, unless the Committee determines on a case-by-case basis that extraordinary circumstances require additional time for consideration, in accordance with the Committee's guidelines;

50. *Encourages* designating States to inform the Monitoring Team whether a national court or other legal authority has reviewed an individual's case and whether any judicial proceedings have begun, and to include any other relevant information when it submits its standard form for listing;

51. *Requests* the Committee to facilitate, through the Monitoring Team or specialized UN agencies, assistance on capacity building for enhancing implementation of the measures, upon request by Member States;

Coordination and outreach

52. *Reiterates* the need to enhance ongoing cooperation among the Committee, the Counter-Terrorism Committee (CTC) and the Committee established pursuant to resolution 1540 (2004), as well as their respective groups of experts, including through, as appropriate, enhanced information-sharing, coordination on visits to countries within their respective mandates, on facilitating and monitoring technical assistance, on relations with international and regional organizations and agencies and on other issues of relevance to all three committees, *expresses its*

intention to provide guidance to the committees on areas of common interest in order better to coordinate their efforts and facilitate such cooperation, and *requests* the Secretary-General to make the necessary arrangements for the groups to be co-located as soon as possible;

53. *Encourages* the Monitoring Team and the United Nations Office on Drugs and Crime, to continue their joint activities, in cooperation with CTED and 1540 Committee experts to assist Member States in their efforts to comply with their obligations under the relevant resolutions, including through organizing regional and subregional workshops;

54. *Requests* the Committee to consider, where and when appropriate, visits to selected countries by the Chair and/or Committee members to enhance the full and effective implementation of the measures referred to in paragraph 1 above, with a view to encouraging States to comply fully with this resolution and resolutions 1267 (1999), 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008) and 1904 (2009);

55. *Requests* the Committee to report orally, through its Chair, at least every 180 days to the Council on the state of the overall work of the Committee and the Monitoring Team, and, as appropriate, in conjunction with the reports by the Chairs of CTC and the Committee established pursuant to resolution 1540 (2004), and *further requests* the Chair to hold periodic briefings for all interested Member States;

Monitoring Team

56. *Decides*, in order to assist the Committee in fulfilling its mandate, as well as to support the Ombudsperson, to extend the mandate of the current New York-based Monitoring Team and its members, established pursuant to paragraph 7 of resolution 1526 (2004), for a further period of 18 months, under the direction of the Committee with the responsibilities outlined in annex I, and requests the Secretary-General to make the necessary arrangements to this effect;

57. *Directs* the Monitoring Team to review the Committee's procedures for granting exemptions pursuant to resolution 1452 (2002), and to provide recommendations for how the Committee can improve the process for granting such exemptions;

58. *Directs* the Monitoring Team to keep the Committee informed of instances of non-compliance with the measures imposed in this resolution, and further *directs* the Monitoring Team to provide recommendations to the Committee on actions taken to respond to non-compliance;

Reviews

59. *Decides* to review the measures described in paragraph 1 above with a view to their possible further strengthening in 18 months, or sooner if necessary;

60. *Decides* to remain actively seized of the matter.

Annex I

In accordance with paragraph 56 of this resolution, the Monitoring Team shall operate under the direction of the Committee and shall have the following responsibilities:

(a) To submit, in writing, two comprehensive, independent reports to the Committee, one by 31 March 2012, and the second by 31 October 2012, on implementation by Member States of the measures referred to in paragraph 1 of this resolution, including specific recommendations for improved implementation of the measures and possible new measures;

(b) To assist the Ombudsperson in carrying out his or her mandate as specified in Annex II of this resolution;

(c) To assist the Committee in regularly reviewing names on the Al-Qaida Sanctions List, including by undertaking travel and contact with Member States, with a view to developing the Committee's record of the facts and circumstances relating to a listing;

(d) To analyse reports submitted pursuant to paragraph 6 of resolution 1455 (2003), the checklists submitted pursuant to paragraph 10 of resolution 1617 (2005), and other information submitted by Member States to the Committee, as instructed by the Committee;

(e) To assist the Committee in following up on requests to Member States for information, including with respect to implementation of the measures referred to in paragraph 1 of this resolution;

(f) To submit a comprehensive program of work to the Committee for its review and approval, as necessary, in which the Monitoring Team should detail the activities envisaged in order to fulfil its responsibilities, including proposed travel, based on close coordination with CTED and the 1540 Committee's group of experts to avoid duplication and reinforce synergies;

(g) To work closely and share information with CTED and the 1540 Committee's group of experts to identify areas of convergence and overlap and to help facilitate concrete coordination, including in the area of reporting, among the three Committees;

(h) To participate actively in and support all relevant activities under the United Nations Global Counter-Terrorism Strategy including within the Counter-Terrorism Implementation Task Force, established to ensure overall coordination and coherence in the counter-terrorism efforts of the United Nations system, in particular through its relevant working groups;

(i) To assist the Committee with its analysis of non-compliance with the measures referred to in paragraph 1 of this resolution by collating information collected from Member States and submitting case studies, both on its own initiative and upon the Committee's request, to the Committee for its review;

(j) To present to the Committee recommendations, which could be used by Member States to assist them with the implementation of the measures referred to in paragraph 1 of this resolution and in preparing proposed additions to the Al-Qaida Sanctions List;

(k) To assist the Committee in its consideration of proposals for listing, including by compiling and circulating to the Committee information relevant to the proposed listing, and preparing a draft narrative summary referred to in paragraph 16;

(l) To bring to the Committee's attention new or noteworthy circumstances that may warrant a delisting, such as publicly-reported information on a deceased individual;

(m) To consult with Member States in advance of travel to selected Member States, based on its program of work as approved by the Committee;

(n) To coordinate and cooperate with the national counter-terrorism focal point or similar coordinating body in the country of visit, where appropriate;

(o) To encourage Member States to submit names and additional identifying information for inclusion on the Al-Qaida Sanctions List, as instructed by the Committee;

(p) To present to the Committee additional identifying and other information to assist the Committee in its efforts to keep the Al-Qaida Sanctions List as updated and accurate as possible;

(q) To study and report to the Committee on the changing nature of the threat of Al-Qaida and the best measures to confront it, including by developing a dialogue with relevant scholars and academic bodies, in consultation with the Committee;

(r) To collate, assess, monitor and report on and make recommendations regarding implementation of the measures, including implementation of the measure in paragraph 1 (a) of this resolution as it pertains to preventing the criminal misuse of the Internet by Al-Qaida, and other individuals, groups, undertakings and entities associated with it; to pursue case studies, as appropriate; and to explore in depth any other relevant issues as directed by the Committee;

(s) To consult with Member States and other relevant organizations, including regular dialogue with representatives in New York and in capitals, taking into account their comments, especially regarding any issues that might be contained in the Monitoring Team's reports referred to in paragraph (a) of this annex;

(t) To consult with Member States' intelligence and security services, including through regional forums, in order to facilitate the sharing of information and to strengthen enforcement of the measures;

(u) To consult with relevant representatives of the private sector, including financial institutions, to learn about the practical implementation of the assets freeze and to develop recommendations for the strengthening of that measure;

(v) To work with relevant international and regional organizations in order to promote awareness of, and compliance with, the measures;

(w) To assist the Committee in facilitating assistance on capacity building for enhancing implementation of the measures, upon request by Member States;

(x) To work with INTERPOL and Member States to obtain photographs of listed individuals for possible inclusion in INTERPOL Special Notices;

(y) To assist other subsidiary bodies of the Security Council, and their expert panels, upon request, with enhancing their cooperation with INTERPOL, referred to in resolution 1699 (2006);

(z) To report to the Committee, on a regular basis or when the Committee so requests, through oral and/or written briefings on the work of the Monitoring Team, including its visits to Member States and its activities;

(aa) To submit to the Committee within 90 days a written report and recommendations on linkages between Al-Qaida and those individuals, groups, undertakings or entities eligible for designation under paragraph 1 of resolution 1988 (2011), with a particular focus on entries that appear on both the Al-Qaida Sanctions List and the 1988 List, and thereafter submit such a report and recommendations periodically; and

(bb) Any other responsibility identified by the Committee.

Annex II

In accordance with paragraph 21 of this resolution, the Office of the Ombudsperson shall be authorized to carry out the following tasks upon receipt of a delisting request submitted by, or on behalf of, an individual, group, undertaking or entity on the Al-Qaida Sanctions List or by the legal representative or estate of such individual, group, undertaking or entity ("the petitioner").

The Council recalls that Member States are not permitted to submit delisting petitions on behalf of an individual, group, undertaking or entity to the Office of the Ombudsperson.

Information gathering (four months)

1. Upon receipt of a delisting request, the Ombudsperson shall:

(a) Acknowledge to the petitioner the receipt of the delisting request;

(b) Inform the petitioner of the general procedure for processing delisting requests;

(c) Answer specific questions from the petitioner about Committee procedures;

(d) Inform the petitioner in case the petition fails to properly address the original designation criteria, as set forth in paragraph 4 of this resolution, and return it to the petitioner for his or her consideration; and,

(e) Verify if the request is a new request or a repeated request and, if it is a repeated request to the Ombudsperson and it does not contain any additional information, return it to the petitioner for his or her consideration.

2. For delisting petitions not returned to the petitioner, the Ombudsperson shall immediately forward the delisting request to the members of the Committee, designating State(s), State(s) of residence and nationality or incorporation, relevant UN bodies, and any other States deemed relevant by the Ombudsperson. The Ombudsperson shall ask these States or relevant UN bodies to provide, within four months, any appropriate additional information relevant to the delisting request. The Ombudsperson may engage in dialogue with these States to determine:

(a) These States' opinions on whether the delisting request should be granted; and

(b) Information, questions or requests for clarifications that these States would like to be communicated to the petitioner regarding the delisting request, including any information or steps that might be taken by a petitioner to clarify the delisting request.

3. The Ombudsperson shall also immediately forward the delisting request to the Monitoring Team, which shall provide to the Ombudsperson, within four months:

(a) All information available to the Monitoring Team that is relevant to the delisting request, including court decisions and proceedings, news reports, and information that States or relevant international organizations have previously shared with the Committee or the Monitoring Team;

(b) Fact-based assessments of the information provided by the petitioner that is relevant to the delisting request; and

(c) Questions or requests for clarifications that the Monitoring Team would like asked of the petitioner regarding the delisting request.

4. At the end of this four-month period of information gathering, the Ombudsperson shall present a written update to the Committee on progress to date, including details regarding which States have supplied information. The Ombudsperson may extend this period once for up to two months if he or she assesses that more time is required for information gathering, giving due consideration to requests by Member States for additional time to provide information.

Dialogue (two months)

5. Upon completion of the information gathering period, the Ombudsperson shall facilitate a two-month period of engagement, which may include dialogue with the petitioner. Giving due consideration to requests for additional time, the Ombudsperson may extend this period once for up to two months if he or she assesses that more time is required for engagement and the drafting of the Comprehensive Report described in paragraph 7 below. The Ombudsperson may shorten this time period if he or she assesses less time is required.

6. During this period of engagement, the Ombudsperson:

(a) May ask the petitioner questions or request additional information or clarifications that may help the Committee's consideration of the request, including any questions or information requests received from relevant States, the Committee and the Monitoring Team;

(b) Should request from the petitioner a signed statement in which the petitioner declares that they have no ongoing association with Al-Qaida, or any cell, affiliate, splinter group, or derivative thereof, and undertakes not to associate with Al-Qaida in the future;

(c) Should meet with the petitioner, to the extent possible;

(d) Shall forward replies from the petitioner back to relevant States, the Committee and the Monitoring Team and follow up with the petitioner in connection with incomplete responses by the petitioner;

(e) Shall coordinate with States, the Committee and the Monitoring Team regarding any further inquiries of, or response to, the petitioner;

(f) During the information gathering or dialogue phase, the Ombudsperson may share with relevant States information provided by a State, including that State's position on the delisting request, if the State which provided the information consents;

(g) In the course of the information gathering and dialogue phases and in the preparation of the report, the Ombudsperson shall not disclose any information shared by a state on a confidential basis, without the express written consent of that state; and,

(h) During the dialogue phase, the Ombudsperson shall give serious consideration to the opinions of designating states, as well as other Member States that come forward with relevant information, in particular those Member States most affected by acts or associations that led to the original designation.

7. Upon completion of the period of engagement described above, the Ombudsperson, with the help of the Monitoring Team, shall draft and circulate to the Committee a Comprehensive Report that will exclusively:

(a) Summarize and, as appropriate, specify the sources of, all information available to the Ombudsperson that is relevant to the delisting request. The report shall respect confidential elements of Member States' communications with the Ombudsperson;

(b) Describe the Ombudsperson's activities with respect to this delisting request, including dialogue with the petitioner; and

(c) Based on an analysis of all the information available to the Ombudsperson and the Ombudsperson's recommendation, lay out for the Committee the principal arguments concerning the delisting request.

Committee discussion

8. After the Committee has had 15 days to review the Comprehensive Report in all official languages of the United Nations, the Chair of the Committee shall place the delisting request on the Committee's agenda for consideration.

9. When the Committee considers the delisting request, the Ombudsperson, aided by the Monitoring Team, as appropriate, shall present the Comprehensive Report in person and answer Committee members' questions regarding the request.

10. Committee consideration of the Comprehensive Report shall be completed no later than 30 days from the date the Comprehensive Report is submitted to the Committee for its review.

11. In cases where the Ombudsperson recommends retaining the listing, the requirement for States to take the measures in paragraph 1 of this resolution shall remain in place with respect to that individual, group, undertaking or entity, unless a Committee member submits a delisting request, which the Committee shall consider under its normal consensus procedures.

12. In cases where the Ombudsperson recommends that the Committee consider delisting, the requirement for States to take the measures described in paragraph 1 of this resolution shall terminate with respect to that individual, group, undertaking or entity 60 days after the Committee completes consideration of a Comprehensive Report of the Ombudsperson, in accordance with this annex II, including paragraph 6 (h), unless the Committee decides by consensus before the end of that 60 day period that the requirement shall remain in place with respect to that individual, group, undertaking or entity; *provided* that, in cases where consensus does not exist, the Chair shall, on the request of a Committee Member, submit the question of whether to delist that individual, group, undertaking or entity to the Security Council for a decision within a period of 60 days; and *provided further* that, in the event of such a request, the requirement for States to take the measures described in paragraph 1 of this resolution shall remain in force for that period with

respect to that individual, group, undertaking or entity until the question is decided by the Security Council.

13. If the Committee decides to reject the delisting request, then the Committee shall convey to the Ombudsperson its decision, setting out its reasons, and including any further relevant information about the Committee's decision, and an updated narrative summary of reasons for listing.

14. After the Committee has informed the Ombudsperson that the Committee has rejected a delisting request, then the Ombudsperson shall send to the petitioner, with an advance copy sent to the Committee, within fifteen days a letter that:

(a) Communicates the Committee's decision for continued listing;

(b) Describes, to the extent possible and drawing upon the Ombudsperson's Comprehensive Report, the process and publicly releasable factual information gathered by the Ombudsperson; and

(c) Forwards from the Committee all information about the decision provided to the Ombudsperson pursuant to paragraph 13 above.

15. In all communications with the petitioner, the Ombudsperson shall respect the confidentiality of Committee deliberations and confidential communications between the Ombudsperson and Member States.

Other Office of the Ombudsperson Tasks

16. In addition to the tasks specified above, the Ombudsperson shall:

(a) Distribute publicly releasable information about Committee procedures, including Committee Guidelines, fact sheets and other Committee-prepared documents;

(b) Where address is known, notify individuals or entities about the status of their listing, after the Secretariat has officially notified the Permanent Mission of the State or States, pursuant to paragraph 19 of this resolution; and

(c) Submit biannual reports summarizing the activities of the Ombudsperson to the Security Council.

United Nations S/RES/1807 (2008)

Security Council

Distr.: General
31 March 2008

Resolution 1807 (2008)

Adopted by the Security Council at its 5861st meeting, on 31 March 2008

The Security Council,

Recalling its previous resolutions, in particular resolution 1794 (2007), and the statements by its President concerning the Democratic Republic of the Congo,

Reaffirming its commitment to the sovereignty, territorial integrity and political independence of the Democratic Republic of the Congo as well as all States in the region,

Reiterating its serious concern regarding the presence of armed groups and militias in the Eastern part of the Democratic Republic of the Congo, particularly in the provinces of North and South Kivu and the Ituri district, which perpetuate a climate of insecurity in the whole region,

Stressing the primary responsibility of the Government of the Democratic Republic of the Congo for ensuring security in its territory and protecting its civilians with respect for the rule of law, human rights and international humanitarian law,

Recalling the joint communiqué of the Government of the Democratic Republic of Congo and the Government of the Republic of Rwanda signed in Nairobi on 9 November 2007 and the outcome of the Conference for Peace, Security and Development in North and South Kivu, held in Goma from 6 to 23 January 2008, which together represent a major step towards the restoration of lasting peace and stability in the Great Lakes region, and *looking forward* to their full implementation,

Recalling its resolution 1804 (2008) and its demand that the Rwandan armed groups operating in the eastern Democratic Republic of the Congo lay down their arms without any further delay or preconditions,

Reiterating the importance of urgently carrying out security sector reform and of disarming, demobilizing, repatriating, resettling and reintegrating, as appropriate, Congolese and foreign armed groups for the long-term stabilization of the Democratic Republic of the Congo, and *welcoming* in this regard the round table on the reform of the security sector that was held on 24 and 25 February 2008 in Kinshasa,

08-28863 (E)

Taking note of the final report (S/2008/43) of the Group of Experts on the Democratic Republic of the Congo established pursuant to resolution 1771 (2007) ("the Group of Experts") and of its recommendations,

Condemning the continuing illicit flow of weapons within and into the Democratic Republic of the Congo, *declaring* its determination to continue to monitor closely the implementation of the arms embargo and other measures set out by its resolutions concerning the Democratic Republic of the Congo,

Stressing that improved exchange of information between the Committee established pursuant to resolution 1533 (2004) ("the Committee"), the Group of Experts, the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), other United Nations offices and missions in the region, within their respective mandates, and the Governments of the region can contribute to the prevention of arms shipments to non-governmental entities and individuals subject to the arms embargo,

Recognizing the linkage between the illegal exploitation of natural resources, illicit trade in such resources and the proliferation and trafficking of arms as one of the factors fuelling and exacerbating conflicts in the Great Lakes region of Africa,

Recalling its resolution 1612 (2005) and its previous resolutions on children and armed conflict, and *strongly condemning* the continued recruitment, targeting and use of children in violation of applicable international law, in the hostilities in the Democratic Republic of the Congo,

Recalling its resolution 1325 (2000) on women, peace and security, and *strongly condemning* the continuing violence, in particular sexual violence directed against women in the Democratic Republic of the Congo,

Calling on the donor community to continue to provide urgent assistance needed for the reform of the administration of justice in the Democratic Republic of the Congo,

Recalling the measures on arms imposed by paragraph 20 of resolution 1493, as amended and expanded by paragraph 1 of resolution 1596,

Recalling the measures on transport imposed by paragraphs 6, 7 and 10 of resolution 1596,

Recalling the financial and travel measures imposed by paragraphs 13 and 15 of resolution 1596, paragraph 2 of resolution 1649, and paragraph 13 of resolution 1698,

Determining that the situation in the Democratic Republic of the Congo continues to constitute a threat to international peace and security in the region,

Acting under Chapter VII of the Charter of the United Nations,

A

1. *Decides*, for a further period ending on 31 December 2008, that all States shall take the necessary measures to prevent the direct or indirect supply, sale or transfer, from their territories or by their nationals, or using their flag vessels or aircraft, of arms and any related materiel, and the provision of any assistance, advice or training related to military activities, including financing and financial

assistance, to all non-governmental entities and individuals operating in the territory of the Democratic Republic of the Congo;

2. *Decides* that the measures on arms, previously imposed by paragraph 20 of resolution 1493 and paragraph 1 of resolution 1596, as renewed in paragraph 1 above, shall no longer apply to the supply, sale or transfer of arms and related materiel, and the provision of any assistance, advice or training related to military activities to the Government of the Democratic Republic of the Congo;

3. *Decides* that the measures in paragraph 1 above shall not apply to:

(a) Supplies of arms and related materiel as well as technical training and assistance intended solely for support of or use by the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC);

(b) Protective clothing, including flack jackets and military helmets, temporarily exported to the Democratic Republic of the Congo by United Nations personnel, representatives of the media and humanitarian and development workers and associated personnel, for their personal use only;

(c) Other supplies of non-lethal military equipment intended solely for humanitarian or protective use, and related technical assistance and training, as notified in advance to the Committee in accordance with paragraph 5 below;

4. *Decides* to terminate the obligations set out in paragraph 4 of resolution 1596 and paragraph 4 of resolution 1771;

5. *Decides*, for the period referred to in paragraph 1 above, that all States shall notify in advance to the Committee any shipment of arms and related materiel for the Democratic Republic of the Congo, or any provision of assistance, advice or training related to military activities in the Democratic Republic of the Congo, except those referred to in subparagraphs (a) and (b) of paragraph 3 above, and *stresses* the importance that such notifications contain all relevant information, including, where appropriate, the end-user, the proposed date of delivery and the itinerary of shipments;

B

6. *Decides* that, for a further period ending on the date referred to in paragraph 1 above, all governments in the region, and in particular those of the Democratic Republic of the Congo and of States bordering Ituri and the Kivus, shall take the necessary measures:

(a) To ensure that aircraft operate in the region in accordance with the Convention on International Civil Aviation, signed in Chicago on 7 December 1944, in particular by verifying the validity of documents carried in aircraft and the licenses of pilots;

(b) To prohibit immediately in their respective territories operation of any aircraft inconsistent with the conditions in that Convention or the standards established by the International Civil Aviation Organisation, in particular with respect to the use of falsified or out-of-date documents, to notify the Committee of the measures they take in this regard;

(c) To ensure that all civilian and military airports or airfields on their respective territories will not be used for a purpose inconsistent with the measures imposed by paragraph 1 above;

7. *Recalls* that, pursuant to paragraph 7 of resolution 1596, each government in the region, in particular those of States bordering Ituri and the Kivus, as well as that of the Democratic Republic of the Congo, must maintain a registry for review by the Committee and the Group of Experts of all information concerning flights originating in their respective territories en route to destinations in the Democratic Republic of the Congo, as well as flights originating in the Democratic Republic of the Congo en route to destinations in their respective territories;

8. *Decides* that, for a further period ending on the date referred to in paragraph 1 above, the government of the Democratic Republic of the Congo on the one hand, and those of States bordering Ituri and the Kivus on the other hand, shall take the necessary measures:

(a) To strengthen, as far as each of them is concerned, customs controls on the borders between Ituri or the Kivus and the neighbouring States;

(b) To ensure that all means of transport on their respective territories will not be used in violation of the measures taken by Member States in accordance with paragraph 1 above, and notify the Committee of such actions;

C

9. *Decides* that, during the period of enforcement of the measures referred to in paragraph 1 above, all States shall take the necessary measures to prevent the entry into or transit through their territories of all persons designated by the Committee pursuant to paragraph 13 below, provided that nothing in this paragraph shall obligate a State to refuse entry into its territory to its own nationals;

10. *Decides* that the measures imposed by paragraph 9 above shall not apply:

(a) Where the Committee determines in advance and on a case-by-case basis that such travel is justified on the grounds of humanitarian need, including religious obligation;

(b) Where the Committee concludes that an exemption would further the objectives of the Council's resolutions, that is peace and national reconciliation in the Democratic Republic of the Congo and stability in the region;

(c) Where the Committee authorises in advance, and on a case by case basis, the transit of individuals returning to the territory of the State of their nationality, or participating in efforts to bring to justice perpetrators of grave violations of human rights or international humanitarian law;

11. *Decides* that all States shall, during the period of enforcement of the measures referred to in paragraph 1 above, immediately freeze the funds, other financial assets and economic resources which are on their territories from the date of adoption of this resolution, which are owned or controlled, directly or indirectly, by persons or entities designated by the Committee pursuant to paragraph 13 below, or that are held by entities owned or controlled, directly or indirectly, by them or by any persons or entities acting on their behalf or at their direction, as designated by the Committee, and *decides further* that all States shall ensure that no funds,

financial assets or economic resources are made available by their nationals or by any persons within their territories, to or for the benefit of such persons or entities;

12. *Decides* that the provisions of paragraph 11 above do not apply to funds, other financial assets and economic resources that:

(a) Have been determined by relevant States to be necessary for basic expenses, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges, or for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services, or fees or service charges, in accordance with national laws, for routine holding or maintenance of frozen funds, other financial assets and economic resources, after notification by the relevant States to the Committee of the intention to authorize, where appropriate, access to such funds, other financial assets and economic resources and in the absence of a negative decision by the Committee within four working days of such notification;

(b) Have been determined by relevant States to be necessary for extraordinary expenses, provided that such determination has been notified by the relevant States to the Committee and has been approved by the Committee; or

(c) Have been determined by relevant States to be the subject of a judicial, administrative or arbitration lien or judgement, in which case the funds, other financial assets and economic resources may be used to satisfy that lien or judgement provided that the lien or judgement was entered prior to the date of the present resolution, is not for the benefit of a person or entity designated by the Committee pursuant to paragraph 13 below, and has been notified by the relevant States to the Committee;

13. *Decides* that the provisions of paragraphs 9 and 11 above shall apply to the following individuals and, as appropriate, entities, as designated by the Committee:

(a) Persons or entities acting in violation of the measures taken by Member States in accordance with paragraph 1 above;

(b) Political and military leaders of foreign armed groups operating in the Democratic Republic of the Congo who impede the disarmament and the voluntary repatriation or resettlement of combatants belonging to those groups;

(c) Political and military leaders of Congolese militias receiving support from outside the Democratic Republic of the Congo, who impede the participation of their combatants in disarmament, demobilization and reintegration processes;

(d) Political and military leaders operating in the Democratic Republic of the Congo and recruiting or using children in armed conflicts in violation of applicable international law;

(e) Individuals operating in the Democratic Republic of the Congo and committing serious violations of international law involving the targeting of children or women in situations of armed conflict, including killing and maiming, sexual violence, abduction and forced displacement;

14. *Decides*, for a further period ending on the date referred to in paragraph 1 above, that the measures in paragraphs 9 and 11 above shall continue to apply to individuals and entities already designated pursuant to paragraphs 13 and 15 of

resolution 1596, paragraph 2 of resolution 1649, and paragraph 13 of resolution 1698, unless the Committee decides otherwise;

D

15. *Decides* that the Committee shall, from the adoption of this resolution, have the following mandate:

(a) To seek from all States, and particularly those in the region, information regarding the actions taken by them to implement effectively the measures imposed by paragraphs 1, 6, 8, 9 and 11 above and to comply with paragraphs 18 and 24 of resolution 1493, and thereafter to request from them whatever further information it may consider useful, including by providing States with an opportunity, at the Committee's request, to send representatives to meet with the Committee for more in-depth discussion of relevant issues;

(b) To examine, and to take appropriate action on, information concerning alleged violations of the measures imposed by paragraph 1 above and information on alleged arms flows highlighted in the reports of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo, identifying where possible individual and entities reported to be engaged in such violations, as well as aircraft or other vehicles used;

(c) To present regular reports to the Council on its work, with its observations and recommendations, in particular on the ways to strengthen the effectiveness of the measures imposed by paragraph 1 above;

(d) To receive notifications in advance from States made under paragraph 5 above, to inform MONUC and the Government of the Democratic Republic of the Congo of every notification received, and to consult with the Government of the Democratic Republic of the Congo and/or the notifying State, if appropriate, to verify that such shipments are in conformity with the measures set forth in paragraph 1 above, and to decide, if need be, upon any action to be taken;

(e) To designate, pursuant to paragraph 13 above, persons and entities as subject to the measures set forth in paragraphs 9 and 11 above, including aircraft and airlines in light of paragraphs 5 and 7 above, and regularly to update its list,

(f) To call upon all States concerned, and particularly those in the region, to provide the Committee with information regarding the actions taken by them to investigate and prosecute as appropriate individuals and entities designated by the Committee pursuant to subparagraph (e) above,

(g) To consider and decide on requests for the exemptions set out in paragraphs 10 and 12 above,

(h) To promulgate guidelines as may be necessary to facilitate the implementation of paragraphs 1, 6, 8, 9 and 11 above;

16. *Calls upon* all States, in particular those in the region, to support the implementation of the arms embargo and to cooperate fully with the Committee in carrying out its mandate;

E

17. *Requests* the Secretary-General to extend, for a period expiring on 31 December 2008, the Group of Experts established pursuant to resolution 1771;

18. *Requests* the Group of Experts to fulfil the following mandate:

(a) To examine and analyse information gathered by MONUC in the context of its monitoring mandate and share with MONUC, as appropriate, information that might be of use in the fulfilment of the Mission's monitoring mandate;

(b) To gather and analyse all relevant information in the Democratic Republic of the Congo, countries of the region and, as necessary, in other countries, in cooperation with the governments of those countries, on flows of arms and related materiel, as well as networks operating in violation of the measures imposed by paragraph 1 above;

(c) To consider and recommend, where appropriate, ways of improving the capabilities of States interested, in particular those of the region, to ensure the measures imposed by paragraph 1 above are effectively implemented;

(d) To update the Committee on its work as appropriate and report to the Council in writing, through the Committee, by 15 August 2008 and again before 15 November 2008, on the implementation of the measures set forth in paragraphs 1, 6, 8, 9 and 11 above, with recommendations in this regard, including information on the sources of financing, such as from natural resources, which are funding the illicit trade of arms;

(e) To keep the Committee frequently updated on its activities;

(f) To provide the Committee in its reports with a list, with supporting evidence, of those found to have violated the measures imposed by paragraph 1 above, and those found to have supported them in such activities for possible future measures by the Council;

(g) Within its capabilities and without prejudice to the execution of the other tasks in its mandate, to assist the Committee in the designation of the individuals referred to in subparagraphs (b) to (e) of paragraph 13 above, by making known without delay to the Committee any useful information;

19. *Requests* MONUC, within its existing capabilities and without prejudice to the performance of its current mandate, and the Group of Experts to continue to focus their monitoring activities in North and South Kivu and in Ituri;

20. *Requests* the Government of the Democratic Republic of the Congo, other Governments in the region as appropriate, MONUC and the Group of Experts to cooperate intensively, including by exchanging information regarding the arms shipment with a view to facilitating the effective implementation of the arms embargo on non-governmental entities and individuals, regarding the illegal trafficking in natural resources and regarding activities of individuals and entities designated by the Committee pursuant to paragraph 13 above;

21. *Reiterates* its demand, expressed in paragraph 19 of resolution 1596, that all parties and all States, particularly those in the region, cooperate fully with the work of the Group of Experts, and that they ensure:

– The safety of its members;

– Unhindered and immediate access, in particular to persons, documents and sites the Group of Experts deems relevant to the execution of its mandate;

F

22. *Decides* that, when appropriate and no later than 31 December 2008, it shall review the measures set forth in this resolution, with a view to adjusting them, as appropriate, in the light of consolidation of the security situation in the Democratic Republic of the Congo, in particular progress in security sector reform including the integration of the armed forces and the reform of the national police, and in disarming, demobilizing, repatriating, resettling and reintegrating, as appropriate, Congolese and foreign armed groups;

23. *Decides* to remain actively seized of the matter.

United Nations S/RES/2293 (2016)*

Security Council

Distr.: General
23 June 2016

Resolution 2293 (2016)

Adopted by the Security Council at its 7724th meeting, on 23 June 2016

The Security Council,

Recalling its previous resolutions and the statements of its President concerning the Democratic Republic of the Congo (DRC),

Reaffirming its strong commitment to the sovereignty, independence, unity and territorial integrity of the DRC as well as all States in the region and emphasizing the need to respect fully the principles of non-interference, good neighbourliness and regional cooperation,

Stressing the primary responsibility of the Government of the DRC for ensuring security in its territory and protecting its populations with respect for the rule of law, human rights and international humanitarian law,

Taking note of the interim report (S/2015/797) and the final report (S/2016/466) of the Group of Experts on the DRC ("the Group of Experts") established pursuant to resolution 1533 (2004) and extended pursuant to resolutions 1807 (2008), 1857 (2008), 1896 (2009), 1952 (2010), 2021 (2011), 2078 (2012), 2136 (2014) and 2198 (2015), *noting* the finding that the linkage between armed groups, criminal networks and illegal exploitation of natural resources contributes to the insecurity in eastern DRC, and *taking note* of their recommendations,

Recalling the strategic importance of the implementation of the Peace, Security and Cooperation (PSC) Framework for the DRC and the region, and *reiterating* its call to all signatories to fulfil promptly, fully and in good faith their respective commitments under this agreement in order to address the root causes of conflict and put an end to recurring cycles of violence,

Recalling the commitments under the PSC Framework by all States of the region not to interfere in the internal affairs of neighbouring countries, and to neither tolerate nor provide assistance or support of any kind to armed groups, and *reiterating* its strong condemnation of any and all internal or external support to armed groups active in the region, including through financial, logistical or military support,

* Reissued for technical reasons on 24 June 2016.

16-10629* (E)

Reiterating its deep concern regarding the security and humanitarian crisis in eastern DRC due to ongoing military activities of foreign and domestic armed groups and the smuggling of Congolese natural resources, in particular gold and ivory, *stressing* the importance of neutralizing all armed groups, including the Democratic Forces for the Liberation of Rwanda (FDLR), the Allied Democratic Forces (ADF), the Lord's Resistance Army (LRA), and all other armed groups in the DRC, in line with resolution 2277 (2016),

Reiterating that the durable neutralization of the FDLR remains essential in bringing stability to and protecting civilians of the DRC and the Great Lakes region, *recalling* that the FDLR is a group under United Nations sanctions whose leaders and members include perpetrators of the 1994 genocide against the Tutsi in Rwanda, during which Hutu and others who opposed the genocide were also killed, and have continued to promote and commit ethnically based and other killings in Rwanda and in the DRC, *noting* the reported military operations undertaken by the Congolese Armed Forces (FARDC) in 2015 and 2016 which have resulted in some destabilization of the FDLR, *expressing concern* that these operations have been carried out simultaneously with Congolese Mai Mai groups, *welcoming* the initial resumption of cooperation of the FARDC with the United Nations Organization Stabilization Mission in the DRC (MONUSCO), and *calling for* the full resumption of cooperation and joint operations, in accordance with MONUSCO's mandate,

Condemning the brutal killings of more than 500 civilians in the Beni area since October 2014, *expressing deep concern* regarding the continued threat posed by armed groups, in particular the ADF, and the persistence of violence in this region, *further expressing concern* at reports of collaboration between elements of the FARDC and armed groups at a local level, in particular recent reports of individual officers of the FARDC playing a role in the insecurity in the region of Beni, *calling* for investigations in order to ensure that those responsible are held to account, *noting* the commitment expressed by the Government of the DRC in its letter of 15 June 2016 (S/2016/542),

Reaffirming the importance of completing the permanent demobilization of the former 23 March Movement (M23) combatants, *stressing* the importance of ensuring that its ex-combatants do not regroup or join other armed groups, and *calling for* the acceleration of the implementation of the Nairobi Declarations and of the Disarmament, Demobilisation, Repatriation, Reintegration and Resettlement (DDRRR) of M23 ex-combatants, including by overcoming obstacles to repatriation, in coordination with the regional States concerned,

Condemning the illicit flow of weapons within and into the DRC, including their recirculation to and between armed groups, in violation of resolutions 1533 (2004), 1807 (2008), 1857 (2008), 1896 (2009), 1952 (2010), 2021 (2011), 2078 (2012), 2136 (2014) and 2198 (2015), and *declaring* its determination to continue to monitor closely the implementation of the arms embargo and other measures set out by its resolutions concerning the DRC,

Acknowledging in this respect the important contribution the Council-mandated arms embargo makes to countering the illicit transfer of small arms and light weapons in the DRC, and in supporting post-conflict peacebuilding, disarmament, demobilization and reintegration of ex-combatants and security sector reform,

Underlining that the transparent and effective management of its natural resources and ending illegal smuggling and trafficking of such resources are critical for the DRC's sustainable peace and security, *expressing concern* at the illegal exploitation and trafficking of natural resources by armed groups, and the negative impact of armed conflict on protected natural areas, *commending* the efforts of the DRC park rangers and others who seek to protect such areas, *encouraging* the Government of the DRC to continue efforts to safeguard these areas, and *stressing* its full respect for the sovereignty of the Government of the DRC over its natural resources and its responsibility to effectively manage these resources in this regard,

Recalling the linkage between the illegal exploitation of natural resources, including poaching and illegal trafficking of wildlife, illicit trade in such resources, and the proliferation and trafficking of arms as one of the major factors fuelling and exacerbating conflicts in the Great Lakes region, and encouraging the continuation of the regional efforts of the International Conference of the Great Lakes Region (ICGLR) and the governments involved against the illegal exploitation of natural resources, and *stressing*, in this regard, the importance of regional cooperation and deepening economic integration with special consideration for the exploitation of natural resources,

Noting the Group of Experts' findings that there have been positive efforts related to the minerals trade and traceability schemes but that gold remains a serious challenge, *recalling* the ICGLR's Lusaka Declaration of the Special Session to Fight Illegal Exploitation of Natural Resources in the Great Lakes Region and its call for industry due diligence, *commending* the ICGLR's commitment and progress on this issue and *underscoring* that it is critical for regional governments and trading centres, particularly those involved in gold refining and the gold trade to intensify efforts to increase vigilance against smuggling and reduce practices that could undermine the DRC and ICGLR's regional efforts,

Noting with concern reports indicating the continued involvement of armed groups, as well as some elements of the FARDC, in the illegal minerals trade, the illegal production and trade of charcoal and wood, and wildlife poaching and trafficking,

Noting with great concern the persistence of serious human rights abuses and international humanitarian law violations against civilians in the eastern part of the DRC, including summary executions, sexual and gender-based violence and large scale recruitment and use of children committed by armed groups,

Stressing the crucial importance of a peaceful and credible electoral cycle, in accordance with the Constitution, for stabilization and consolidation of constitutional democracy in the DRC, *expressing deep concern* at increased restrictions of the political space in the DRC, in particular recent arrests and detention of members of the political opposition and of civil society, as well as restrictions of fundamental freedoms such as the freedom of expression and opinion, and *recalling* the need for an open, inclusive and peaceful political dialogue among all stakeholders focused on the holding of elections, while ensuring the protection of fundamental freedoms and human rights, paving the way for peaceful, credible, inclusive, transparent and timely elections in the DRC, particularly presidential and legislative elections by November 2016, in accordance with the Constitution, while respecting the African Charter on Democracy, Elections and Governance,

Remaining deeply concerned by reports of an increase in serious human rights and international humanitarian law violations committed by some members of the FARDC, the National Intelligence Agency, the Republican Guard and Congolese National Police (PNC), *urging* all parties to refrain from violence and provocation as well as to respect human rights, and *emphasizing* that the Government of the DRC must comply with the principle of proportionality in the use of force,

Recalling the importance of fighting against impunity within all ranks of its security forces, and *stressing the need* for the Government of the DRC to continue its efforts in this regard and to ensure the professionalism of its security forces,

Calling for all those responsible for violations of international humanitarian law and violations or abuses of human rights including those involving violence or abuses against children and acts of sexual and gender-based violence, to be swiftly apprehended, brought to justice and held accountable,

Recalling all its relevant resolutions on women and peace and security, on children and armed conflict, and on the protection of civilians in armed conflicts, also *recalling* the conclusions of the Security Council Working Group on Children and Armed Conflict pertaining to the parties in armed conflict of the DRC (S/AC.51/2014/3) adopted on 18 September 2014,

Welcoming the efforts of the Government of the DRC, including the Presidential Adviser on Sexual Violence and the Recruitment of Children, to cooperate with the Special Representative of the Secretary-General for Children and Armed Conflict, the Special Representative of the Secretary-General on Sexual Violence, and MONUSCO, to implement the action plan to prevent and end the recruitment and use of children and sexual violence by the FARDC, and to combat impunity for conflict-related sexual violence, including sexual violence committed by the FARDC,

Noting the critical importance of effective implementation of the sanctions regime, including the key role that neighbouring States, as well as regional and subregional organizations, can play in this regard and *encouraging* efforts to further enhance cooperation,

Underlining the fundamental importance of timely and detailed notifications to the Committee concerning arms, ammunition and training as set out in section 11 of the Guidelines of the Committee,

Determining that the situation in the DRC continues to constitute a threat to international peace and security in the region,

Acting under Chapter VII of the Charter of the United Nations,

Sanctions regime

1. *Decides* to renew until 1 July 2017 the measures on arms imposed by paragraph 1 of resolution 1807 (2008) and *reaffirms* the provisions of paragraph 5 of that resolution;

2. *Reaffirms* that according to paragraph 2 of resolution 1807 (2008), these measures no longer apply to the supply, sale or transfer of arms and related materiel, and the provision of any assistance, advice or training related to military activities to the Government of the DRC;

3. *Decides* that the measures imposed by paragraph 1 shall not apply to:

(a) Supplies of arms and related materiel, as well as assistance, advice or training, intended solely for the support of or use by MONUSCO or the African Union-Regional Task Force;

(b) Protective clothing, including flak jackets and military helmets, temporarily exported to the DRC by United Nations personnel, representatives of the media and humanitarian and development workers and associated personnel, for their personal use only;

(c) Other supplies of non-lethal military equipment intended solely for humanitarian or protective use, and related technical assistance and training, as notified in advance to the Committee in accordance with paragraph 5 of resolution 1807 (2008);

(d) Other sales and or supply of arms and related materiel, or provision of assistance or personnel, as approved in advance by the Committee;

4. *Decides* to renew, for the period specified in paragraph 1 above, the measures on transport imposed by paragraphs 6 and 8 of resolution 1807 (2008) and *reaffirms* the provisions of paragraph 7 of that resolution;

5. *Decides* to renew, for the period specified in paragraph 1 above, the financial and travel measures imposed by paragraphs 9 and 11 of resolution 1807 (2008) and *reaffirms* the provisions of paragraphs 10 and 12 of resolution 1807 (2008) in relation to those measures;

6. *Decides* that the measures imposed by paragraph 9 of resolution 1807 (2008) shall not apply as per the criteria set out in paragraph 10 of resolution 2078 (2012);

7. *Decides* that the measures referred to in paragraph 5 above shall apply to individuals and entities as designated by the Committee for engaging in or providing support for acts that undermine the peace, stability or security of the DRC, and *decides* that such acts include:

(a) acting in violation of the measures taken by Member States in accordance with paragraph 1 above;

(b) being political and military leaders of foreign armed groups operating in the DRC who impede the disarmament and the voluntary repatriation or resettlement of combatants belonging to those groups;

(c) being political and military leaders of Congolese militias, including those receiving support from outside the DRC, who impede the participation of their combatants in disarmament, demobilization and reintegration processes;

(d) recruiting or using children in armed conflict in the DRC in violation of applicable international law;

(e) planning, directing, or committing acts in the DRC that constitute human rights violations or abuses or violations of international humanitarian law, as applicable, including those acts involving the targeting of civilians, including killing and maiming, rape and other sexual violence, abduction, forced displacement, and attacks on schools and hospitals;

(f) obstructing the access to or the distribution of humanitarian assistance in the DRC;

(g) supporting individuals or entities, including armed groups or criminal networks, involved in destabilizing activities in the DRC through the illicit exploitation or trade of natural resources, including gold or wildlife as well as wildlife products;

(h) acting on behalf of or at the direction of a designated individual or entity, or acting on behalf of or at the direction of an entity owned or controlled by a designated individual or entity;

(i) planning, directing, sponsoring or participating in attacks against MONUSCO peacekeepers or United Nations personnel;

(j) providing financial, material, or technological support for, or goods or services to, a designated individual or entity.

Group of Experts

8. *Decides* to extend until 1 August 2017 the mandate of the Group of Experts, *expresses its intention* to review the mandate and take appropriate action regarding the further extension no later than 1 July 2017, and *requests* the Secretary-General to take the necessary administrative measures as expeditiously as possible to re-establish the Group of Experts, in consultation with the Committee, drawing, as appropriate, on the expertise of the members of the Group established pursuant to previous resolutions;

9. *Requests* the Group of Experts to fulfil its mandate as consolidated below, and to provide to the Council, after discussion with the Committee, a mid-term report no later than 30 December 2016, and a final report no later than 15 June 2017, as well as submit monthly updates to the Committee, except in the months where the mid-term and final reports are due:

(a) assist the Committee in carrying out its mandate, including through providing the Committee with information relevant to the potential designation of individuals and entities who may be engaging in the activities described in paragraph 7 of this resolution;

(b) gather, examine and analyse information regarding the implementation, with a focus on incidents of non-compliance, of the measures decided in this resolution;

(c) consider and recommend, where appropriate, ways of improving the capabilities of Member States, in particular those in the region, to ensure the measures imposed by this resolution are effectively implemented;

(d) gather, examine and analyse information regarding the regional and international support networks to armed groups and criminal networks in the DRC;

(e) gather, examine and analyse information regarding the supply, sale or transfer of arms, related materiel and related military assistance, including through illicit trafficking networks and the transfer of arms and related materiel to armed groups from the DRC security forces;

(f) gather, examine and analyse information regarding perpetrators of serious violations of international humanitarian law and human rights violations and abuses, including those within the security forces, in the DRC,

(g) evaluate the impact of minerals traceability referred to in paragraph 24 of this resolution and continue collaboration with other forums;

(h) assist the Committee in refining and updating information on the list of individuals and entities subject to the measures imposed by this resolution, including through the provision of identifying information and additional information for the publicly-available narrative summary of reasons for listing;

10. *Expresses* its full support to the Group of Experts and calls for enhanced cooperation between all States, particularly those in the region, MONUSCO, relevant UN bodies and the Group of Experts, *encourages* further that all parties and all States ensure cooperation with the Group of Experts by individuals and entities within their jurisdiction or under their control and *reiterates* its demand that all parties and all States ensure the safety of its members and its support staff, and that all parties and all States, including the DRC and countries of the region, provide unhindered and immediate access, in particular to persons, documents and sites the Group of Experts deems relevant to the execution of its mandate;

11. *Calls upon* the Group of Experts to cooperate actively with other Panels or Groups of Experts established by the Security Council, as relevant to the implementation of its mandate;

Armed groups

12. *Strongly condemns* all armed groups operating in the region and their violations of international humanitarian law as well as other applicable international law, and abuses of human rights including attacks on the civilian population, MONUSCO peacekeepers and humanitarian actors, summary executions, sexual and gender-based violence and large scale recruitment and use of children, and *reiterates* that those responsible will be held accountable;

13. *Demands* that the FDLR, the ADF, the LRA and all other armed groups operating in the DRC cease immediately all forms of violence and other destabilizing activities, including the exploitation of natural resources, and that their members immediately and permanently disband, lay down their arms, and liberate and demobilize all children from their ranks;

National and Regional Commitments

14. *Welcomes* the progress made to date by the Government of the DRC on ending the recruitment and use of children in armed conflict, *urges* the Government of the DRC to continue the full implementation and dissemination throughout the military chain of command, including in remote areas, of its commitments made in the action plan signed with the United Nations, and for the protection of girls and boys from sexual violence, and further *calls upon* the Government of the DRC to ensure that children are not detained on charges related to association with armed groups;

15. *Welcomes* efforts made by the Government of the DRC to combat and prevent sexual violence in conflict, including progress made in the fight against

impunity, and *calls on* the Government of DRC to further pursue its action plan commitments to end sexual violence and violations committed by its armed forces and continue efforts in that regard, noting that failure to do so may result in the FARDC being named again in future Secretary-General's reports on sexual violence;

16. *Stresses* the importance of the Government of the DRC actively seeking to hold accountable those responsible for war crimes and crimes against humanity in the country and of regional cooperation to this end, including through its ongoing cooperation with the International Criminal Court, *encourages* MONUSCO to use its existing authority to assist the government of the DRC in this regard, and *calls on* all signatories of the PSC Framework to continue to implement their commitments and cooperate fully with one another and the Government of the DRC, as well as MONUSCO to this end;

17. *Recalls* that there should be no impunity for any of those responsible for violations of international humanitarian law and violations and abuses of human rights in the DRC and the region, and, in this regard, *urges* the DRC, all countries in the region and other concerned UN Member States to bring perpetrators to justice and hold them accountable, including those within the security sector;

18. *Calls on* the Government of the DRC to continue to enhance stockpile security, accountability and management of arms and ammunition, with the assistance of international partners, to address ongoing reports of diversion to armed groups, as necessary and requested, and to urgently implement a national weapons marking program, in particular for state-owned firearms, in line with the standards established by the Nairobi Protocol and the Regional Centre on Small Arms;

19. *Emphasizes* the primary responsibility of the Government of the DRC to reinforce State authority and governance in eastern DRC, including through effective security sector reform to allow army, police and justice sector reform, and to end impunity for violations and abuses of human rights and violations of international humanitarian law, and *urges* the Government of the DRC to increase efforts in this regard, in accordance with its national commitments under the PSC Framework;

20. *Urges* the Government of the DRC as well as all relevant parties to ensure an environment conducive to a free, fair, credible, inclusive, transparent, peaceful and timely electoral process, in accordance with the Congolese Constitution, and *recalls* paragraphs 7, 8, 9 and 10 of resolution 2277 (2016);

21. *Calls upon* all States, especially those in the region, to take effective steps to ensure that there is no support, in or from their territories, for armed groups in, or travelling through, the DRC, stressing the need to address the networks of support, the recruitment and use of child soldiers, financing and recruitment of armed groups active in the DRC, as well as the need to address the ongoing collaboration between FARDC elements and armed groups at a local level, and *calls upon* all States to take steps to hold accountable, where appropriate, leaders and members of the FDLR and other armed groups residing in their countries;

Natural Resources

22. *Further encourages* the continuation of efforts by the Government of the DRC to address issues of illegal exploitation and smuggling of natural resources,

including holding accountable those elements of the FARDC which participate in the illicit trade of natural resources, particularly gold and wildlife products;

23. *Stresses* the need to undertake further efforts to cut off financing for armed groups involved in destabilizing activities through the illicit trade of natural resources, including gold or wildlife products;

24. *Welcomes* in this regard the measures taken by the Congolese Government to implement the due diligence guidelines on the supply chain of minerals, as defined by the Group of Experts and the Organization for Economic Cooperation and Development (OECD), *recognizes* the Congolese Government's efforts to implement minerals traceability schemes, and *calls on* all States to assist the DRC, the ICGLR and the countries in the Great Lakes region to develop a responsible minerals trade;

25. *Welcomes* measures taken by the Governments in the region to implement the Group of Experts due diligence guidelines, including adopting the Regional Certification Mechanism of the ICGLR into their national legislation, in accordance with OECD Guidance and international practice, *requests* the extension of the certification process to other Member States in the region, and *calls on* all States, particularly those in the region, to continue to raise awareness of the due diligence guidelines, including by urging importers, processing industries, including gold refiners, and consumers of Congolese mineral products to exercise due diligence in accordance with paragraph 19 of resolution 1952 (2010);

26. *Encourages* the ICGLR and ICGLR Member States to work closely with the industry schemes currently operating in the DRC to ensure sustainability, transparency, and accountability of operations, and further *recognizes* and *encourages* the DRC government's continued support for the establishment of traceability and diligence systems to allow for the export of artisanal gold;

27. *Continues to encourage* the ICGLR to put in place the necessary technical capacity required to support Member States in their fight against the illegal exploitation of natural resources, *notes* that some ICGLR Member States have made significant progress, and *recommends* all Member States to fully implement the regional certification scheme and report mineral trade statistics in accordance with paragraph 19 of resolution 1952 (2010);

28. *Encourages* all States to continue efforts to end the illicit trade in natural resources, in particular in the gold sector, and to hold those complicit in the illicit trade accountable, as part of broader efforts to ensure that the illicit trade in natural resources is not benefiting sanctioned entities, armed groups or criminal networks, including those with members in the FARDC;

29. *Reaffirms* the provisions of paragraphs 7 to 9 of resolution 2021 (2011) and *calls upon* the DRC and States in the Great Lakes region to cooperate at the regional level to investigate and combat regional criminal networks and armed groups involved in the illegal exploitation of natural resources, including wildlife poaching and trafficking, and require their customs authorities to strengthen their control on exports and imports of minerals from the DRC;

Role of MONUSCO

30. *Recalls* the mandate of MONUSCO as outlined in resolution 2277 (2016), in particular in paragraph 31 underlining the importance of enhanced political and conflict-related analysis, including by collecting and analysing information on the criminal networks which support the armed groups, paragraph 36 (ii) regarding the monitoring of the implementation of the arms embargo, and paragraph 36 (iii) on mining activities;

31. *Encourages* timely information exchange between MONUSCO and the Group of Experts in line with paragraph 43 of resolution 2277 (2016), and *requests* MONUSCO to assist the Committee and the Group of Experts, within its capabilities;

Sanctions Committee, Reporting and Review

32. *Calls upon* all States, particularly those in the region and those in which individuals and entities designated pursuant to paragraph 7 of this resolution are based, to regularly report to the Committee on the actions they have taken to implement the measures imposed by paragraphs 1, 4, and 5 and recommended in paragraph 8 of resolution 1952 (2010);

33. *Emphasizes* the importance for the Committee of holding regular consultations with concerned Member States, as may be necessary, in order to ensure full implementation of the measures set forth in this resolution;

34. *Requests* the Committee to report orally, through its Chair, at least once per year to the Council, on the state of the overall work of the Committee, including alongside the Special Representative of the Secretary-General for the DRC on the situation in the DRC as appropriate, and encourages the Chair to hold regular briefings for all interested Member States;

35. *Requests* the Committee to identify possible cases of non-compliance with the measures pursuant to paragraphs 1, 4 and 5 above and to determine the appropriate course of action on each case, and *requests* the Chair, in regular reports to the Council pursuant to paragraph 34 of this resolution, to provide progress reports on the Committee's work on this issue;

36. *Requests* the Special Representative of the Secretary-General for Children and Armed Conflict and the Special Representative for Sexual Violence in Conflict to continue sharing relevant information with the Committee in accordance with paragraph 7 of resolution 1960 (2010) and paragraph 9 of resolution 1998 (2011);

37. *Decides* that, when appropriate and no later than 1 July 2017, it shall review the measures set forth in this resolution, with a view to adjusting them, as appropriate, in light of the security situation in the DRC, in particular progress in security sector reform and in disarming, demobilizing, repatriating, resettling and reintegrating, as appropriate, Congolese and foreign armed groups, with a particular focus on children among them, and compliance with this resolution;

38. *Decides* to remain actively seized of the matter.

United Nations S/RES/2140 (2014)

Security Council

Distr.: General
26 February 2014

Resolution 2140 (2014)

Adopted by the Security Council at its 7119th meeting, on 26 February 2014

The Security Council,

Recalling its resolution 2014 (2011), 2051 (2012) and presidential statement of 15 February 2013,

Reaffirming its strong commitment to the unity, sovereignty, independence and territorial integrity of Yemen,

Commending the engagement of the Gulf Cooperation Council (GCC) in assisting the political transition in Yemen,

Welcoming the outcomes of the comprehensive National Dialogue Conference, signed by all political parties, and whose decisions provide a road map for a continued Yemeni led democratic transition underpinned by a commitment to democracy, good governance, rule of law, national reconciliation, and respect for the human rights and fundamental freedoms of all the people of Yemen,

Commending those who have facilitated the outcome of the comprehensive National Dialogue Conference through their constructive participation, in particular the leadership of President Abd Rabbo Mansour Hadi,

Expressing concern at the ongoing political, security, economic and humanitarian challenges in Yemen, including the ongoing violence,

Recalling the listing of Al-Qaida in the Arabian Peninsula (AQAP) and associated individuals on the Al-Qaida sanctions list established by the Committee pursuant to resolutions 1267 (1999) and 1989 (2011) and *stressing* in this regard the need for robust implementation of the measures in paragraph 1 of resolution 2083 as a significant tool in combating terrorist activity in Yemen,

Condemning all terrorist activities, attacks against civilians, oil, gas and electricity infrastructure and against the legitimate authorities, including those aimed at undermining the political process in Yemen,

Further condemning attacks against military and security facilities, in particular the attack on the Ministry of Defence on 5 December 2013 and the 13 February attack of the Ministry of Interior Prison, *stressing* the need for the

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Yemeni Government to efficiently continue reforms of the Armed Forces and in the security sector,

Reaffirming its resolution 2133 and *calling* upon all member states to prevent terrorists from benefiting directly or indirectly from ransom payments or from political concessions and to secure the safe release of hostages,

Noting the formidable economic, security and social challenges confronting Yemen, which have left many Yemenis in acute need of humanitarian assistance, *reaffirming* its support to the Yemeni government to safeguard security, promote social and economic development, and put forward political, economic, and security reforms, and welcoming the work of the Mutual Accountability Framework Executive Bureau, the World Bank, and the International Monetary Fund (IMF) in their support to the Government of Yemen on economic reform,

Stressing that the best solution to the situation in Yemen is through a peaceful, inclusive, orderly and Yemeni-led political transition process that meets the legitimate demands and aspirations of the Yemeni people for peaceful change and meaningful political, economic and social reform, as set out in the GCC Initiative and Implementation Mechanism and the outcomes of the comprehensive National Dialogue Conference, *welcoming* Yemen's efforts to strengthen women's participation in political and public life, including through measures to ensure at least 30 per cent women candidates for national legislative elections and elected councils,

Further recalling its resolutions 1612 (2005), 1882 (2009), 1998 (2011) and 2068 (2012) on Children and Armed Conflict and its resolutions 1325 (2000), 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), 2106 (2013) and 2122 (2013) on Women, Peace and Security,

Recognizing that the transition process requires turning the page from the presidency of Ali Abdullah Saleh, and welcoming the involvement and cooperation of all stakeholders in Yemen, including groups that were not party to the GCC Initiative and its Implementation Mechanism,

Reiterating the need for comprehensive, independent and impartial investigations consistent with international standards into alleged human rights violations and abuses in line with the outcomes of the comprehensive National Dialogue Conference, the GCC Initiative, and the Implementation Mechanism, to ensure full accountability,

Recognizing the importance of governance reforms to the political transition in Yemen, *noting* in this regard the proposals in the National Dialogue Conference's Good Governance Working Group report, including, among other things, prerequisites for candidates for Yemeni leadership positions and the disclosure of their financial assets,

Recalling its resolution 2117 (2013) and expressing grave concern at the threat to peace and security in Yemen arising from the illicit transfer, destabilising accumulation and misuse of small arms and light weapons,

Emphasizing the need for continued progress in the implementation of the GCC Initiative and Implementation Mechanism to avoid further deterioration of the humanitarian and security situation in Yemen,

Noting with appreciation the work of the United Nations country team and agencies in Yemen,

Welcoming the efforts made by the Secretariat to expand and improve the roster of experts for the Security Council Subsidiary Organs Branch, bearing in mind the guidance provided by the Note of the President (S/2006/997),

Determining that the situation in Yemen constitutes a threat to international peace and security in the region,

Acting under Chapter VII of the Charter of the United Nations,

1. *Reaffirms* the need for the full and timely implementation of the political transition following the comprehensive National Dialogue Conference, in line with the GCC Initiative and Implementation Mechanism, and in accordance with resolution 2014 (2011) and 2051 (2012), and with regard to the expectations of the Yemeni people;

Implementation of Political Transition

2. *Welcomes* the recent progress made in the political transition of Yemen and expresses strong support for completing the next steps of the transition, in line with the Implementation Mechanism, including:

(a) drafting a new constitution in Yemen;

(b) electoral reform including the drafting and adoption of a new electoral law consistent with the new Constitution;

(c) the holding of a referendum on the draft constitution, including suitable outreach;

(d) state structure reform to prepare Yemen for the transition from a unitary to a federal state; and

(e) timely general elections, after which the current term of President Hadi would end following the inauguration of the President elected under the new Constitution;

3. *Encourages* all constituencies in the country, including the youth movements, women's groups, in all regions in Yemen, to continue their active and constructive engagement in the political transition and to continue the spirit of consensus to implement the subsequent steps in the transition process and the recommendations of the National Dialogue Conference, and calls upon the Hiraak Southern movement, the Houthi movement and others to constructively partake and to reject the use of violence to achieve political aims;

4. *Welcomes* the Yemeni Government's plan to introduce an Asset Recovery Law, and supports international cooperation on this, including through the Deauville initiative;

5. *Expresses concern* over use of the media to incite violence and frustrate the legitimate aspirations for peaceful change of the people of Yemen;

6. *Looks forward* to steps by the Government of Yemen, towards the implementation of Republican Decree No. 140 of 2012, which establishes a committee to investigate allegations of violations of human rights in 2011 and which

states that investigations shall be transparent and independent and adhere to international standards, in accordance with Human Rights Council resolution 19/29, and invites the Government of Yemen to provide soon a time frame for the early appointment of members of that committee;

7. *Expresses* its concern that children continue to be recruited and used in violation of applicable international law by armed groups, and the Yemeni Government forces, and calls for continued national efforts to end and prevent the recruitment and use of children, including through the signing and implementation by the Yemeni Government of the action plan to halt and prevent the recruitment and use of children in the government forces of Yemen, in line with the Security Council resolutions 1612 (2005), 1882 (2009) and 1998 (2011), and *urges* armed groups to allow the United Nations personnel safe and unhindered access to territories under their control for monitoring and reporting purposes;

8. *Also looks forward* to the early adoption of a law on transitional justice and national reconciliation that, while taking into account the recommendations of the National Dialogue Conference, is in accordance with the international obligations and commitments of Yemen and following best practices as appropriate;

9. *Calls* on all parties to comply with their obligations under international law including applicable international humanitarian law and human rights law;

Further Measures

10. *Emphasizes* that the transition agreed upon by the parties to the GCC Initiative and Implementation Mechanism Agreement has not yet been fully achieved and *calls* upon all Yemenis to fully respect the implementation of the political transition and adhere to the values of the Implementation Mechanism Agreement;

11. *Decides* that all Member States shall, for an initial period of one year from the date of the adoption of this resolution, freeze without delay all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the individuals or entities designated by the Committee established pursuant to paragraph 19 below, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, and *decides further* that all Member States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the individuals or entities designated by the Committee;

12. *Decides* that the measures imposed by paragraph 11 above do not apply to funds, other financial assets or economic resources that have been determined by relevant Member States:

(a) To be necessary for basic expenses, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services in accordance with national laws, or fees or service charges, in accordance with national laws, for routine holding or maintenance of frozen funds, other financial assets and economic resources, after notification by the relevant State to the Committee of the intention to authorize, where appropriate, access to such funds,

other financial assets or economic resources and in the absence of a negative decision by the Committee within five working days of such notification;

(b) To be necessary for extraordinary expenses, provided that such determination has been notified by the relevant State or Member States to the Committee and has been approved by the Committee;

(c) To be the subject of a judicial, administrative or arbitral lien or judgment, in which case the funds, other financial assets and economic resources may be used to satisfy that lien or judgment provided that the lien or judgment was entered into prior to the date of the present resolution, is not for the benefit of a person or entity designated by the Committee, and has been notified by the relevant State or Member States to the Committee;

13. *Decides* that Member States may permit the addition to the accounts frozen pursuant to the provisions of paragraph 11 above of interests or other earnings due on those accounts or payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to the provisions of this resolution, provided that any such interest, other earnings and payments continue to be subject to these provisions and are frozen;

14. *Decides* that the measures in paragraph 11 above shall not prevent a designated person or entity from making payment due under a contract entered into prior to the listing of such a person or entity, provided that the relevant States have determined that the payment is not directly or indirectly received by a person or entity designated pursuant to paragraph 11 above, and after notification by the relevant States to the Committee of the intention to make or receive such payments or to authorize, where appropriate, the unfreezing of funds, other financial assets or economic resources for this purpose, 10 working days prior to such authorization;

Travel ban

15. *Decides* that, for an initial period of one year from the date of the adoption of this resolution, all Member States shall take the necessary measures to prevent the entry into or transit through their territories of individuals designated by the Committee established pursuant to paragraph 19 below, provided that nothing in this paragraph shall oblige a State to refuse its own nationals entry into its territory;

16. *Decides* that the measures imposed by paragraph 15 above shall not apply:

(a) Where the Committee determines on a case-by-case basis that such travel is justified on the grounds of humanitarian need, including religious obligation;

(b) Where entry or transit is necessary for the fulfilment of a judicial process;

(c) Where the Committee determines on a case-by-case basis that an exemption would further the objectives of peace and national reconciliation in Yemen; and

(d) Where a State determines on a case-by-case basis that such entry or transit is required to advance peace and stability in Yemen and the States subsequently notifies the Committee within forty-eight hours after making such a determination;

Designation Criteria

17. *Decides* that the provisions of paragraphs 11 and 15 shall apply to individuals or entities designated by the Committee as engaging in or providing support for acts that threaten the peace, security or stability of Yemen;

18. *Underscores* that such acts as described in paragraph 17 above may include, but are not limited to:

(a) Obstructing or undermining the successful completion of the political transition, as outlined in the GCC Initiative and Implementation Mechanism Agreement;

(b) Impeding the implementation of the outcomes of the final report of the comprehensive National Dialogue Conference through violence, or attacks on essential infrastructure; or

(c) Planning, directing, or committing acts that violate applicable international human rights law or international humanitarian law, or acts that constitute human rights abuses, in Yemen;

Sanctions Committee

19. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council consisting of all the members of the Council (herein "the Committee"), to undertake to following tasks:

(a) To monitor implementation of the measures imposed in paragraph 11 and 15 above with a view to strengthening, facilitating and improving implementation of these measures by Member States;

(b) To seek and review information regarding those individuals and entities who may be engaging in the acts described in paragraph 17 and 18 above;

(c) To designate individuals and entities to be subject to the measures imposed in paragraphs 11 and 15 above;

(d) To establish such guidelines as may be necessary to facilitate the implementation of the measures imposed above;

(e) To report within 60 days to the Security Council on its work and thereafter to report as deemed necessary by the Committee;

(f) To encourage a dialogue between the Committee and interested Member States, in particular those in the region, including by inviting representatives of such States to meet with the Committee to discuss implementation of the measures;

(g) To seek from all States whatever information it may consider useful regarding the actions taken by them to implement effectively the measures imposed;

(h) To examine and take appropriate action on information regarding alleged violations or non-compliance with the measures contained in paragraphs 11 and 15;

20. *Directs* the Committee to cooperate with other relevant Security Council Sanctions Committees, in particular the Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and Associated Individuals and Entities;

Reporting

21. *Requests* the Secretary-General to create for an initial period of 13 months, in consultation with the Committee, and to make the necessary financial and security arrangements to support the work of the Panel, a group of up to four experts ("Panel of Experts"), under the direction of the Committee to carry out the following tasks:

(a) Assist the Committee in carrying out its mandate as specified in this resolution, including through providing the Committee at any time with information relevant to the potential designation at a later stage of individuals and entities who may be engaging in the activities described in paragraph 17 and 18 above;

(b) Gather, examine and analyse information from States, relevant United Nations bodies, regional organisations and other interested parties regarding the implementation of the measures decided in this resolution, in particular incidents of undermining the political transition;

(c) Provide to the Council, after discussion with the Committee, an update no later than 25 June 2014, an interim report by 25 September 2014, and a final report no later than 25 February 2015; and

(d) To assist the Committee in refining and updating information on the list of individuals subject to measures imposed pursuant to paragraphs 11 and 15 of this resolution, including through the provision of identifying information and additional information for the publicly-available narrative summary of reasons for listing;

22. *Directs* the Panel to cooperate with other relevant expert groups established by the Security Council to support the work of its Sanctions Committees, in particular the Analytical Support and Sanctions Monitoring Team established by resolution 1526 (2004);

23. *Urges* all parties and all Member States, as well as international, regional and subregional organizations to ensure cooperation with the Panel of experts and further urges all Member States involved to ensure the safety of the members of the Panel of experts and unhindered access, in particular to persons, documents and sites in order for the Panel of experts to execute its mandate;

Commitment to Review

24. *Affirms* that it shall keep the situation in Yemen under continuous review and that it shall be prepared to review the appropriateness of the measures contained in this resolution, including the strengthening, modification, suspension or lifting of the measures, as may be needed at any time in light of developments;

Economic Reform and Development Assistance to Support the Transition

25. *Calls* upon donors and regional organisations to fully disburse the pledges made at the Riyadh Donor conference in September 2012 to fund the priorities set out in the Mutual Accountability Framework agreed in Riyadh; and encourages donors with undisbursed pledges to work closely with the Executive Bureau to identify priority projects for support, taking into account the security conditions on the ground;

26. *Emphasizes* the importance of Government of National Unity taking action to implement the urgent policy reforms set out in the Mutual Accountability Framework; and encourages donors to provide technical assistance to help drive forward these reforms, including through the Executive Bureau;

27. *Expresses* its concern over reported serious human rights abuses and violence against civilians in both the Northern and Southern Governorates, including Al Dhale'e Governorate, *urges* all parties involved to end the conflicts and comply with their obligations under applicable international humanitarian and human rights law, and *stresses* the need for parties to take all required measures to avoid civilian casualties, respect and protect the civilian population;

28. *Encourages* the international community to continue providing humanitarian assistance to Yemen and *calls* for the full funding of the 2014 Strategic Response Plan for Yemen, and in this regard requests all parties in Yemen to facilitate safe and unhindered humanitarian access to ensure the delivery of assistance to all populations in need and *calls* on all parties to take necessary steps to ensure the safety and security of humanitarian personnel and of the United Nations and its associated personnel and their assets;

29. *Condemns* the growing number of attacks carried out or sponsored by Al-Qaida in the Arabian Peninsula, and expresses its determination to address this threat in accordance with the Charter of the United Nations and international law including applicable human rights, refugee and humanitarian law, and in this regard, through the Al-Qaida sanctions regime administered by the Committee pursuant to resolutions 1267 (1999) and 1989 (2011) and *reiterates its readiness*, under the above-mentioned regime, to sanction further individuals, groups, undertakings and entities who do not cut off all ties to Al-Qaida and associated groups;

30. *Calls for* continued national efforts to address the threat posed by all weapons, including explosive weapons and small arms and light weapons, to stability and security in Yemen, including inter alia through ensuring the safe and effective management, storage and security of their stockpiles of small arms and light weapons and explosive weapons, and the collection and/or destruction of explosive remnants of war and surplus, seized, unmarked, or illicitly held weapons and ammunition, and *further stresses* the importance of incorporating such elements into security sector reform;

31. *Acknowledges* the serious economic, political and security obstacles facing refugees and internally displaced persons in Yemen who wish to return to their homes after years of conflict, and *supports* and encourages the efforts of the Government of Yemen and the international community to facilitate their return;

United Nations involvement

32. *Requests* the Secretary-General to continue his good offices role, *notes* with appreciation the work Special Adviser, Jamal Benomar, *stresses* the importance of their close co-ordination with international partners, including the GCC, Group of Ambassadors, and other actors, in order to contribute to the successful transition, and in this regard *further* requests the Secretary-General to continue to coordinate assistance from the international community in support of the transition;

33. *Requests* the Secretary-General to continue to report on developments in Yemen, including on the implementation of the outcome of the comprehensive National Dialogue Conference every 60 days;

34. *Decides* to remain actively seized of the matter.

Annex 202

United Nations S/RES/2342 (2017)

Security Council

Distr.: General
23 February 2017

Resolution 2342 (2017)

Adopted by the Security Council at its 7889th meeting, on 23 February 2017

The Security Council,

Recalling its resolutions 2014 (2011), 2051 (2012), 2140 (2014), 2201 (2015), 2204 (2015), 2216 (2015), 2266 (2016) and the statements of its President dated 15 February 2013 (S/PRST/2013/3), 29 August 2014 (S/PRST/2014/18), 22 March 2015 (S/PRST/2015/8) and 25 April 2016 (S/PRST/2016/5) concerning Yemen,

Reaffirming its strong commitment to the unity, sovereignty, independence and territorial integrity of Yemen,

Expressing concern at the ongoing political, security, economic and humanitarian challenges in Yemen, including the ongoing violence, and threats arising from the illicit transfer, destabilizing accumulation and misuse of weapons,

Reiterating its call for all parties in Yemen to adhere to resolving their differences through dialogue and consultation, reject acts of violence to achieve political goals, and refrain from provocation,

Reaffirming the need for all parties to comply with their obligations under international law, including international humanitarian law and international human rights law as applicable,

Expressing its support for and commitment to the work of the Special Envoy for Yemen to the Secretary-General, Ismail Ould Cheikh Ahmed, in support of the Yemeni transition process,

Expressing its grave concern that areas of Yemen are under the control of Al-Qaida in the Arabian Peninsula (AQAP) and about the negative impact of their presence, violent extremist ideology and actions on stability in Yemen and the region, including the devastating humanitarian impact on the civilian populations, *expressing* concern at the increasing presence and future potential growth of the Islamic State in Iraq and Levant (ISIL, also known as Da'esh) affiliates in Yemen and *reaffirming its resolve* to address all aspects of the threat posed by AQAP, ISIL (Da'esh), and all other associated individuals, groups, undertakings and entities,

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Recalling the listing of Al-Qaida in the Arabian Peninsula (AQAP) and associated individuals on the ISIL (Da'esh) and Al-Qaida Sanctions List and stressing in this regard the need for robust implementation of the measures in paragraph 2 of resolution 2253 (2015) as a significant tool in combating terrorist activity in Yemen,

Noting the critical importance of effective implementation of the sanctions regime imposed pursuant to resolution 2140 (2014) and resolution 2216 (2015), including the key role that Member States from the region can play in this regard, and encouraging *efforts* to further enhance cooperation,

Recalling the provisions of paragraph 14 of resolution 2216 (2015) imposing a targeted arms embargo,

Gravely distressed by the continued deterioration of the devastating humanitarian situation in Yemen, *expressing serious concern* at all instances of hindrances to the effective delivery of humanitarian assistance, including limitations on the delivery of vital goods to the civilian population of Yemen,

Emphasizing the necessity of discussion by the Committee established pursuant to paragraph 19 of resolution 2140 (2014) ("the Committee"), of the recommendations contained in the Panel of Experts reports,

Determining that the situation in Yemen continues to constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

1. *Reaffirms* the need for the full and timely implementation of the political transition following the comprehensive National Dialogue Conference, in line with the Gulf Cooperation Council Initiative and Implementation Mechanism, and in accordance with resolutions 2014 (2011), 2051 (2012), 2140 (2014), 2201 (2015), 2204 (2015) 2216 (2015), and 2266 (2016) and with regard to the expectations of the Yemeni people;

2. *Decides* to renew until 26 February 2018 the measures imposed by paragraphs 11 and 15 of resolution 2140 (2014), *reaffirms* the provisions of paragraphs 12, 13, 14 and 16 of resolution 2140 (2015), and *further reaffirms* the provisions of paragraphs 14 to 17 of resolution 2216 (2015);

Designation Criteria

3. *Reaffirms* that the provisions of paragraphs 11 and 15 of resolution 2140 (2014) and paragraph 14 of resolution 2216 (2015) shall apply to individuals or entities designated by the Committee, or listed in the annex to resolution 2216 (2015) as engaging in or providing support for acts that threaten the peace, security or stability of Yemen;

4. *Reaffirms* the designation criteria set out in paragraph 17 of resolution 2140 (2014) and paragraph 19 of resolution 2216 (2015);

Reporting

5. *Decides* to extend until 28 March 2018 the mandate of the Panel of Experts as set out in paragraph 21 of resolution 2140 (2014), and paragraph 21 of

resolution 2216 (2015), *expresses its intention* to review the mandate and take appropriate action regarding the further extension no later than 28 February 2018, and *requests* the Secretary-General to take the necessary administrative measures as expeditiously as possible to re-establish the Panel of Experts, in consultation with the Committee until 28 March 2018 drawing, as appropriate, on the expertise of the members of the Panel established pursuant to resolution 2140 (2014);

6. *Requests* the Panel of Experts to provide a midterm update to the Committee no later than 28 July 2017, and a final report no later than 28 January 2018 to the Security Council, after discussion with the Committee;

7. *Directs* the Panel to cooperate with other relevant expert groups established by the Security Council to support the work of its Sanctions Committees, in particular the Analytical Support and Sanctions Monitoring Team established by resolution 1526 (2004) and extended by resolution 2253 (2015);

8. *Urges* all parties and all Member States, as well as international, regional and subregional organizations to ensure cooperation with the Panel of Experts and *further urges* all Member States involved to ensure the safety of the members of the Panel of Experts and unhindered access, in particular to persons, documents and sites, in order for the Panel of Experts to execute its mandate;

9. *Emphasizes* the importance of holding consultations with concerned Member States, as may be necessary, in order to ensure full implementation of the measures set forth in this resolution;

10. *Calls upon* all Member States which have not already done so to report to the Committee as soon as possible on the steps they have taken with a view to implementing effectively the measures imposed by paragraphs 11 and 15 of resolution 2140 (2014) and paragraph 14 of resolution 2216 (2015) and *recalls* in this regard that Member States undertaking cargo inspections pursuant to paragraph 15 of resolution 2216 (2015) are required to submit written reports to the Committee as set out in paragraph 17 of resolution 2216 (2015);

11. *Recalls* the Informal Working Group on General issues of Sanctions report (S/2006/997) on best practices and methods, including paragraphs 21, 22 and 23 that discuss possible steps for clarifying methodological standards for monitoring mechanisms;

12. *Reaffirms* its intention to keep the situation in Yemen under continuous review and its readiness to review the appropriateness of the measures contained in this resolution, including the strengthening, modification, suspension or lifting of the measures, as may be needed at any time in light of developments;

13. *Decides* to remain actively seized of the matter.

U.S. DEPARTMENT OF THE TREASURY

Press Center

Treasury Targets Iranian Attempts to Evade Sanctions

5/9/2013

Action Identifies Front Company and Vessels Attempting to Obscure Iranian Oil Deals Using Ship-to-Ship Transfers and Designates Iranian Bank

WASHINGTON – The U.S. Department of the Treasury is taking a number of actions today against Iranian attempts to circumvent international financial sanctions. As part of the Treasury Department's continuing vigilance against Iran's efforts to use front companies and deceptive business practices to sell their oil on the international market, today Treasury identified Sambouk Shipping FZC as subject to sanctions under Executive Order (E.O.) 13599, which, among other things, targets the Government of Iran (GOI) and persons acting for or on behalf of the GOI. Sambouk Shipping is tied to Dr. Dimitris Cambis who, along with a network of front companies, were sanctioned in March 2013 under E.O. 13599 and the Iran Threat Reduction Act and Syria Human Rights Act of 2012 (TRA) after the U.S. government uncovered Dr. Cambis's scheme to evade international oil sanctions against Iran. In an attempt to continue his scheme, Dr. Cambis is using the recently formed Sambouk Shipping to manage eight of the vessels that he operates on behalf of the National Iranian Tanker Company (NITC). These vessels have been used to execute ship-to-ship transfers of Iranian oil in the Persian Gulf. These transfers are intended to facilitate deceptive sales of Iranian oil by obscuring the origin of that oil.

Today, the Treasury Department also imposed sanctions against Iranian Venezuelan Bi-National Bank (IVBB). IVBB was designated pursuant to E.O. 13382, which targets proliferators of weapons of mass destruction (WMD) and their supporters, for engaging in financial transactions on behalf of the previously sanctioned Export Development Bank of Iran (EDBI).

"As Iran becomes increasingly isolated from the international financial system and energy markets, it is turning increasingly to convoluted schemes and shady actors to maintain its access to the global financial system," said Under Secretary for Terrorism and Financial Intelligence David S. Cohen. "As long as Iran tries to evade our sanctions, we will continue to expose their deceptive maneuvers."

Treasury's Office of Foreign Assets Control is also updating its list of Specially Designated Nationals and Blocked Persons (SDN List) entries today for eight vessels blocked due to the interest of National Iranian Tanker Company in the vessels. Since their original identification these vessels have been renamed and/or reflagged. Treasury is also identifying eight previously unidentified vessels as blocked property in which NITC has an interest. Including today's additions, Treasury has identified 64 vessels as blocked property in which NITC has an interest.

U.S. persons are generally prohibited from engaging in any transactions with the entities listed today, and any assets those entities may have subject to U.S. jurisdiction are frozen.

The Iranian Venezuelan Bi-National Bank

The Iranian Venezuelan Bi-National Bank (IVBB) is being designated pursuant to E.O. 13382 for its activities on behalf of EDBI. EDBI was designated under E.O. 13382 on October 22, 2008, for providing financial services to Iran's Ministry of Defense and Armed Forces Logistics (MODAFL).

IVBB has been processing funds transfers on behalf of EDBI since at least January 2012. EDBI has used IVBB to act as a proxy to fund export activities and to transfer millions of dollars worth of funds from China's Bank of Kunlun to EDBI. Additionally, senior EDBI staff is entitled to authorize transaction instructions to Bank of Kunlun on behalf of IVBB.

Bank of Kunlun was sanctioned by the U.S. Treasury Department under Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA) on July 31, 2012, for providing financial services to more than six Iranian banks that were designated by the U.S. in connection with Iran's WMD programs or its support for international terrorism. Prior to the sanctions imposed against it under the CISADA, Bank of Kunlun was engaged in a significant amount of direct of business with EDBI, handling the equivalent of tens of millions of dollars worth of funds for EDBI.

IVBB was originally established as a joint venture between Iran and Venezuela, and EDBI was the Iranian party tasked with creating the joint venture with Venezuela. However, there is no evidence Venezuela retains any ties to this bank.

Identifying Information

Name: Iranian-Venezuelan Bi-National Bank
Address: Tosee Building Ground Floor, Bokharest Street 44-46, Tehran, Iran
SW FT/BIC: IVBB RT1

Name: Sambouk Shipping FZC
Address: FITCO Building No. 3, Office 101, 1st Floor, P.O. Box 50044, Fujairah, United Arab Emirates
Alternate Address: Office 1202, Crystal Plaza, PO Box 50044, Buhaira Corniche, Sharjah, United Arab Emirates

Newly-Identified Vessels

Name: Atlantis
Vessel Type: Crude Oil Tanker
Flag: Tanzania
MO Number: 9569621

Name: Badr
Vessel Type: Utility Vessel
Flag: Iran
MO Number: 8407345

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Name: Demos
Vessel Type: Crude Oil Tanker
Flag: Tanzania
MO Number: 9569683

Name: Infinity
Vessel Type: Crude Oil Tanker
Flag: Tanzania
MO Number: 9569671

Name: Justice
Vessel Type: Crude Oil Tanker
Flag: None Identified
MO Number: 9357729

Name: Sunrise
Vessel Type: LPG Tanker
Flag: None Identified
MO Number: 9615092

Name: Skyline
Vessel Type: Crude Oil Tanker
Flag: Tanzania
MO Number: 9569669

Name: Younes
Vessel Type: Platform Supply Ship
Flag: Iran
MO Number: 8212465

Previously-Identified Vessels

To view a list of the updated vessel names and flagging click *here*.

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U.S. DEPARTMENT OF THE TREASURY

Press Center

Treasury Exposes Iranian Attempts to Evade Oil Sanctions

9/6/2013

Action Targets Individuals and Companies Acting on Behalf of the Government of Iran

WASHINGTON – The U.S. Department of the Treasury today identified a network of six individuals and four businesses as subject to sanctions pursuant to Executive Order (E.O.) 13599 for acting for or on behalf of the Government of Iran. These actions are part of the United States Government's ongoing efforts to prevent sanctions evasion by individuals and companies acting on behalf of the Government of Iran, including efforts to sell Iranian oil in circumvention of the strict limitations that the U.S. and many of its partners have adopted.

In its efforts to evade sanctions, the Government of Iran relies on front companies, financial institutions and businessmen willing to engage in deceptive transactions to conceal the direct involvement of the Iranian Government and its instrumentalities such as the National Iranian Oil Company (NIOC) and the Naftiran Intertrade Company (NICO) Sarl in global oil deals.

Today's action targets the network of Seyed Seyyedi, an Iranian businessman and the director of Sima General Trading, an entity previously sanctioned by Treasury; a network of companies based in the U.A.E. that Seyyedi controls; and representatives of NIOC and NICO based in the UK and Switzerland.

"Our sanctions on Iran's oil sales are a critically important component of maintaining pressure on the Iranian Government, and we will not allow Iran to relieve that pressure through evasion and circumvention," said Treasury Under Secretary for Terrorism and Financial Intelligence David S. Cohen. "We will continue to target those individuals and entities that devise schemes to evade our sanctions."

Seyed Seyyedi was identified pursuant to E.O. 13599 today for acting on behalf of various Government of Iran entities and front companies, including NIOC, NICO, as well as Sima General Trading. Treasury previously identified Sima General Trading as part of a network of Iranian government front companies in March 2013 for its role in the sanctions evasion scheme being carried out by the Greek businessman, Dimitris Cambis. Seyyedi's Sima General Trading helped finance a Cambis front company to purchase oil tankers while disguising the fact that the tankers were being purchased on behalf of the National Iranian Tanker Company (NITC). Cambis' front companies were used to deceive the international business community by obscuring the Iranian ownership of ships capable of carrying roughly 200 million U.S. dollars worth of oil per shipment. Treasury is also identifying the U.A.E. -based KASB International LLC, Petro Royal FZE, and AA Energy FZCO, each of which is controlled by Seyyedi and used by him to assist NICO and NICO front companies, such as Sima General Trading, in its sanctions evasion schemes.

In addition to Seyed Seyyedi, Treasury is also identifying several other persons and entities for their links to the Government of Iran's operations to evade oil sanctions.

Swiss Management Services Sarl is a Swiss company controlled by NICO Sarl and used by NICO to continue its operations on behalf of Iran following multiple U.S. sanctions actions targeting NICO and NICO Sarl. Mohmmad Moinie is Switzerland-based NICO Sarl's commercial director.

Reza Parsaei is a director for NIOC International Affairs (London) Ltd. which was identified as an entity of the Government of Iran in July 2010. Parsaei has involved himself in a scheme to deceptively import Iranian oil into the EU. Parsaei also coordinates closely with another director for NIOC International Affairs (London) Ltd., Seyyed Mohamad Ali Khatibi Tabatabaei. Seyed Mohaddes and Mohammed Ziracchian Zadeh act as directors for the Iranian Oil Company (U K.) Ltd., which was also identified as an entity of the Government of Iran in July 2010.

Each of the individuals and companies sanctioned today were identified under E.O. 13599, which blocks the property of the Government of Iran, including those of individuals and entities identified as acting for or on behalf of the Government of Iran. Transactions by U.S. persons or through the United States with any of these entities are generally prohibited, and any assets they may have under U.S. jurisdiction are blocked. Further, foreign persons and financial institutions that facilitate transactions for such persons or provide them with material support may also be exposed to sanctions.

Identifying information

Name: Seyed Nasser Mohammad Seyyedi
Title: Managing Director, Sima General Trading
DOB: April 21, 1963
Citizenship: Iran
Passport: L18507193 (Iran)
alt. Passport: X95321252 (Iran)
alt. Passport: B14354139 (Iran)

Name: AA Energy FZCO
Address: United Arab Emirates

Name: Petro Royal FZE
Address: United Arab Emirates

Name: KASB International LLC
Address: United Arab Emirates

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Name: Swiss Management Services Sarl
Address: 28C, Route de Denges, Lonay, Switzerland 1027, Switzerland

Name: Mohammad Moinie
Title: Commercial Director, Naftiran Intertrade Co Sarl
DOB: January 4, 1956
POB: Brojerd, Iran
Citizenship: United Kingdom
Passport: 301762718 (United Kingdom)

Name: Reza Parsaei
Title: Director, NIOC International Affairs (London) Ltd.
DOB: August 9, 1963
Citizenship: Iran

Name: Seyyed Mohamad Ali Khatibi Tabatabaei
Title: Director, NIOC International Affairs (London) Ltd.
Title: Director of International Affairs, NIOC
DOB: September 27, 1955
Citizenship: Iran

Name: Seyed Mahmoud Mohaddes
Title: Managing Director, Iranian Oil Company (U.K.) Ltd.
DOB: June 7, 1957
Citizenship: Iran

Name: Mahmoud Ziracchian Zadeh
Title: Director, Iranian Oil Company (U.K.) Ltd.
DOB: July 24, 1959
Citizenship: Iran

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United Nations S/RES/1455 (2003)

Security Council

Distr.: General

17 January 2003

Resolution 1455 (2003)

Adopted by the Security Council at its 4686th meeting, on 17 January 2003

The Security Council,

Recalling its resolutions 1267 (1999) of 15 October 1999, 1333 (2000) of 19 December 2000, 1363 (2001) of 30 July 2001, 1373 (2001) of 28 September 2001, 1390 (2002) of 16 January 2002 and 1452 (2002) of 20 December 2002,

Underlining the obligation placed upon all Member States to implement, in full, resolution 1373 (2001), including with regard to any member of the Taliban and the Al-Qaida organization, and any individuals, groups, undertakings and entities associated with the Taliban and the Al-Qaida organization, who have participated in the financing, planning, facilitating and preparation or perpetration of terrorist acts or in supporting terrorist acts, as well as to facilitate the implementation of counter terrorism obligations in accordance with relevant Security Council resolutions,

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations and international law, threats to international peace and security caused by terrorist acts,

Noting that, in giving effect to the measures in paragraph 4 (b) of resolution 1267 (1999), paragraph 8 (c) of resolution 1333 (2000) and paragraphs 1 and 2 of resolution 1390 (2002), full account is to be taken of the provisions of paragraphs 1 and 2 of resolution 1452 (2002),

Reiterating its condemnation of the Al-Qaida network and other associated terrorist groups for ongoing and multiple criminal terrorist acts, aimed at causing the deaths of innocent civilians, and other victims, and the destruction of property,

Reiterating its unequivocal condemnation of all forms of terrorism and terrorist acts as noted in resolutions 1368 (2001) of 12 September 2001, 1438 (2002) of 14 October 2002, 1440 (2002) of 24 October 2002, and 1450 (2002) of 13 December 2002,

Reaffirming that acts of international terrorism constitute a threat to international peace and security,

Acting under Chapter VII of the Charter of the United Nations,

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1. *Decides* to improve the implementation of the measures imposed by paragraph 4 (b) of resolution 1267 (1999), paragraph 8 (c) of resolution 1333 (2000) and paragraphs 1 and 2 of resolution 1390 (2002);

2. *Decides* that the measures referred to in paragraph 1 above will be further improved in 12 months, or sooner if necessary;

3. *Stresses* the need for improved coordination and increased exchange of information between the Committee established pursuant to resolution 1267 (1999) (hereinafter referred to as "the Committee") and the Committee established pursuant to resolution 1373 (2001);

4. *Requests* the Committee to communicate to Member States the list referred to in paragraph 2 of resolution 1390 (2002) at least every three months, and stresses to all Member States the importance of submitting to the Committee the names and identifying information, to the extent possible, of and about members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them so that the Committee can consider adding new names and details to its list, unless to do so would compromise investigations or enforcement actions;

5. *Calls upon* all States to continue to take urgent steps to enforce and strengthen through legislative enactments or administrative measures, where appropriate, the measures imposed under domestic laws or regulations against their nationals and other individuals or entities operating in their territory, to prevent and punish violations of the measures referred to in paragraph 1 of this resolution, and to inform the Committee of the adoption of such measures, and invites States to report the results of all related investigations or enforcement actions to the Committee, unless to do so would compromise the investigation or enforcement actions;

6. *Calls upon* all States to submit an updated report to the Committee no later than 90 days from adoption of this resolution on all steps taken to implement the measures referred to in paragraph 1 above and all related investigations and enforcement actions, including a comprehensive summary of frozen assets of listed individuals and entities within Member State territories, unless to do so would compromise investigations or enforcement actions;

7. *Calls upon* all States, relevant United Nations bodies, and, as appropriate, other organizations and interested parties to cooperate fully with the Committee and with the Monitoring Group referred to in paragraph 8 below, including supplying such information as may be sought by the Committee pursuant to all pertinent resolutions and by providing all relevant information, to the extent possible, to facilitate proper identification of all listed individuals and entities;

8. *Requests* the Secretary-General, upon adoption of this resolution and acting in consultation with the Committee, to reappoint five experts, drawing, as much as possible and as appropriate, on the expertise of the members of the Monitoring Group established pursuant to paragraph 4 (a) of resolution 1363 (2001), to monitor for a further period of 12 months the implementation of the measures referred to in paragraph 1 of this resolution and to follow up on relevant leads relating to any incomplete implementation of the measures referred to in paragraph 1 above;

9. *Requests* the Chairman of the Committee to report orally at least every 90 days to the Council in detail on the overall work of the Committee and the Monitoring Group and stipulates that these updates shall include a summary of progress in submitting the reports referred to in paragraph 6 of resolution 1390 (2002) and paragraph 6 above;

10. *Requests* the Secretary-General to ensure that the Monitoring Group and the Committee and its Chairman have access to sufficient expertise and resources as and when required to assist in the discharge of their responsibilities;

11. *Requests* the Committee to consider, where and when appropriate, a visit to selected countries by the Chairman of the Committee and/or Committee members to enhance the full and effective implementation of the measures referred to in paragraph 1 above, with a view to encouraging States to implement all relevant Council resolutions;

12. *Requests* the Monitoring Group to submit a detailed work programme within 30 days of the adoption of this resolution and to assist the Committee in providing guidance for Member States on the format of the reports referred to in paragraph 6 above;

13. *Further requests* the Monitoring Group to submit two written reports to the Committee, the first by 15 June 2003 and the second by 1 November 2003, on implementation of the measures referred to in paragraph 1 above and to brief the Committee when the Committee so requests;

14. *Further requests* the Committee, through its Chairman, to provide the Council by 1 August 2003 and by 15 December 2003 with detailed oral assessments of Member State implementation of the measures referred to in paragraph 1 above based on Member State reports referred to in paragraph 6 above, paragraph 6 of resolution 1390 (2002) and all pertinent parts of Member State reports submitted under resolution 1373 (2001), and in line with transparent criteria to be determined by the Committee and communicated to all Member States, in addition to considering supplementary recommendations by the Monitoring Group, with a view to recommending further measures for Council consideration to improve the measures referred to in paragraph 1 above;

15. *Requests* the Committee, based on its oral assessments, through its Chairman, to the Council referred to in paragraph 14 above, to prepare and then to circulate a written assessment to the Council of actions taken by States to implement the measures referred to in paragraph 1 above;

16. *Decides* to remain actively seized of the matter.

United Nations S/RES/1963 (2010)*

Security Council

Distr.: General
20 December 2010

Resolution 1963 (2010)

Adopted by the Security Council at its 6459th meeting, on 20 December 2010

The Security Council,

Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed and remaining determined to contribute further to enhancing the effectiveness of the overall effort to fight this scourge on a global level,

Reaffirming also that terrorism cannot and should not be associated with any religion, nationality, civilization or group,

Noting with concern that terrorism continues to pose a serious threat to international peace and security, the enjoyment of human rights, the social and economic development of all Member States, and undermines global stability and prosperity, that this threat has become more diffuse, with an increase, in various regions of the world, of terrorist acts including those motivated by intolerance or extremism, *expressing* its determination to combat this threat, and *stressing* the need to ensure that counter-terrorism remains a priority on the international agenda,

Recognizing that terrorism will not be defeated by military force, law enforcement measures, and intelligence operations alone, and *underlining* the need to address the conditions conducive to the spread of terrorism, as outlined in Pillar I of the UN Global Counter-Terrorism Strategy (A/RES/60/288) including, but not limited to, the need to strengthen efforts for the successful prevention and peaceful resolution of prolonged conflict, and the need to promote the rule of law, the protection of human rights and fundamental freedoms, good governance, tolerance, inclusiveness to offer a viable alternative to those who could be susceptible to terrorist recruitment and to radicalization leading to violence,

Expressing concern at the increase in incidents of kidnapping and hostage-taking committed by terrorist groups, in some areas of the world with a specific political context, with the aim of raising funds or gaining political concessions,

* Reissued for technical reasons.

10-70223* (E)

Reiterating the obligation of Member States to prevent and suppress the financing of terrorist acts, and criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts,

Reaffirming the obligation of the Member States to freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities,

Reaffirming further the obligation of the Member States to prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons,

Reiterating further the obligation of Member States to prevent the movement of terrorist groups by, inter alia, effective border controls, and, in this context, to exchange information expeditiously, improve cooperation amongst competent authorities to prevent the movement of terrorists and terrorist groups to and from their territories, the supply of weapons for terrorists and financing that would support terrorists,

Underlining that safe havens provided to terrorists continue to be a significant concern and that all Member States must cooperate fully in the fight against terrorism in order to find, deny safe haven and bring to justice, on the basis of the principle of extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens,

Recognizing that development, peace and security, and human rights are interlinked and mutually reinforcing, and *underlining* the international effort to eradicate poverty and promote sustained economic growth, sustainable development and global prosperity for all,

Emphasizing that continuing international efforts to enhance dialogue and broaden understanding among civilizations in an effort to prevent the indiscriminate targeting of different religions and cultures, can help counter the forces that fuel polarization and extremism, and will contribute to strengthening the international fight against terrorism, and, in this respect, *appreciating* the positive role of the Alliance of Civilizations and other similar initiatives,

Reaffirming that Member States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, in particular international human rights, refugee, and humanitarian law,

Reaffirming its call upon all States to become party to the international counter-terrorism conventions and protocols as soon as possible, whether or not they

are a party to regional conventions on the matter, and to fully implement their obligations under those which they are a party,

Reiterating its call upon Member States to enhance their cooperation and solidarity, particularly through bilateral and multilateral arrangements and agreements to prevent and suppress terrorist attacks and encourages Member States to strengthen cooperation at the regional and subregional level,

Expressing concern at the increased use, in a globalized society, by terrorists of new information and communication technologies, in particular the Internet, for the purposes of the recruitment and incitement as well as for the financing, planning and preparation of their activities,

Recognizing the importance that Member States act cooperatively to prevent terrorists from exploiting technology, communications and resources to incite support for terrorist acts,

Recognizing the importance of the support of local communities, private sector, civil society and media for increasing awareness about the threats of terrorism and more effectively tackling them,

Expressing its profound solidarity with the victims of terrorism and their families, stresses the importance of assisting victims of terrorism, and providing them and their families with support to cope with their loss and grief, recognizes the important role that victims and survivor networks play in countering terrorism, including by bravely speaking out against violent and extremist ideologies, and in this regard, welcomes and encourages the efforts and activities of Member States and the UN system, including the Counter-Terrorism Implementation Task Force (CTITF) in this field",

Recalling resolution 1373 (2001) of 28 September 2001, which established the Counter-Terrorism Committee (CTC), and *recalling also* resolution 1624 (2005) and its other resolutions concerning threats to international peace and security caused by terrorist acts,

Recalling, in particular, resolution 1535 (2004) of 26 March 2004, resolution 1787 (2007) of 10 December 2007, and resolution 1805 (2008) of 20 March 2008, which pertain to the Counter-Terrorism Committee Executive Directorate (CTED),

Welcoming the CTC's efforts to pursue a more strategic and transparent approach to its work, to seek to raise the visibility of its work within the wider United Nations and counter-terrorism community, and to streamline its working methods, all of which have led to increased effectiveness; and *urging* that these efforts be intensified,

Noting with appreciation CTED's continuing emphasis on the guiding principles of cooperation, transparency, and even-handedness, and *welcoming* CTED's increased regional and subregional approaches to and thematic focus in its work, including in identifying and addressing technical assistance needs, as it continues to intensify its outreach efforts,

Underscoring the central role of the United Nations in the global fight against terrorism and *welcoming* the adoption by the General Assembly of the United Nations Global Counter-Terrorism Strategy (A/RES/60/288) of 8 September 2006, the institutionalization of the Counter-Terrorism Implementation Task Force

(CTITF) in accordance with General Assembly resolution 64/235 of 24 December 2009, which will further enhance the CTITF's efforts to ensure overall coordination and coherence in the counter-terrorism efforts of the United Nations system, including in the field, and the call for enhanced engagement of Member States with the work of the CTITF (A/64/297),

1. *Underlines* that the overarching goal of the CTC is to ensure the full implementation of resolution 1373 (2001) and *recalls* CTED's crucial role in supporting the Committee in the fulfilment of its mandate;

2. *Decides* that CTED will continue to operate as a special political mission under the policy guidance of the CTC for the period ending 31 December 2013 and further decides to conduct an interim review by 30 June 2012;

3. *Welcomes and endorses* the recommendations contained in the "Report of the Counter-Terrorism Committee to the Security Council for its Comprehensive Consideration of the Work of the Counter-Terrorism Executive Directorate";

4. *Urges CTED to continue* to strengthen its role in facilitating technical assistance for implementation of resolution 1373 (2001) aimed at increasing the capabilities of Member States and regions in the fight against terrorism by addressing their counter-terrorism needs, in close cooperation with CTITF, as well as with bilateral and multilateral assistance providers, and welcomes the focused and regional approach of CTED to this work;

5. *Encourages* CTED, in close cooperation within the CTITF and its relevant Working Groups, to focus increased attention on resolution 1624 (2005) in its dialogue with member States to develop, in accordance with their obligations under international law, strategies which include countering incitement of terrorist acts motivated by extremism and intolerance and in facilitating technical assistance for its implementation, as called for in resolution 1624 (2005) and the United Nations Global Counter-Terrorism Strategy;

6. *Encourages* CTED to arrange meetings with Member States in various formats, with their consent, including for the purpose of considering advising, as appropriate, on the development of comprehensive and integrated national counter-terrorism strategies and the mechanisms to implement them that include attention to the factors that lead to terrorist activities, in accordance with their obligations under international law, and in close cooperation within the CTITF and its Working Groups, with a view to ensuring coherence and complementarity of efforts and to avoid any duplication;

7. *Encourages* CTED to interact, as appropriate and in consultation with the CTC and relevant member States, with civil society and other relevant non-government actors in the context of its efforts to support the CTC's efforts to monitor the implementation of resolutions 1373 (2001) and 1624 (2005);

8. *Stresses* the importance of a tailored dialogue among CTED, the CTC, and Member States, and *encourages* the CTC and CTED to continue to arrange meetings involving counter-terrorism officials from Member States and relevant international, regional, and subregional organizations, with a thematic or regional focus relevant to the implementation of resolutions 1373 (2001) and 1624 (2005);

9. *Urges* CTED also to intensify cooperation with relevant international, regional, and subregional organizations with a view to enhance Member States'

capacity to fully implement resolution 1373 (2001) and resolution 1624 (2005) and to facilitate the provision of technical assistance;

10. *Reminds* that effective counter-terrorism measures and respect for human rights are complementary and mutually reinforcing, and are an essential part of a successful counter-terrorism effort, *notes* the importance of respect for the rule of law so as to effectively combat terrorism, and thus encourages CTED to further develop its activities in this area, to ensure that all human rights issues relevant to the implementation of resolutions 1373 (2001) and 1624 (2005) are addressed consistently and even-handedly including, as appropriate, on country visits that are organized with the consent of the visited member State;

11. *Highlights* the importance of the CTC/CTED work program and in this context looks forward to a special meeting open to the wider membership, to commemorate the 10th anniversary of the adoption of resolution 1373 (2001) and the establishment of the Committee;

12. *Directs* CTED to produce an updated Global Implementation Survey of resolution 1373 (2001) by 30 June 2011 and in advance of the above mentioned meeting that inter alia:

– assesses the evolution of risks and threats, and the impact of the implementation;

– identifies gaps in the implementation;

– proposes new practical ways to implement the resolution;

13. *Directs* CTED to produce a Global Implementation Survey of resolution 1624 (2005) by 31 December 2011, that inter alia:

– assesses the evolution of risks and threats, and the impact of the implementation;

– identifies gaps in the implementation;

– proposes new practical ways to implement the resolution;

14. *Requests* the CTC to report orally, through its Chairman, at least every 180 days to the Council on the overall work of the CTC and CTED, and, as appropriate, in conjunction with the reports of the Chairmen of the Committee established pursuant to resolution 1267 (1999) and the Committee established pursuant to resolution 1540 (2004), and urges the CTC Chairman to continue the practice of providing informal briefings, including with a regional or thematic focus, for all interested Member States;

15. *Encourages* CTED to continue to report to the Committee, on a regular basis or when the Committee so requests, through oral and/or written briefings on the work of CTED, including its visits to Member States, the conduct of workshops and other activities;

16. *Reiterates* the need to enhance the ongoing cooperation among the CTC, the Committee established pursuant to resolution 1267 (1999), and the Committee established pursuant to resolution 1540 (2004), as well as their respective groups of experts, including through, as appropriate, enhanced and systematized information sharing, coordination on visits to countries and participation in workshops, on technical assistance, on relations with international and regional organizations and

agencies, and on other issues of relevance to all three committees, *expresses* its intention to provide guidance to the committees on areas of common interest in order to better coordinate counter-terrorism efforts, and *recalls* resolution 1904 (2009) which requests the Secretary-General to make the necessary arrangements for the groups to be co-located as soon as possible;

17. *Encourages* CTED to continue joint activities, in cooperation with the 1267 Monitoring Team, the 1540 Committee experts and the United Nations Office on Drugs and Crime to assist Member States in their efforts to comply with their obligations under the relevant resolutions, including through organizing regional and subregional workshops;

18. *Welcomes and encourages* CTED's continued active participation in and support of all relevant activities under the United Nations Global Counter-Terrorism Strategy, including within the CTITF and its Working Groups, established to ensure overall coordination and coherence in the counter-terrorism efforts of the United Nations system.

United Nations S/RES/2129 (2013)

Security Council

Distr.: General
17 December 2013

Resolution 2129 (2013)

Adopted by the Security Council at its 7086th meeting, on 17 December 2013

The Security Council,

Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed and remaining determined to contribute further to enhancing the effectiveness of the overall effort to fight this scourge on a global level,

Noting with concern that terrorism continues to pose a serious threat to international peace and security, the enjoyment of human rights, the social and economic development of all Member States, and undermines global stability and prosperity, that this threat has become more diffuse, with an increase, in various regions of the world, of terrorist acts including those motivated by intolerance or extremism, *expressing its determination* to combat this threat, and *stressing* the need to ensure that counter-terrorism remains a priority on the international agenda,

Recognizing that terrorism will not be defeated by military force, law enforcement measures, and intelligence operations alone, and underlining the need to address the conditions conducive to the spread of terrorism, as outlined in Pillar I of the United Nations Global Counter-Terrorism Strategy (A/RES/60/288) including, but not limited to, the need to strengthen efforts for the successful prevention and peaceful resolution of prolonged conflict, and the need to promote the rule of law, the protection of human rights and fundamental freedoms, good governance, tolerance, inclusiveness to offer a viable alternative to those who could be susceptible to terrorist recruitment and to radicalization leading to violence,

Recognizing that development, security, and human rights are mutually reinforcing and are vital to an effective and comprehensive approach to countering terrorism, and *underlining* that a particular goal of counter-terrorism strategies should be to ensure sustainable peace and security,

Reaffirming that Member States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, in particular international human rights, refugee and international humanitarian law, and *underscoring* that effective counter-terrorism measures and respect for human

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rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing, and are an essential part of a successful counter-terrorism effort, and notes the importance of respect for the rule of law so as to effectively prevent and combat terrorism,

Reaffirming also that terrorism cannot and should not be associated with any religion, nationality, civilization or group,

Emphasizing that continuing international efforts to enhance dialogue and broaden understanding among civilizations in an effort to prevent the indiscriminate targeting of different religions and cultures, and addressing unresolved regional conflicts and the full range of global issues, including development issues, will contribute to strengthening the international fight against terrorism,

Expressing deep concern that incitement of terrorist acts motivated by extremism and intolerance poses a serious and growing danger to the enjoyment of human rights, threatens the social and economic development of all States and undermines global stability and prosperity,

Strongly condemning incidents of kidnapping and hostage-taking committed by terrorist groups for any purpose, including with the aim of raising funds or gaining political concessions, *deeply concerned* by the increase in such kidnappings, and *underscoring* the urgent need to address this issue,

Recalling the adoption of resolution 2122, and *reaffirming* the intention to increase its attention to women, peace and security issues in all relevant thematic areas of work on its agenda, including in threats to international peace and security caused by terrorist acts,

Expressing concern regarding the connection, in some cases, between terrorism and transnational organized crime and illicit activities such as drugs, arms and human trafficking, and money-laundering, and *emphasizes* the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security,

Reiterating the obligation of Member States to prevent and suppress the financing of terrorist acts, and criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts,

Reaffirming the obligation of Member States to freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities,

Reaffirming further the obligation of Member States to prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or

controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons,

Reiterating that sanctions are an important tool in countering terrorism, and *underlines* the importance of prompt and effective implementation of relevant resolutions, in particular Security Council resolutions 1267 (1999) and 1989 (2011) as key instruments in the fight against terrorism, and *reiterates* its continued commitment to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions,

Acknowledging the important work on countering the financing of terrorism of the United Nations entities and other multilateral bodies and forums, including the Financial Action Task Force, and *encouraging* CTED to cooperate closely with these entities,

Reiterating further the obligation of Member States to prevent the movement of terrorist groups by, inter alia, effective border controls, and, in this context, to exchange information expeditiously, improve cooperation among competent authorities to prevent the movement of terrorists and terrorist groups to and from their territories, the supply of weapons for terrorists and financing that would support terrorists,

Underlining that safe havens provided to terrorists continue to be a significant concern and that all Member States must cooperate fully in the fight against terrorism in order to find, deny safe haven and bring to justice, on the basis of the principle of extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens,

Expressing concern at the increased use, in a globalized society, by terrorists and their supporters of new information and communication technologies, in particular the Internet, for the purposes of recruitment and incitement to commit terrorist acts, as well as for the financing, planning and preparation of their activities, and *underlining* the need for Member States to act cooperatively to prevent terrorists from exploiting technology, communications and resources to incite support for terrorist acts, while respecting human rights and fundamental freedoms and in compliance with other obligations under international law,

Recalls its decision that States shall eliminate the supply of weapons, including small arms and light weapons, to terrorists, as well as its calls for States to find ways of intensifying and accelerating the exchange of operational information regarding traffic in arms, and to enhance coordination of efforts on national, subregional, regional and international levels,

Recognizing the importance of having in place criminal justice institutions that can effectively prevent and respond to terrorism within a rule of law framework and *underlining* the importance of strengthening cooperation among Member States and with United Nations entities and subsidiary bodies with a view to enhancing their individual capabilities, including by supporting their efforts to develop and implement rule of law based counter-terrorism practices,

Recognizing the challenges faced by Member States in the management of terrorists in custody, encourages Member States to collaborate and share best

practices regarding the management of terrorists in a secure, well-managed and regulated custodial environment in which human rights are respected and the development of programs for the rehabilitation and reintegration of convicted terrorists, *noting* the work of the United Nations Interregional Crime and Justice Research Institute (UNICRI), the United Nations Office on Drugs and Crime (UNODC), and other relevant United Nations agencies in providing interested Member States with technical assistance in these areas, and *encouraging* interested Member States to request such assistance from these agencies,

Noting the work of the Global Counterterrorism Forum (GCTF), in particular its publication of several framework documents and good practices, including in the areas of countering violent extremism, criminal justice, kidnapping for ransom, providing support to victims of terrorism, and community-oriented policing, to complement the work of the relevant United Nations counterterrorism entities in these areas, and *encouraging* CTED to continue its interaction with GCTF, in its work with Member States to promote the full implementation of resolutions 1373 (2001) and 1624 (2005),

Recognizing the need for Member States to prevent the abuse of non-governmental, non-profit and charitable organizations by and for terrorists, and calling upon non-governmental, non-profit, and charitable organizations to prevent and oppose, as appropriate, attempts by terrorists to abuse their status, while recalling the importance of fully respecting the rights to freedom of expression and association of individuals in civil society and freedom of religion or belief, and noting the relevant recommendation and guidance documents of the Financial Action Task Force,

Expressing its profound solidarity with the victims of terrorism and their families, stresses the importance of assisting victims of terrorism, and providing them and their families with support to cope with their loss and grief, recognizes the important role that victims and survivor networks play in countering terrorism, including by bravely speaking out against violent and extremist ideologies, and in this regard, welcomes and encourages the efforts and activities of Member States and the United Nations system, including the Counter-Terrorism Implementation Task Force (CTITF) in this field,

Reiterating its call to Member States to enhance their cooperation and solidarity, particularly through bilateral and multilateral arrangements and agreements to prevent and suppress terrorist attacks, and *encouraging* Member States to strengthen cooperation at the regional and subregional level, noting also the particular benefits to be derived from cross-regional collaboration and training, including, as appropriate, law enforcement, corrections and justice sector professionals and their staffs, and noting the importance of close collaboration within and between all agencies of government and international organizations in combating terrorism and its incitement,

Reaffirming its call upon all States to become party to the international counter-terrorism conventions and protocols as soon as possible, whether or not they are a party to regional conventions on the matter, and to fully implement their obligations under those which they are a party,

Recognizing the importance of local communities, private sector, civil society and media in increasing awareness about the threats of terrorism and more effectively tackling them,

Recalling resolution 1373 (2001) of 28 September 2001, which established the Counter-Terrorism Committee (CTC), and recalling also resolution 1624 (2005) and its other resolutions concerning threats to international peace and security caused by terrorist acts,

Recalling, in particular, resolution 1535 (2004) of 26 March 2004, resolution 1787 (2007) of 10 December 2007, resolution 1805 (2008) of 20 March 2008, and resolution 1963 (2010) of 20 December 2010 which pertain to the Counter-Terrorism Committee Executive Directorate (CTED), and *recalling* also the crucial role of the Counter Terrorism Committee (CTC) and CTED in ensuring the full implementation of resolutions 1373 (2001) and 1624 (2005), and *underlines* the importance of capacity-building and technical assistance with a view to increasing the capabilities of Member States, regional and subregional organizations for effective implementation of its resolutions,

Underscoring the central role of the United Nations in the global fight against terrorism and *welcoming* the adoption by the General Assembly of the United Nations Global Counter-Terrorism Strategy (A/RES/60/288) of 8 September 2006, and *expressing support* for the activities of the Counter-Terrorism Implementation Task Force (CTITF), in accordance with General Assembly resolution 64/235 of 24 December 2009, to ensure overall coordination and coherence in the counter-terrorism efforts of the United Nations system, and its crucial role in promoting the United Nations Global Counter-Terrorism Strategy and the full participation, within their mandate, of relevant Security Council subsidiary bodies in the work of the CTITF and its working groups,

Recognizing the work carried out by the United Nations Counter-Terrorism Centre (UNCCT) within the CTITF Office, in accordance with the General Assembly resolution A/RES/66/10, and its role in building the capacity of Member States,

1. *Underlines* that the overarching goal of the CTC is to ensure the full implementation of resolution 1373 (2001) and recalls CTED's crucial role in supporting the Committee in the fulfilment of its mandate;

2. *Decides* that CTED will continue to operate as a special political mission under the policy guidance of the CTC for the period ending 31 December 2017 and further decides to conduct an interim review by 31 December 2015;

3. *Welcomes* the adoption of, and *commends*, the "Report of the Counter-Terrorism Committee to the Security Council for its Comprehensive Consideration of the Work of the Counter-Terrorism Executive Directorate from 2011 to 2013";

4. *Underscores* the essential role of CTED within the United Nations to assess issues and trends relating to the implementation of resolutions 1373 (2001) and 1624 (2005), and to share information, as appropriate, with relevant United Nations counterterrorism bodies and relevant international, regional and subregional organizations, *welcomes* the thematic and regional approach of CTED aimed at addressing the counter-terrorism needs of each Member State and region, and in this

regard, *encourages* CTED to promote international cooperation to further the implementation of resolutions 1373 and 1624;

5. *Directs* CTED to identify emerging issues, trends and developments related to resolutions 1373 (2001) and 1624 (2005), while taking into account the United Nations Global Counter-Terrorism Strategy, as appropriate, at all levels, in consultation with relevant partners, and to advise the CTC on practical ways for Member States to implement resolutions 1373 (2001) and 1624 (2005);

6. *Recalls* that CTED provided to the Committee, in accordance with resolution 1963 (2010), Global Implementation Surveys of resolutions 1373 (2001) and 1624 (2005), and *directs* CTED to produce updated versions of these Global Implementation Surveys to the Committee prior to 31 December 2015;

7. *Encourages* CTED to cooperate with Member States and regional and subregional organizations, upon request, to assess and advise them on formulating national and regional counterterrorism strategies to further the implementation of resolutions 1373 (2001) and 1624 (2005), and to make available its assessments and other information, as appropriate, to relevant CTITF entities;

8. *Stresses* the importance of CTED providing timely country reports to the Committee, *encourages* the Committee and CTED to engage with Member States, as appropriate, after relevant country reports are adopted by the Committee, and *invites* CTED to conduct regular follow-up activity with concerned Member States, as appropriate;

9. *Directs* CTED to report to the Committee in a timely manner, on a regular basis or when the Committee so requests, through oral and/or written briefings on the work of CTED, including its visits to Member States, the conduct of assessments, representing the CTC at different international and regional meetings, and other activities, including during planning stages, and to conduct an annual review and forecast of activities to facilitate implementation of United Nations Security Council resolutions 1373 (2001) and 1624 (2005) and cooperation in this area;

10. *Directs* CTED to make available information contained in national counterterrorism surveys and assessments, when agreed by concerned Member States, and *further directs* CTED to make available information on regional counterterrorism capacities, when approved by the CTC, as appropriate;

11. *Encourages* CTED, in close cooperation with bilateral and multilateral donors and technical assistance providers, including relevant United Nations counterterrorism bodies, to continue to work with Member States, regional and subregional organizations, at their request and in accordance with resolutions 1373 (2001) and 1624 (2005), to facilitate technical assistance, specifically by promoting engagement between providers of capacity-building assistance and recipients, and *encourages* CTED, as appropriate, to assess the impact of its donor-supported project activity linked to building capacity and cooperation;

12. *Encourages* CTED, in close cooperation with the CTITF and its relevant Working Groups, to continue to pay close attention to resolution 1624 (2005) in its dialogue with Member States, and to work with them to develop, in accordance with their obligations under international law, strategies which include countering incitement of terrorist acts motivated by extremism and intolerance and to facilitate

technical assistance for its implementation, as called for in resolution 1624 (2005) and the United Nations Global Counter-Terrorism Strategy;

13. *Reiterates* the obligation of Member States to refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists, and *encourages* CTED to continue to fully take this obligation into account throughout its activities;

14. *Notes* the evolving nexus between terrorism and information and communications technologies, in particular the Internet, and the use of such technologies to commit terrorist acts, and to facilitate such acts through their use to incite, recruit, fund, or plan terrorist acts, and *directs* CTED to continue to address this issue, in consultation with Member States, international, regional and subregional organizations, the private sector and civil society and to advise the CTC on further approaches;

15. *Recalls* the adoption by the GCTF of the "Algiers Memorandum on Good Practices on Preventing and Denying the Benefits of Kidnapping for Ransom by Terrorists" (the "Memorandum") and *encourages* CTED to take it into account, as appropriate, consistent with its mandate, including in its facilitation of capacity-building to Member States;

16. *Expresses* its profound solidarity with the victims of terrorism and their families, and *encourages* CTED to take into account the important role that victims and survivor networks can play in countering terrorism, in close cooperation with CTITF and its relevant Working Groups;

17. *Recognizes* the comprehensive international standards embodied in the Financial Action Task Force's (FATF) revised Forty Recommendations on Combating Money Laundering and the Financing of Terrorism and Proliferation, and *encourages* CTED to work closely with the FATF, including in the FATF's mutual evaluations process, focusing on effective implementation of counter terrorist financing recommendations;

18. *Encourages* CTED to continue its dialogue with Member States in various formats, with their consent, including for the purpose of considering advising, as appropriate, on the development of comprehensive and integrated national counter-terrorism strategies and the mechanisms to implement them that include attention to the factors that lead to terrorist activities, in accordance with their obligations under international law, and in close cooperation with the CTITF and its Working Groups, with a view to ensuring coherence and complementarity of efforts and to avoid any duplication;

19. *Recognizes* the advantages of a comprehensive approach to preventing the spread of terrorism and violent extremism, consistent with resolutions 1373 (2001) and 1624 (2005), and in this regard, *invites* CTED, as appropriate and in consultation with relevant Member States, to further engage and enhance its partnerships with international, regional and subregional organizations, civil society, academia and other entities in conducting research and information-gathering, and identifying good practices, and in that context to support the CTC's efforts to promote the implementation of resolutions 1373 (2001) and 1624 (2005), and *underscores* the importance of engaging with development entities;

20. *Stresses* the importance of a tailored dialogue and engagement among CTED, the CTC, and Member States, and *encourages* the CTC and CTED to continue to arrange meetings involving counter-terrorism officials from Member States and relevant international, regional, and subregional organizations, with a thematic or regional focus relevant to the implementation of resolutions 1373 (2001) and 1624 (2005);

21. *Reminds* Member States that effective counter-terrorism measures and respect for human rights are complementary and mutually reinforcing, and are an essential part of a successful counter-terrorism effort, notes the importance of respect for the rule of law so as to effectively combat terrorism, and *encourages* CTED to further develop its activities in this area, to ensure that all human rights and rule of law issues relevant to the implementation of resolutions 1373 (2001) and 1624 (2005) are addressed consistently and even-handedly including, as appropriate, on country visits that are organized with the consent of the visited Member State and in the delivery of technical assistance;

22. *Requests* the CTC to report orally, through its Chair, at least once per year to the Council on the state of the overall work of the CTC and CTED, and, as appropriate, in conjunction with the reports by the Chairs of the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011) and the Committee established pursuant to resolution 1540 (2004), *expresses its intention* to hold informal consultations at least once per year on the work of the Committee, and further *requests* the Committee to hold periodic meetings, including with a regional or thematic focus, for all Member States;

23. *Reiterates* the need to enhance the ongoing cooperation among the CTC, the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011), and the Committee established pursuant to resolution 1540 (2004), as well as their respective groups of experts, including through, as appropriate, enhanced and systematized information sharing, coordination on visits to countries and participation in workshops, on technical assistance, on relations with international, regional and subregional organizations and agencies, including through the shared use of regionally-based focal points, as appropriate and in accordance with respective mandates, and on other issues of relevance to all three committees, *expresses* its intention to provide guidance to the committees on areas of common interest in order to better coordinate counter-terrorism efforts; and *stresses* the importance of CTED and relevant CTITF entities being co-located and making necessary efforts to achieve this objective;

24. *Directs* CTED to increase cooperation with committees that have mandates established pursuant to resolutions 1267 (1999) and 1989 (2011), 1988 (2011), 1373 (2001) and 1540 (2004) and their respective groups of experts;

25. *Encourages* CTED to enhance its dialogue and information sharing with Special Envoys, the Department of Political Affairs and the Department of Peacekeeping Operations, including during planning stages of missions, as appropriate, in relation to the implementation of resolutions 1373 (2001) and 1624 (2005);

26. *Welcomes* and *encourages* CTED's continued active participation in and support of all relevant activities under the United Nations Global Counter-Terrorism Strategy, including within the CTITF and its Working Groups, established to ensure overall coordination and coherence in the counter-terrorism efforts of the United Nations system;

27. *Decides* to remain actively seized of the matter.

United Nations S/RES/2178 (2014)

Security Council

Distr.: General
24 September 2014

Resolution 2178 (2014)

Adopted by the Security Council at its 7272nd meeting, on 24 September 2014

The Security Council,

Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed, and *remaining* determined to contribute further to enhancing the effectiveness of the overall effort to fight this scourge on a global level,

Noting with concern that the terrorism threat has become more diffuse, with an increase, in various regions of the world, of terrorist acts including those motivated by intolerance or extremism, and *expressing* its determination to combat this threat,

Bearing in mind the need to address the conditions conducive to the spread of terrorism, and *affirming* Member States' determination to continue to do all they can to resolve conflict and to deny terrorist groups the ability to put down roots and establish safe havens to address better the growing threat posed by terrorism,

Emphasizing that terrorism cannot and should not be associated with any religion, nationality or civilization,

Recognizing that international cooperation and any measures taken by Member States to prevent and combat terrorism must comply fully with the Charter of the United Nations,

Reaffirming its respect for the sovereignty, territorial integrity and political independence of all States in accordance with the Charter,

Reaffirming that Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law, international refugee law, and international humanitarian law, *underscoring* that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort and notes the importance of respect for the rule of law so as to effectively prevent and combat terrorism, and *noting* that failure to comply with these and other international obligations, including under the Charter

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of the United Nations, is one of the factors contributing to increased radicalization and fosters a sense of impunity,

Expressing grave concern over the acute and growing threat posed by foreign terrorist fighters, namely individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict, and *resolving* to address this threat,

Expressing grave concern about those who attempt to travel to become foreign terrorist fighters,

Concerned that foreign terrorist fighters increase the intensity, duration and intractability of conflicts, and also may pose a serious threat to their States of origin, the States they transit and the States to which they travel, as well as States neighbouring zones of armed conflict in which foreign terrorist fighters are active and that are affected by serious security burdens, and *noting* that the threat of foreign terrorist fighters may affect all regions and Member States, even those far from conflict zones, and *expressing* grave concern that foreign terrorist fighters are using their extremist ideology to promote terrorism,

Expressing concern that international networks have been established by terrorists and terrorist entities among States of origin, transit and destination through which foreign terrorist fighters and the resources to support them have been channelled back and forth,

Expressing particular concern that foreign terrorist fighters are being recruited by and are joining entities such as the Islamic State in Iraq and the Levant (ISIL), the Al-Nusrah Front (ANF) and other cells, affiliates, splinter groups or derivatives of Al-Qaida, as designated by the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011), *recognizing* that the foreign terrorist fighter threat includes, among others, individuals supporting acts or activities of Al-Qaida and its cells, affiliates, splinter groups, and derivative entities, including by recruiting for or otherwise supporting acts or activities of such entities, and *stressing* the urgent need to address this particular threat,

Recognizing that addressing the threat posed by foreign terrorist fighters requires comprehensively addressing underlying factors, including by preventing radicalization to terrorism, stemming recruitment, inhibiting foreign terrorist fighter travel, disrupting financial support to foreign terrorist fighters, countering violent extremism, which can be conducive to terrorism, countering incitement to terrorist acts motivated by extremism or intolerance, promoting political and religious tolerance, economic development and social cohesion and inclusiveness, ending and resolving armed conflicts, and facilitating reintegration and rehabilitation,

Recognizing also that terrorism will not be defeated by military force, law enforcement measures, and intelligence operations alone, and *underlining* the need to address the conditions conducive to the spread of terrorism, as outlined in Pillar I of the United Nations Global Counter-Terrorism Strategy (A/RES/60/288),

Expressing concern over the increased use by terrorists and their supporters of communications technology for the purpose of radicalizing to terrorism, recruiting and inciting others to commit terrorist acts, including through the internet, and

financing and facilitating the travel and subsequent activities of foreign terrorist fighters, and *underlining* the need for Member States to act cooperatively to prevent terrorists from exploiting technology, communications and resources to incite support for terrorist acts, while respecting human rights and fundamental freedoms and in compliance with other obligations under international law,

Noting with appreciation the activities undertaken in the area of capacity building by United Nations entities, in particular entities of the Counter-Terrorism Implementation Task Force (CTITF), including the United Nations Office of Drugs and Crime (UNODC) and the United Nations Centre for Counter-Terrorism (UNCCT), and also the efforts of the Counter Terrorism Committee Executive Directorate (CTED) to facilitate technical assistance, specifically by promoting engagement between providers of capacity-building assistance and recipients, in coordination with other relevant international, regional and subregional organizations, to assist Member States, upon their request, in implementation of the United Nations Global Counter-Terrorism Strategy,

Noting recent developments and initiatives at the international, regional and subregional levels to prevent and suppress international terrorism, and *noting* the work of the Global Counterterrorism Forum (GCTF), in particular its recent adoption of a comprehensive set of good practices to address the foreign terrorist fighter phenomenon, and its publication of several other framework documents and good practices, including in the areas of countering violent extremism, criminal justice, prisons, kidnapping for ransom, providing support to victims of terrorism, and community-oriented policing, to assist interested States with the practical implementation of the United Nations counter-terrorism legal and policy framework and to complement the work of the relevant United Nations counter-terrorism entities in these areas,

Noting with appreciation the efforts of INTERPOL to address the threat posed by foreign terrorist fighters, including through global law enforcement information sharing enabled by the use of its secure communications network, databases, and system of advisory notices, procedures to track stolen, forged identity papers and travel documents, and INTERPOL's counter-terrorism fora and foreign terrorist fighter programme,

Having regard to and highlighting the situation of individuals of more than one nationality who travel to their states of nationality for the purpose of the perpetration, planning, preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and *urging* States to take action, as appropriate, in compliance with their obligations under their domestic law and international law, including international human rights law,

Calling upon States to ensure, in conformity with international law, in particular international human rights law and international refugee law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, including by foreign terrorist fighters,

Reaffirming its call upon all States to become party to the international counter-terrorism conventions and protocols as soon as possible, whether or not they are a party to regional conventions on the matter, and to fully implement their obligations under those to which they are a party,

Noting the continued threat to international peace and security posed by terrorism, and *affirming* the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts, including those perpetrated by foreign terrorist fighters,

Acting under Chapter VII of the Charter of the United Nations,

1. *Condemns* the violent extremism, which can be conducive to terrorism, sectarian violence, and the commission of terrorist acts by foreign terrorist fighters, and *demands* that all foreign terrorist fighters disarm and cease all terrorist acts and participation in armed conflict;

2. *Reaffirms* that all States shall prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents, *underscores*, in this regard, the importance of addressing, in accordance with their relevant international obligations, the threat posed by foreign terrorist fighters, and *encourages* Member States to employ evidence-based traveller risk assessment and screening procedures including collection and analysis of travel data, without resorting to profiling based on stereotypes founded on grounds of discrimination prohibited by international law;

3. *Urges* Member States, in accordance with domestic and international law, to intensify and accelerate the exchange of operational information regarding actions or movements of terrorists or terrorist networks, including foreign terrorist fighters, especially with their States of residence or nationality, through bilateral or multilateral mechanisms, in particular the United Nations;

4. *Calls upon* all Member States, in accordance with their obligations under international law, to cooperate in efforts to address the threat posed by foreign terrorist fighters, including by preventing the radicalization to terrorism and recruitment of foreign terrorist fighters, including children, preventing foreign terrorist fighters from crossing their borders, disrupting and preventing financial support to foreign terrorist fighters, and developing and implementing prosecution, rehabilitation and reintegration strategies for returning foreign terrorist fighters;

5. *Decides* that Member States shall, consistent with international human rights law, international refugee law, and international humanitarian law, prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities;

6. *Recalls* its decision, in resolution 1373 (2001), that all Member States shall ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice, and *decides* that all States shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense:

(a) their nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to

travel from their territories to a State other than their States of residence or nationality, for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training;

(b) the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to finance the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training; and,

(c) the wilful organization, or other facilitation, including acts of recruitment, by their nationals or in their territories, of the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training;

7. *Expresses* its strong determination to consider listing pursuant to resolution 2161 (2014) individuals, groups, undertakings and entities associated with Al-Qaida who are financing, arming, planning, or recruiting for them, or otherwise supporting their acts or activities, including through information and communications technologies, such as the internet, social media, or any other means;

8. *Decides* that, without prejudice to entry or transit necessary in the furtherance of a judicial process, including in furtherance of such a process related to arrest or detention of a foreign terrorist fighter, Member States shall prevent the entry into or transit through their territories of any individual about whom that State has credible information that provides reasonable grounds to believe that he or she is seeking entry into or transit through their territory for the purpose of participating in the acts described in paragraph 6, including any acts or activities indicating that an individual, group, undertaking or entity is associated with Al-Qaida, as set out in paragraph 2 of resolution 2161 (2014), provided that nothing in this paragraph shall oblige any State to deny entry or require the departure from its territories of its own nationals or permanent residents;

9. *Calls upon* Member States to require that airlines operating in their territories provide advance passenger information to the appropriate national authorities in order to detect the departure from their territories, or attempted entry into or transit through their territories, by means of civil aircraft, of individuals designated by the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011) (“the Committee”), and further *calls upon* Member States to report any such departure from their territories, or such attempted entry into or transit through their territories, of such individuals to the Committee, as well as sharing this information with the State of residence or nationality, as appropriate and in accordance with domestic law and international obligations;

10. *Stresses* the urgent need to implement fully and immediately this resolution with respect to foreign terrorist fighters, *underscores* the particular and urgent need to implement this resolution with respect to those foreign terrorist fighters who are associated with ISIL, ANF and other cells, affiliates, splinter groups or derivatives of Al-Qaida, as designated by the Committee, and *expresses* its

readiness to consider designating, under resolution 2161 (2014), individuals associated with Al-Qaida who commit the acts specified in paragraph 6 above;

International Cooperation

11. *Calls upon* Member States to improve international, regional, and subregional cooperation, if appropriate through bilateral agreements, to prevent the travel of foreign terrorist fighters from or through their territories, including through increased sharing of information for the purpose of identifying foreign terrorist fighters, the sharing and adoption of best practices, and improved understanding of the patterns of travel by foreign terrorist fighters, and for Member States to act cooperatively when taking national measures to prevent terrorists from exploiting technology, communications and resources to incite support for terrorist acts, while respecting human rights and fundamental freedoms and in compliance with other obligations under international law;

12. *Recalls* its decision in resolution 1373 (2001) that Member States shall afford one another the greatest measure of assistance in connection with criminal investigations or proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings, and *underlines* the importance of fulfilling this obligation with respect to such investigations or proceedings involving foreign terrorist fighters;

13. *Encourages* Interpol to intensify its efforts with respect to the foreign terrorist fighter threat and to recommend or put in place additional resources to support and encourage national, regional and international measures to monitor and prevent the transit of foreign terrorist fighters, such as expanding the use of INTERPOL Special Notices to include foreign terrorist fighters;

14. *Calls upon* States to help build the capacity of States to address the threat posed by foreign terrorist fighters, including to prevent and interdict foreign terrorist fighter travel across land and maritime borders, in particular the States neighbouring zones of armed conflict where there are foreign terrorist fighters, and *welcomes* and *encourages* bilateral assistance by Member States to help build such national capacity;

Countering Violent Extremism in Order to Prevent Terrorism

15. *Underscores* that countering violent extremism, which can be conducive to terrorism, including preventing radicalization, recruitment, and mobilization of individuals into terrorist groups and becoming foreign terrorist fighters is an essential element of addressing the threat to international peace and security posed by foreign terrorist fighters, and *calls upon* Member States to enhance efforts to counter this kind of violent extremism;

16. *Encourages* Member States to engage relevant local communities and non-governmental actors in developing strategies to counter the violent extremist narrative that can incite terrorist acts, address the conditions conducive to the spread of violent extremism, which can be conducive to terrorism, including by empowering youth, families, women, religious, cultural and education leaders, and all other concerned groups of civil society and adopt tailored approaches to countering recruitment to this kind of violent extremism and promoting social inclusion and cohesion;

17. *Recalls* its decision in paragraph 14 of resolution 2161 (2014) with respect to improvised explosive devices (IEDs) and individuals, groups, undertakings and entities associated with Al-Qaida, and *urges* Member States, in this context, to act cooperatively when taking national measures to prevent terrorists from exploiting technology, communications and resources, including audio and video, to incite support for terrorist acts, while respecting human rights and fundamental freedoms and in compliance with other obligations under international law;

18. *Calls upon* Member States to cooperate and consistently support each other's efforts to counter violent extremism, which can be conducive to terrorism, including through capacity building, coordination of plans and efforts, and sharing lessons learned;

19. *Emphasizes* in this regard the importance of Member States' efforts to develop non-violent alternative avenues for conflict prevention and resolution by affected individuals and local communities to decrease the risk of radicalization to terrorism, and of efforts to promote peaceful alternatives to violent narratives espoused by foreign terrorist fighters, and *underscores* the role education can play in countering terrorist narratives;

United Nations Engagement on the Foreign Terrorist Fighter Threat

20. *Notes* that foreign terrorist fighters and those who finance or otherwise facilitate their travel and subsequent activities may be eligible for inclusion on the Al-Qaida Sanctions List maintained by the Committee pursuant to resolutions 1267 (1999) and 1989 (2011) where they participate in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of, Al-Qaida, supplying, selling or transferring arms and related materiel to, or recruiting for, or otherwise supporting acts or activities of Al-Qaida or any cell, affiliate, splinter group or derivative thereof, and *calls upon* States to propose such foreign terrorist fighters and those who facilitate or finance their travel and subsequent activities for possible designation;

21. *Directs* the Committee established pursuant to resolution 1267 (1999) and 1989 (2011) and the Analytical Support and Sanctions Monitoring Team, in close cooperation with all relevant United Nations counter-terrorism bodies, in particular CTED, to devote special focus to the threat posed by foreign terrorist fighters recruited by or joining ISIL, ANF and all groups, undertakings and entities associated with Al-Qaida;

22. *Encourages* the Analytical Support and Sanctions Monitoring Team to coordinate its efforts to monitor and respond to the threat posed by foreign terrorist fighters with other United Nations counter-terrorism bodies, in particular the CTITF;

23. *Requests* the Analytical Support and Sanctions Monitoring Team, in close cooperation with other United Nations counter-terrorism bodies, to report to the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011) within 180 days, and provide a preliminary oral update to the Committee within 60 days, on the threat posed by foreign terrorist fighters recruited by or joining ISIL, ANF and all groups, undertakings and entities associated with Al-Qaida, including:

(a) a comprehensive assessment of the threat posed by these foreign terrorist fighters, including their facilitators, the most affected regions and trends in radicalization to terrorism, facilitation, recruitment, demographics, and financing; and

(b) recommendations for actions that can be taken to enhance the response to the threat posed by these foreign terrorist fighters;

24. *Requests* the Counter-Terrorism Committee, within its existing mandate and with the support of CTED, to identify principal gaps in Member States' capacities to implement Security Council resolutions 1373 (2001) and 1624 (2005) that may hinder States' abilities to stem the flow of foreign terrorist fighters, as well as to identify good practices to stem the flow of foreign terrorist fighters in the implementation of resolutions 1373 (2001) and 1624 (2005), and to facilitate technical assistance, specifically by promoting engagement between providers of capacity-building assistance and recipients, especially those in the most affected regions, including through the development, upon their request, of comprehensive counter-terrorism strategies that encompass countering violent radicalization and the flow of foreign terrorist fighters, recalling the roles of other relevant actors, for example the Global Counterterrorism Forum;

25. *Underlines* that the increasing threat posed by foreign terrorist fighters is part of the emerging issues, trends and developments related to resolutions 1373 (2001) and 1624 (2005), that, in paragraph 5 of resolution 2129 (2013), the Security Council directed CTED to identify, and therefore merits close attention by the Counter-Terrorism Committee, consistent with its mandate;

26. *Requests* the Committee established pursuant to resolutions 1267 (1999) and 1989 (2011) and the Counter-Terrorism Committee to update the Security Council on their respective efforts pursuant to this resolution;

27. *Decides* to remain seized of the matter.

United Nations S/RES/2341 (2017)

Security Council

Distr.: General
13 February 2017

Resolution 2341 (2017)

Adopted by the Security Council at its 7882nd meeting, on 13 February 2017

The Security Council,

Recalling its resolutions 1373 (2001), 1963 (2010), 2129 (2013) and 2322 (2016),

Reaffirming its primary responsibility for the maintenance of international peace and security, in accordance with the Charter of the United Nations,

Reaffirming its respect for the sovereignty, territorial integrity and political independence of all States in accordance with the United Nations Charter,

Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever, wherever and by whomsoever committed, and *remaining determined* to contribute further to enhancing the effectiveness of the overall effort to fight this scourge on a global level,

Reaffirming that terrorism poses a threat to international peace and security and that countering this threat requires collective efforts on national, regional and international levels on the basis of respect for international law, including international human rights law and international humanitarian law, and the Charter of the United Nations,

Reaffirming that terrorism should not be associated with any religion, nationality, civilization or ethnic group,

Stressing that the active participation and collaboration of all States and international, regional and subregional organizations is needed to impede, impair, isolate, and incapacitate the terrorist threat, and *emphasizing* the importance of implementing the United Nations Global Counter-Terrorism Strategy (GCTS), contained in General Assembly resolution 60/288 of 8 September 2006, and its subsequent reviews,

Reiterating the need to undertake measures to prevent and combat terrorism, in particular by denying terrorists access to the means to carry out their attacks, as

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outlined in Pillar II of the UN GCTS, including the need to strengthen efforts to improve security and protection of particularly vulnerable targets, such as infrastructure and public places, as well as resilience to terrorist attacks, in particular in the area of civil protection, while recognizing that States may require assistance to this effect,

Recognizing that each State determines what constitutes its critical infrastructure, and how to effectively protect it from terrorist attacks,

Recognizing a growing importance of ensuring reliability and resilience of critical infrastructure and its protection from terrorist attacks for national security, public safety and the economy of the concerned States as well as well-being and welfare of their population,

Recognizing that preparedness for terrorist attacks includes prevention, protection, mitigation, response and recovery with an emphasis on promoting security and resilience of critical infrastructure, including through public-private partnership as appropriate,

Recognizing that protection efforts entail multiple streams of efforts, such as planning; public information and warning; operational coordination; intelligence and information sharing; interdiction and disruption; screening, search and detection; access control and identity verification; cybersecurity; physical protective measures; risk management for protection programmes and activities; and supply chain integrity and security,

Acknowledging a vital role that informed, alert communities play in promoting awareness and understanding of the terrorist threat environment and specifically in identifying and reporting suspicious activities to law enforcement authorities, and the importance of expanding public awareness, engagement, and public-private partnership as appropriate, especially regarding potential terrorist threats and vulnerabilities through regular national and local dialogue, training, and outreach,

Noting increasing cross-border critical infrastructure interdependencies between countries, such as those used for, inter alia, generation, transmission and distribution of energy, air, land and maritime transport, banking and financial services, water supply, food distribution and public health,

Recognizing that, as a result of increasing interdependency among critical infrastructure sectors, some critical infrastructure is potentially susceptible to a growing number and a wider variety of threats and vulnerabilities that raise new security concerns,

Expressing concern that terrorist attacks on critical infrastructure could significantly disrupt the functioning of government and private sector alike and cause knock-on effects beyond the infrastructure sector,

Underlining that effective critical infrastructure protection requires sectoral and cross-sectoral approaches to risk management and includes, inter alia, identifying and preparing for terrorist threats to reduce vulnerability of critical infrastructure, preventing and disrupting terrorist plots against critical infrastructure where possible, minimizing impacts and recovery time in the event of damage from a terrorist attack, identifying the cause of damage or the source of an attack,

preserving evidence of an attack and holding those responsible for the attack accountable,

Recognizing in this regard that the effectiveness of critical infrastructure protection is greatly enhanced when based on an approach that considers all threats and hazards, notably terrorist attacks, and when combined with regular and substantive consultation and cooperation with operators of critical infrastructure and law enforcement and security officials charged with protection of critical infrastructure, and, when appropriate, with other stakeholders, including private sector owners,

Recognizing that the protection of critical infrastructure requires cooperation domestically and across borders with governmental authorities, foreign partners and private sector owners and operators of such infrastructure, as well as sharing their knowledge and experience in developing policies, good practices, and lessons learned,

Recalling that the resolution 1373 (2001) called upon Member States to find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups and to cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks,

Noting the work of relevant international, regional and subregional organizations, entities, forums and meetings on enhancing protection, security, and resilience of critical infrastructure,

Welcoming the continuing cooperation on counter-terrorism efforts between the Counter-Terrorism Committee (CTC) and International Criminal Police Organization (INTERPOL), the United Nations Office on Drugs and Crime, in particular on technical assistance and capacity-building, and all other United Nations bodies, and *strongly encouraging* their further engagement with the United Nations Counter-Terrorism Implementation Task Force (CTITF) to ensure overall coordination and coherence in the counter-terrorism efforts of the United Nations system,

1. *Encourages* all States to make concerted and coordinated efforts, including through international cooperation, to raise awareness, to expand knowledge and understanding of the challenges posed by terrorist attacks, in order to improve preparedness for such attacks against critical infrastructure;

2. *Calls upon* Member States to consider developing or further improving their strategies for reducing risks to critical infrastructure from terrorist attacks, which should include, inter alia, assessing and raising awareness of the relevant risks, taking preparedness measures, including effective responses to such attacks, as well as promoting better interoperability in security and consequence management, and facilitating effective interaction of all stakeholders involved;

3. *Recalls* its decision in resolution 1373 (2001) that all States shall establish terrorist acts as serious criminal offences in domestic laws and regulations,

and *calls upon* all Member States to ensure that they have established criminal responsibility for terrorist attacks intended to destroy or disable critical infrastructure, as well as the planning of, training for, and financing of and logistical support for such attacks;

4. *Calls upon* Member States to explore ways to exchange relevant information and to cooperate actively in the prevention, protection, mitigation, preparedness, investigation, response to or recovery from terrorist attacks planned or committed against critical infrastructure;

5. *Further calls upon* States to establish or strengthen national, regional and international partnerships with stakeholders, both public and private, as appropriate, to share information and experience in order to prevent, protect, mitigate, investigate, respond to and recover from damage from terrorist attacks on critical infrastructure facilities, including through joint training, and use or establishment of relevant communication or emergency warning networks;

6. *Urges* all States to ensure that all their relevant domestic departments, agencies and other entities work closely and effectively together on matters of protection of critical infrastructure against terrorist attacks;

7. *Encourages* the United Nations as well as those Member States and relevant regional and international organizations that have developed respective strategies to deal with protection of critical infrastructure to work with all States and relevant international, regional and subregional organizations and entities to identify and share good practices and measures to manage the risk of terrorist attacks on critical infrastructure;

8. *Affirms* that regional and bilateral economic cooperation and development initiatives play a vital role in achieving stability and prosperity, and in this regard calls upon all States to enhance their cooperation to protect critical infrastructure, including regional connectivity projects and related cross-border infrastructure, from terrorist attacks, as appropriate, through bilateral and multilateral means in information sharing, risk assessment and joint law enforcement;

9. *Urges* States able to do so to assist in the delivery of effective and targeted capacity development, training and other necessary resources, technical assistance, technology transfers and programmes, where it is needed to enable all States to achieve the goal of protection of critical infrastructure against terrorist attacks;

10. *Directs* the CTC, with the support of the Counter-Terrorism Executive Directorate (CTED) to continue as appropriate, within their respective mandates, to examine Member States efforts to protect critical infrastructure from terrorist attacks as relevant to the implementation of resolution 1373 (2001) with the aim of identifying good practices, gaps and vulnerabilities in this field;

11. *Encourages* in this regard the CTC, with the support of CTED, as well as the CTITF to continue working together to facilitate technical assistance and capacity building and to raise awareness in the field of protection of critical infrastructure from terrorist attacks, in particular by strengthening its dialogue with States and relevant international, regional and subregional organizations and

working closely, including by sharing information, with relevant bilateral and multilateral technical assistance providers;

12. *Encourages* the CTITF Working Group on the Protection of Critical Infrastructure including Vulnerable Targets, Internet and Tourism Security to continue its facilitation, and in cooperation with other specialized United Nations agencies, assistance on capacity-building for enhancing implementation of the measures upon request by Member States;

13. *Requests* the CTC to update the Council in twelve months on the implementation of this resolution;

14. *Decides* to remain seized of the matter.

U.S. Department of State
Diplomacy in Action

Iran's Recent Actions and Implementation of the JCPOA

Testimony
Thomas A. Shannon, Jr.
Under Secretary for Political Affairs
Statement Before the Senate Foreign Relations Committee
Washington, DC
April 5, 2016

Chairman Corker, Ranking Member Cardin, and distinguished members of the Committee, I am pleased to appear before you to discuss U.S. policy toward Iran. Thank you for the opportunity.

The successful negotiation of the Joint Comprehensive Plan of Action (JCPOA) with Iran created a framework whereby we and our P5+1 partners could pursue a common goal of ensuring that Iran does not obtain a nuclear weapon. Reaching that goal however, will depend on how the JCPOA is implemented and whether Iran lives up to its international commitments. So far implementation is proceeding well. Should Iran continue along this path, we believe that, through the JCPOA, we can achieve our goal. Indeed, the significant nuclear steps Iran has already taken have put it much further away from a bomb than before this deal was in place.

While we are encouraged by Iran’s adherence to its nuclear commitments thus far, I assure you that the Administration shares your concerns about the government of Iran’s actions beyond the nuclear issue, including its destabilizing activities in the Middle East and its human rights abuses at home. Iran’s support for terrorist groups like Hizballah, its assistance to the Asad regime in Syria and the Houthi rebels in Yemen, and its ballistic missile program are at odds with U.S. interests, and pose fundamental threats to the region and beyond. Iran continues to violate fundamental rights of its citizens by suppressing dissent, restricting freedom of expression, and torturing prisoners, among other abuses.

It is my purpose today to talk about our progress since JCPOA Implementation Day and the path forward for the coming years. We have several key objectives in our policy toward Iran: First, to ensure Iran’s adherence to the JCPOA, which will prevent Iran from developing a nuclear weapon and guarantees that its nuclear program remains exclusively peaceful.

Second, to counter Iran's support for terrorism and other destabilizing activities, while also working diplomatically to encourage Iran to play a more constructive role in the region. Third, to promote respect for human rights in Iran. Let me speak briefly to each of these efforts.

JCPOA Implementation

On January 16, the International Atomic Energy Agency (IAEA) verified that Iran had completed the nuclear-related steps necessary to reach JCPOA Implementation Day. This meant Iran had dismantled two-thirds of its installed uranium enrichment capacity, going from over 19,000 centrifuges before the JCPOA to just 5,060. In addition, Iran terminated all uranium enrichment at, and removed all nuclear material from, its underground Fordow facility. Reaching Implementation Day also meant Iran had shipped out 98 percent of its enriched uranium stockpile, reducing it from roughly 12,000 kilograms before the deal, to no more than 300 kilograms of up to 3.67 percent enriched uranium hexafluoride today, where it must stay. Iran also removed the core of the Arak Heavy Water Reactor and filled it with concrete, permanently rendering the core unusable and eliminating the nation's only source of weapons-grade plutonium, thus blocking that potential pathway to a weapon. The reactor is now being redesigned to not produce weapons-grade plutonium during standard operation and to minimize non-weapons usable plutonium production.

Additionally, Iran is now adhering to the IAEA Additional Protocol and the IAEA has put in place the JCPOA's numerous enhanced transparency measures. For example, modern technologies such as online enrichment monitors and electronic seals can detect cheating and tampering in real time. Iran's key declared nuclear facilities are now under continuous IAEA monitoring, and the IAEA also has oversight of Iran's entire nuclear fuel cycle from its uranium mines and mills to enrichment facilities.

Thanks to the JCPOA, Iran is now under the most comprehensive transparency and monitoring regime ever negotiated to monitor a nuclear program.

On March 9, the IAEA released its first monitoring report since Implementation Day. The report affirmed that Iran continues to adhere to its JCPOA commitments.

Iran has taken significant, irreversible steps that have fundamentally changed the trajectory of its nuclear program. Simply put, the JCPOA is working. It has effectively cut off all of Iran's pathways to building a nuclear weapon. This has made the United States, Israel, the Middle East, and the world safer and more secure. Before the JCPOA took effect, Iran was less than 90 days away from getting enough fissile material for a nuclear weapon. Today, thanks to the JCPOA, Iran is over a year away from being able to get that material. Any attempt to do so would be detected immediately by the international community.

This is why the United States is confident the JCPOA will ensure Iran's nuclear program is and will remain exclusively peaceful. In exchange for Iran completing its key nuclear steps, on Implementation Day the United States and the European Union (EU) lifted nuclear-related sanctions on Iran. The United States retains our ability and authorities to snap sanctions back into place should Iran walk away from the JCPOA. But as long as Iran continues to meet its commitments, the United States will continue to meet our commitments.

Regional Activity

I want to re-emphasize that the JCPOA did not resolve our profound differences with Iran. We remain clear-eyed about continued Iranian destabilizing activity. For decades, Iran's threats and actions to destabilize the Middle East have isolated it from much of the world. Over the past three decades, Iran has continued its support for terrorism and militancy, including its support for Lebanese Hizballah, Palestinian terrorist groups in Gaza, Kata'ib Hizballah and other Iraqi Shi'a militia groups in Iraq, and Shia militant groups in Syria. Iran was designated a State Sponsor of Terrorism in 1984 and remains so-designated today.

The Islamic Revolutionary Guard Corps – Qods Force (IRGC-QF) cultivates and supports militant groups around the region. Iran has been smuggling weapons to the Houthis in Yemen, fueling a brutal civil conflict in that country. Additionally, Iran sees the Asad regime in Syria as a crucial ally in the region and a key link to Iran's primary beneficiary and terrorist partner, Lebanese Hizballah. Iran provides arms, financing, and training to fighters to support the Asad regime's brutal crackdown that has resulted in the deaths of over 250,000 people in Syria.

That's why we have retained our sanctions related to Iran's destabilizing activities in the region, including its support for terrorism. We aggressively employ Executive Order (E.O.) 13224, which allows us to target terrorists and those who support them across the globe including Iranian persons and entities that provide support to terrorism. The IRGC-QF, the Iranian Ministry of Intelligence and Security, Iran's Mahan Air, Hizballah, and over 100 other Iran-related individuals and entities remain subject to sanctions under this E.O. On March 24, we designated six additional individuals and entities engaged in procurement activities for Mahan Air, which was named in 2011 as a Specially Designated Global Terrorist due to its support for the IRGC-QF.

We have found through experience that the most effective way to push back on aggressive Iranian activity is to work cooperatively with our allies to deter and disrupt Iranian threats. This is why we increased our security cooperation with the Gulf Cooperation Council – the GCC – following the Camp David summit and have provided additional assistance to Israel. We continue to interdict, and actively work with our coalition partners to interdict, Iranian weapons shipments throughout the region. Notable successes on this front include Israel's seizure of the Klos C vessel carrying weapons bound for Gaza in 2014, military and diplomatic efforts to prevent an Islamic Revolutionary Guard Corps (IRGC) naval flotilla from docking in Yemen in April 2015, and the four dhow seizures since September 2015 carrying weapons from Iran that we assess were bound for Yemen.

We take any threat to Israel extremely seriously and we understand that Iran's support for terrorism requires our strong support to one of our closest allies. This Administration has provided more than $23.5 billion in foreign military financing for Israel under the current Memorandum of Understanding. Additionally, the United States has invested over $3 billion – beyond our Foreign Military Financing (FMF) assistance – in the Iron Dome system and other missile defense programs for Israel. And we are currently working together on additional long-term support to Israel.

Iran's Ballistic Missile Tests

Iran's attempts to develop increasingly advanced ballistic missile systems are a threat to regional and international security. While full implementation of the JCPOA will ensure that Iran is unable to develop a nuclear warhead to place on a missile, we will continue to use all available multilateral and unilateral tools, including sanctions when appropriate, to impede Iran's ballistic missile program.

Following Iran's October 2015 missile test, we sanctioned eight individuals and three entities involved in procuring materials and other equipment for Iran's ballistic missile program. We also led an international effort at the United Nations to highlight and condemn Iran's tests, which violated the provisions of UN Security Council resolution 1929.

Iran conducted another set of dangerous and provocative missile tests in March. On March 24, we designated two Iran-based entities directly involved with Iran's ballistic missile program.

Additionally, we called for UN Security Council consultations on Iran's missile launches on March 14, where Ambassador Samantha Power condemned these launches as destabilizing and inconsistent with UN Security Council resolution (UNSCR) 2231. As a next step, on March 29, we submitted a joint letter along with France, the United Kingdom, and Germany to the UN Security Council requesting the UN Secretary-General report on Iran's ballistic missile activity as inconsistent with UNSCR 2231, and calling for additional Security Council discussions in the "2231 format" on the launches so that the Council can discuss appropriate responses. The Security Council met at experts-level in its "2231 format" on April 1, where U.S. missile experts briefed on the technical details of Iran's launches and explained why they were inconsistent with UNCR 2231.

We will also continue to work through the Missile Technology Control Regime and the Proliferation Security Initiative to prevent and interdict transfers of material and technology to Iran that would support its ballistic missile program.

In addition to our effects to enhance Israeli security, we'll also work closely with our Gulf allies, as part of the Camp David process started by the President last year, to develop missile defense capabilities and systems.

Human Rights

Iran violates fundamental human rights of its citizens by severely restricting civil liberties, including the freedoms of peaceful assembly, expression, and religion. Iran has the world's highest per capita rate of executions, which often happen after legal proceedings that do not follow Iran's constitutional guarantee of due process or international obligations and standards regarding fair trial guarantees. There are over 1,000 political prisoners in Iran, including 19 journalists. Many of them experience harsh treatment and extended pretrial detention. Women continue to face legal and social discrimination and limitations on their ability to travel, work, and access educational opportunities.

We use a variety of tools to raise awareness of these human rights violations and abuses and to hold their perpetrators accountable. This policy has not changed as a result of the JCPOA. We continue to have human rights sanctions authorities, including under the Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA) of 2010. Since 2010, we have imposed sanctions on 19 individuals and 17 entities that were determined to meet the CISADA criteria. Human rights-related sanctions are not subject to relief under the JCPOA, and we continue to vigorously enforce these sanctions.

We are also working multilaterally to press Iran to better respect the human rights of its citizens. The United States strongly supports the annual UN General Assembly Third Committee resolution highlighting Iran's poor human rights record and calling on Iran to take measures to address its abuses. Additionally, the United States fully supports the mandate of the UN Special Rapporteur on the Situation of Human Rights in Iran, which was renewed March 23 primarily because of our aggressive lobbying campaign.

We are vocal about our concerns with Iran's ongoing repression of human rights and fundamental freedoms of its people. We document the Iranian government's human rights abuses in the annual International Religious Freedom, Human Rights, and Trafficking in Persons reports. Iran is designated as a "Country of Particular Concern" under the International Religious Freedom Act and is a Trafficking in Persons Tier 3 country.

The Way Forward

As a result of the nuclear negotiations, we have started to talk directly with Iran in ways we had not done for decades. While our concerns about Iran are substantial, we believe it is in the U.S. national interest to continue a dialogue with Iran on the issues that divide us – while we also continue to use all tools available to counter the Iranian activities we oppose.

The nuclear negotiations also opened up the opportunity to talk with Iran about U.S. citizens unjustly held in their prisons, which was done on a separate track. We had a dialogue that freed four U.S. citizens – Amir Hekmati, Saeed Abedini, Nosratollah Khosravi Roodsari, and Jason Rezaian – and Iran separately released U.S. student Matthew Trevithick. The protection of U.S. citizens is a top priority of the State Department. We will continue to hold Iran to its commitment to bilateral discussions about the whereabouts of Robert Levinson. Iran has a responsibility to assist us in locating and bringing home Mr. Levinson, as he went missing on Iran's Kish Island. And we continue to be concerned by the reports regarding the detention of U.S. citizens Siamak Namazi and his father, Baquer Namazi.

Iran also participates in the International Syria Support Group, working with over 20 other countries and international organizations to reach a political transition in Syria. We know Iran works against our interests supporting the Asad regime, but we also know we can't resolve this conflict with Iran outside the tent playing a spoiler role. We thus judge that Iran, with its close relationship with and history of supporting Asad, needs to be a part of any lasting resolution to the conflict. This conflict has gone on far too long, and taken too many lives, to not have all the parties at the table trying to find a solution that gives the Syrian people a better future. We know there is strong hostility towards the United States within certain Iranian quarters.

We know parts of the Iranian establishment fear any relationship with United States. But we also know that millions of Iranians want to end their country's isolation while also benefitting from new economic opportunities. We now see Iran reengaging with the global community via high-level visits and trade agreements.

U.S. policy toward Iran must be calibrated to talk with Iran when it is in our interest while ensuring we address the threats to peace and security Iran continues to pose.

Congress plays an essential role in shaping this posture. The legislative and executive branches should work together, like we did to build international pressure on Iran, to now calibrate our approach such that we are simultaneously resolute when dealing with Iranian threats, while willing to engage when we think it in U.S. interests to do so. I look forward to continued consultations with Congress as we strive to find this balance.

We also must continue to make clear that our hand of friendship is open to the Iranian people despite the significant differences we have with its government. That is why President Obama and Secretary Kerry yet again this year delivered Nowruz messages addressed directly to the Iranian people, expressing the desire for stronger ties between Iranians and Americans.

It is up to Iran to decide the scope and pace of engagement. Whether Iran engages substantively with us or not, we are confident that the JCPOA makes us and our partners safer. We will continue to work with the IAEA, the EU, and the P5+1 to vigorously monitor and verify that Iran is keeping its commitments, and will continue to use all of the tools, both unilaterally and multilaterally, to address our other issues of concern with Iran.

Thank you for this opportunity to testify. I look forward to taking your questions.

Annex 212

Remarks at the Security Council Stakeout Following Consultations on Iran

Ambassador Samantha Power
U.S. Permanent Representative to the United Nations
U.S. Mission to the United Nations

New York City
March 14, 2016

AS DELIVERED

Hi, everybody. We called for consultations today to discuss Iran's recent ballistic missile launches, which the United States condemns as dangerous, destabilizing, and provocative. Given the multiple, interrelated conflicts in the Middle East today, such launches – accompanied by strident and militaristic rhetoric – undermine prospects for peace.

The United States was particularly troubled by reports that Iranian military leaders have claimed these missiles are designed to be a direct threat to Israel. We condemn such threats against one of our closest allies and another UN Member State.

Beyond just destabilizing the region, these launches were also in defiance of provisions of UN Security Council Resolution 2231, the resolution that came into effect on January 16, on Implementation Day for the JCPOA.

In that resolution, as you all know, Iran was "called upon not to undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons, including launches using such ballistic missile technology." Iran, however, continues to act as if this Council has not spoken on the matter.

I'm happy to take your questions.

QUESTION: Thank you, Madam Ambassador. We understand from Ambassador Churkin that Russia does not believe that there is any violation and he does not see the need for sanctions or anything else against Iran. So what is the U.S. going to do to follow this up and to obviously try and get some kind of action?

AMBASSADOR POWER: Well, I just read you the text of 2231, which calls upon Iran not to undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons. These were designed to be capable of delivering nuclear weapons. This merits a Council response. The Council needs to take its responsibility and Russia seems to be lawyering its way to look for reasons not to act rather than stepping up and being prepared to shoulder our collective responsibility.

We will continue to push in the Security Council in the 2231 format, bring forward the technical information – that Iran itself has made public – showing that the technology they used is inherently capable of delivering nuclear weapons and thus inherently defying Resolution 2231. So we're not going to give up at the Security Council, no matter the quibbling that we heard today about this and that, and we also

can consider, of course, our own appropriate national response.

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STANDARD DRAFT

TREATY OF FRIENDSHIP, COMMERCE

AND NAVIGATION

ARTICLE VII

Business Activities of Persons and Companies

Paragraph 1: National Treatment for Business Activities

Paragraph 2: Exceptions to National Treatment

Paragraph 3: Special Formalities for Alien Enterprises

Paragraph 4: Most-Favored-Nation Treatment for Business Activities

Protocol, Paragraph 3: Practice of Professions

Protocol, Paragraph 4: Mining Activities

General:

This Article often is called the heart of the treaty. It is central to the basic treaty objective of providing rules of fair and equitable treatment in matters of establishment, for it deals with the central establishment matter, which is the entry and operation of business enterprises. The rule it embodies is national treatment, defined in Article XXII(1) as essentially the same treatment as that granted in like situations to enterprises of the treaty partner. National treatment is considered to represent the best treatment that an alien enterprise reasonably may expect from the host country, except in an insignificant number of cases. National treatment, moreover, best expresses in realistic terms the essential equity sought by the treaty as the underlying principle for the conduct of economic activities in a foreign country; that is, the alien enterprise shall be equated with the like domestic enterprise. It shall enjoy no greater advantages but must not suffer any material disadvantages.

After considerable experimentation with the most effective way of formulating the basic rule, the present pattern of Article VII evolved. Article VII(1) makes a sweeping grant of national treatment with respect to engaging in business activities generally. Article VII(2) provides the necessary exceptions for activities deemed sensitive for reasons of public policy and consequently restricted as to participation by alien interests. Article VII(4) grants most-favored-nation treatment for all matters covered by Article VII, but in practical terms this grant is residual in nature and of relatively little significance except in connection with activities reserved from national treatment under Article VII(2).

The objective of Article VII is to confer rights of entry, establishment and operation in the broadest terms practicable. To this end, it not only defines permitted business activities as liberally as possible but confers wide freedom of choice as to the type of organization the alien enterprise may use in order to carry on its activities. This freedom of choice, moreover, extends to organizing subsidiary companies under the laws of the treaty partner and to acquiring majority interests in companies of the treaty partner. The grant of treaty rights is rounded out by rights with respect to control and management.

The grant of rights under Article VII(1) is subject to two significant qualifications. One is the reservation of sensitive activities in Article VII(2), but that reservation is subject to a "grandfather" clause. The other is Article VII(3). That provision is intended to deal with the necessity of treating domestic and alien enterprises differently in some particulars because it is not practicable for administrative reasons to accord them identical treatment. A leading example is insurance where the State regulatory authorities have found it necessary to apply different technical and procedural rules to alien insurers in connection with such matters as the location of mandatory deposits in order to maintain

approximately the same measure of supervision as over domestic insurers. The crucial element in Article VII(3), however, is that any formalities permitted shall not impair the substance of the rights conferred by Article VII as a whole.

During the course of negotiation with many countries, the major problem arising in connection with Article VII has been the selective admission of foreign investments or "screening." This problem, moreover, was the subject of the longest and most intensive interagency debate in the course of the modern treaty program. The result was that the United States would agree to inclusion of screening provisions in treaties but only in special and limited circumstances. Such acceptance further was conditioned on assurances of national treatment for enterprises after admission under screening procedures.

The bias of the treaty, as well as the bias of foreign economic policy generally during the 1940's and 1950's, was against screening. Objections to screening were based on fundamental principles of free enterprise. They were heightened by the motives underlying screening, mainly doctrinaire statism, extreme nationalism and fear of competition. It also was considered that screening ran counter to the evident need of many countries to obtain the assistance of foreign capital in their economic development.

On the treaty plane, it was considered that the standard draft treaty made adequate provision for each treaty partner to regulate foreign investments within a framework of equitable and nondiscriminatory standards without need for recourse to a sweeping screening reservation. Any such reservation would simply extend the right to discriminate to the ordinary run of business activity.

The treaty in fact confers no absolute right of free entry of capital for any purpose. Entry is subject to substantial limitations. Entry is conditioned on: (1) the entry rights of capital from third countries; that is, most-favored-nation treatment; (2) the rights enjoyed by domestic capital to initiate private investments; that is, national treatment; (3) the reservation of sensitive fields of activity from the national treatment rule; (4) the reservation for essential security interests; and (5) the exclusion of rights to engage in activities subject to government monopoly or which have been nationalized. In short, the treaty accords only the right to enter fields where domestic private capital is allowed to operate.

A further objection to screening was that the arguments most commonly advanced in its favor were not persuasive when considered in the treaty context. These arguments may be summarized as follows:

1. Screening is necessary to preserve a country's right to engage in economic planning.

2. Screening will prevent treaty rules from interfering with socialization programs.

3. Screening is needed to prevent undue competition for scarce materials.

4. Screening prevents profiteering, speculation and diversion of capital to projects of small public benefit.

5. Screening is a protection against undue strain on limited foreign exchange during periods of stringency.

6. Screening is essential as protection against overpowering inflows of United States capital.

In the main, these arguments are arguments deriving from the behavior of any capital, domestic or foreign. Profiteering is as undesirable when the profiteer is a citizen as when he is a foreigner. The treaty partner, moreover, can act freely against such imagined or perceived evils, provided only that it observe the treaty rules of nondiscrimination, and that just compensation be paid for any United States property that may be taken. If, as may be assumed, a country has the administrative competence to engage in screening, it has the competence to regulate the behavior of capital, domestic and foreign, effectively and in a manner consistent with the treaty.

Another serious objection to screening is that it is a matter of complex administrative procedures, open to subjective influences and often inequitable in application. A further element is the difficulty of confining screening to the process of entry, as there is a strong tendency to extend controls to the post-entry operations of the screened enterprise, especially if its operations are successful in a manner or to an extent contrary to the screening agency's predilections.

Despite the objectionable nature of screening in principle and in application, it was recognized that the only practical course was to follow a cautious case-by-case approach, making concessions only if unavoidable in order to conclude an otherwise satisfactory treaty and adapting the nature and extent of the concession to the circumstances of the country in question. The result was that a number of treaties contain limited screening reservations, and a few with developing countries provide for selective admission of United States enterprises generally, subject to national treatment for post-entry operations.

ARTICLE XVII

State Trading

Paragraph 1: State Trading

Paragraph 2: Government Procurement

Paragraph 3: Marine Insurance

Protocol, Paragraph 5: Postal Services

General:

The function of Article XVII in the overall scheme of the treaty is to deal with the hazards of unfair competition from state-controlled enterprises and of discriminatory practices in the provision of services associated with merchandise trade. The treaty approach was to select those provisions of the General Agreement on Tariffs and Trade (61 Stat. (5) and (6); 4 Bevans 639) and the proposed Havana Charter for an International Trade Organization (Department of State Publication 3206) that would be of greatest usefulness in a situation where the GATT exception (Article XXI(3)) was not operative. The growth of state trading activities between the two World Wars made inclusion of treaty rules on the subject necessary to ensure a complete group of basic trade provisions. The need for such rules had already been foreshadowed by the inclusion of a limited provision on state trading activities in reciprocal trade agreements. See Article V of the Reciprocal Trade Agreement of 1942 with Mexico (57 Stat. 833; 9 Bevans 1109).

The treaty provisions on state trading activities and on purchase by the Government for its own account follow the comparable GATT provisions. The provisions of Article XVII(2) on government contracts and the sale of services by the Government, however, are innovative, not being found either in

GATT or in the proposed ITO Charter. They represent a limited and tentative effort to begin building up international rules on the subject. Because of the limitations arising from the existence of Federal, State and local entities that it was necessary to observe in connection with government procurement, the treaty could not go beyond a rule according something less than most-favored-nation treatment through the formulation of "fair and equitable treatment" as compared with that accorded to any third country. This limited standard, moreover, is difficult to define, and there is no record of any attempt at precise definition in a treaty context.

A much more important limitation written into Article XVII(1) and (2) involves the governments to which it applies. These provisions were carefully and deliberately worded in such a way as to confine their coverage to the Federal Government and to any state trading activities in which it might engage. These provisions do not apply to the States, in large measure because of concern about the possible impact of provisions of this kind on the operations of State liquor authorities. The limitation in treaty coverage is achieved through employment of the capitalized word "Government" as, in effect, a term of art denoting the Federal Government. This usage is in contrast to employment of the term "Party," which is used consistently throughout the treaty to denote the United States of America in the sense of all its political entities, Federal, State and otherwise.

Article XVII(3) represents an effort to deal with a special situation in response to representations by a particular segment of the insurance industry, which considered that Article VII(1) failed to provide adequately for the manner in which it conducted its foreign business and thus left it vulnerable to discriminatory practices on the part of foreign countries. It was seeking action against such practices in multilateral forums with relatively little success and saw in the treaty a means of

obtaining a measure of international recognition that the practices in question are undesirable and should be avoided. There is no significance in the location of this provision in Article XVII. It can be and in a few cases has been placed elsewhere in the treaty.

Article XVII, Paragraph 1: State Trading

1. Each Party undertakes(1) (a) that enterprises owned or controlled by its Government(2), and that monopolies or agencies granted exclusive or special privileges(3) within its territories, shall make their purchases and sales involving imports and exports(4) affecting the commerce of the other Party(5) solely in accordance with commercial considerations(6), including price, quality, availability(7), marketability, transportation and other conditions of purchase or sale; and (b) that the nationals, companies and commerce of such other Party shall be afforded adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases and sales(8).

(1) This provision is derived from the more recent reciprocal trade agreements, from Article XVII(1)(b) of GATT (61 Stat. (5) and (6); 4 Bevans 639)

and Article 29(1)(b) of the proposed ITO Charter (Department of State Publication 3206).

(2) This provision is consciously intended to permit the construction that only the Federal Government is committed. The language is derived from the provisions of reciprocal trade agreements, which, being executive agreements, were drawn up with the particular intention of avoiding committing the State liquor authorities.

(3) The term "exclusive or special privileges" refers to both monopolies and agencies. The privileges involved are special exceptions, subsidies, concessions, monopoly rights in a certain area or with respect to a certain commodity, and other similar privileges that a government might extend to one of its agencies or to a quasi-official or even a non-official organization.

(4) The reference to imports and exports is intended to mean to the extent that imports or exports may be permitted. The government enterprise is free to preclude purchases of exports altogether in favor of the purchase of domestic products. This intent is made clear by the negotiating history of GATT.

(5) This wording establishes a further limitation. The policy of the state trading agency as to imports must have a bearing, in view of the bilateral nature of this provision, on the commerce of the treaty partner. As used here, the concept of the commerce of a given country means the importation of goods that were produced in that country or, if processed goods, were last processed in that country. The United States standard is that such processing must result in a substantial transformation.

(6) The term "commercial considerations" provides the governing element in this provision. The rules contained in Article XVII(1) are not intended to apply to transactions by a government in its

sovereign capacity, as for example, in the purchase of arms, but to transactions by the Government in the capacity of a merchant or entrepreneur. The intent of requiring purchases or sales in accordance with commercial standards is to preclude deals made on a political basis in order to favor an ally or gain some other non-commercial advantage. It is not possible to define "commercial considerations" precisely, but the intent is to seek to ensure that state trading organizations act as though they were private companies interested solely in making the best possible business deals. Use of the word "solely" in the context of the provision reinforces this intent.

Another objective of the provision is to establish certain rules to enable private business enterprises to co-exist with state-trading organizations. In particular, there is an intent to ensure such private enterprises an opportunity to enter bids on the purchases or sales of state trading organizations. The latter thereby could compare such bids with other offers in the process of determining the most advantageous commercial transaction. Judgment as to what constituted commercial considerations was a matter for the state trading organization. The presumption was that it was observing the treaty commitment, but this presumption was rebuttable in particular cases.

(7) The term "availability" is intended to refer to the availability of the goods for purchase or sale and not to the availability of means of payment for the goods. This concept of the term was expanded, however, in the course of negotiations to include means of payment. See Treaty with Japan, Protocol, Paragraph 10. In effect, this development added another item to the listing of valid commercial considerations.

(8) Clause (a) deals with products and clause (b) with persons. Neither embodies a national treatment concept, but states in terminology suitable for persons and private business concerns the general principles of conduct set forth in clause (a).

Article XVII, Paragraph 2: Government Procurement

2. Each Party shall accord to the nationals, companies and commerce of the other Party fair and equitable treatment(9), as compared with that accorded to the nationals, companies and commerce of any third country, with respect to: (a) the governmental purchase of supplies(10)(11)(12), (b) the awarding of concessions and other government contracts(13), and (c) the sale of any service sold by the Government or by any monopoly or agency granted exclusive or special privileges(14)(15).

(9) The intent is to provide a more flexible standard of treatment than in Article XVII(1). There was, moreover, no connotation of national treatment. The standard was comparative in nature and the treatment involved would be tested not against domestic enterprises but against third-party enterprises. There was no requirement of literal most-favored-nation treatment and, in practical terms, the supply contract or concession did not necessarily have to be awarded to the lowest foreign bidder in cases where foreign bids were solicited. The term "fair and equitable treatment" is not susceptible to precise definition but it is considered as calling for an

open policy and fair consideration to all candidates in the invitation to bid and the award of final contracts.

(10) This clause is derived from provisions of the more recent reciprocal trade agreements, from Article XVII (2)(a) of GATT and from Article 29(2)(a) of the proposed ITO Charter. Clauses (b) and (c) have no counterpart in those instruments.

(11) This clause, as well as clauses (b) and (c), is limited in application to the Federal Government, as is indicated by the use of capitalization whenever the noun rather than the adjectival form of that term is used.

(12) Clause (a) relates to articles or commodities whereas clause (c) relates to intangibles. It, as well as clauses (b) and (c), are not in conflict with the Buy American Act (41 U.S.C. 10a-10c). The Act authorizes preferential treatment for United States producers or suppliers with respect to internal or domestic purchases, whereas Article XVII(2) establishes rules for external or foreign purchases.

(13) Clause (b) does not deal with trade matters but is essentially an establishment provision, which seeks to regulate situations in which private enterprise directly faces the state. It further illustrates why it is not practicable to accord literal most-favored-nation treatment, for in many cases the concession or contract may pertain to a single object, such as a mineral deposit, and thus limited to a single contract, with no occasion for the application of literal most-favored-nation treatment.

The relationship of clause (b) to Article VII, particularly the reservations in Article VII(2), is based on the distinction between private enterprises in competition with each other and private enterprises seeking to enter into business arrangements with the state. Under Article VII(4) most-favored-nation treatment is to be granted even when national treatment

can not be granted, and that rule would prevail in situations of private competition. If, on the other hand, the activity involved a concession by the state, Article XVII(2) would apply, and most-favored-nation treatment need not be accorded.

(14) Clause (c) is intended to apply to such matters as shipping, radio, telegraph and telephone services. Its wording is broad enough to extend to aviation services, although it is not considered as applying to the operating rights of airlines, which are governed by bilateral air transport services agreements.

(15) Postal services are excluded from coverage under clauses (b) and (c) by a standard Protocol provision. See Note 19 below.

Article XVII, Paragraph 3: Marine Insurance

3. Neither Party(16) shall impose any measure of a discriminatory nature(17) that hinders or prevents the importer or exporter of products of either country from obtaining marine insurance(18) on such products in companies of either Party(19).

(16) This provision was included in the treaty at the instance of the Association of Marine Underwriters of the United States, which expressed to the Department of State and to the Senate its concern over the spread of discriminatory measures in foreign countries that reduced access of United States marine insurers to the market. The Association sought to bring influence to bear in various multilateral forums, including GATT and the United Nations Transport and Communications Commission to condemn such measures and further undertook to obtain bilateral treaty provisions designed to curb such discriminations.

The basic intent was to provide equality of competitive opportunity in bilateral relations between the treaty partners.

(17) The problem for the marine underwriter derived from the placement of the risk. If the shipment is at the risk of the United States purchaser or seller, he is free to place insurance with any company. If, however, the risk was insured by a purchaser or seller of the treaty partner, his government might require that the insurance be placed with a domestic company. Such a requirement would foreclose a free market in insurance for approximately 50 per cent of the market. It is this market share that would be thrown open to competition by Article XVII(3). The marine underwriters were unable to obtain any protection from Article VII(1), because they normally conducted their operations from the United States, writing policies in dollars only and not establishing branches in foreign countries.

(18) The United States agreed to a Belgian proposal to cover aviation as well as marine insurance but suggeste that the provision refer to transport insurance as preferable in this context and more in keeping with the meaning and usage in GATT and other international forums in discussing this subject.

(19) The balance of payments reservation for quantitative restrictions appearing, for example, in Article XIV (7) of the Treaty with Japan is not applicable to marine insurance and adding such a reservation, as in Article XV(3) of that Treaty, is redundant. The provision declaring that Article XII governs all exchange control matters was included in the Treaty with the Netherlands (Article XII(6)) to make it clear that any such reservation elsewhere in the treaty is redundant.

Protocol, Paragraph 5; Postal Services

5. The provisions of Article XVII, paragraph 2(b) and (c), and of Article XIX, paragraph 4, shall not apply to postal services(20).

(20) This reservation was included because of special privileges granted by the postal authorities to citizens of the country and because of contracts and bounties awarded exclusively to national air and shipping lines. See also Article XIX, Note 19.

ARTICLE XXI

General Exceptions

Paragraph 1: General Exceptions

Paragraph 2: Territorial Preferences

Paragraph 3: GATT Exception

Paragraph 4: Restrictions on Employment

Protocol, Paragraph 6: Status of Puerto Rico

General:

Article XXI is essentially a convenient device within the overall scheme of the treaty for grouping in one place exceptions from the provisions of the treaty generally or from groups of related provisions. This technique eliminates the repetitive provision of exceptions and permits a more cohesive presentation. Much the same technique was used in the General Agreement on Tariffs and Trade (61 Stat. (5) and (6); 4 Bevans 639) and the proposed Havana Charter for an International Trade Organization (Department of State Publication 3206).

There are three distinct categories of exceptions in Article XXI. The first, contained in Article XXI(1), consists of a group of exceptions, varied in character, that have become customary in international instruments dealing with establishment and trade matters. The standard version of Article XXI(1) includes the most essential exceptions, as for example, for national security. At various times other exceptions were added at the instance of the treaty partner. A particular example is the exception for measures to protect national treasures of archaeological, historic or artistic value. In a few cases the exception for political activities

was placed in Article XXI rather than in Article VIII(2), in large measure because it belongs in the former as logically as in the latter.

The second category consists of exceptions to the trade provisions of the treaty, specifically for the trade preferences of the treaty partners and for their obligations under GATT. Both of these exceptions touch upon vital elements of United States trade policy, and both tend to become critical issues in negotiations with countries favoring a less liberal approach to world trade. The United States requires Article XXI(2) to maintain the integrity of its existing commitments for preferential trade treatment. On the other hand, it was United States policy to seek to limit bilateral trade preferences generally, in the interest of encouraging freer multilateral trade. It sought to preserve only those preferences which pre-existed and were specifically sanctioned by GATT. Its own preferences came within this category, but in some negotiations the treaty partner endeavored to obtain treaty recognition for prospective trade arrangements that were difficult to justify on any grounds permissible under GATT or the treaty, such as the customs union exception in Article XIV(6).

Adoption in 1974 of the Generalized System of Preferences for trade with developing countries was an exception to the policy of sanctioning only pre-existing preferences, but this action was taken pursuant to a GATT waiver and comes within the terms of the GATT exception.

The GATT exception is essential to preserve freedom of action needed in order to comply with obligations assumed by the United States under GATT, or to enable it to take measures permissible under GATT in furtherance of its multilateral trade objectives. In effect, the GATT exception tends to suspend all but a few lesser features of the trade provisions while the treaty partners are contracting parties to GATT, and most negotiating issues involving Article XXI(3) arose in the context of a hypothetical post-

GATT situation or in the situation that would prevail if one treaty partner withdrew from GATT.

The last category of exceptions involves the provisions of Article XXI(4), which reserve the explicit right of the United States to maintain its labor or occupational controls at the frontier through the application of its immigration laws rather than through work permits or other internal police controls, as in the case of some treaty partners.

Article XXI, Paragraph 1: General Exceptions

1. The present Treaty shall not preclude[1] the application of measures:

(a) regulating the importation or exportation of gold or silver[2];

(b) relating to fissionable materials[3], to radioactive by-products[4] of the utilization or processing thereof or to materials that are the source of fissionable materials[5];

(c) regulating[6] the production[7] of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment[8];

(d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace or security[9] or necessary to protect its essential security interests[10][11][12][13]; and

(d) denying to any company in the ownership or direction of which nationals of any third country or countries[14] have directly or indirectly a controlling[15] interest, the advantages[16] of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts[17].

(1) The wording of the introductory clause is intended to make clear that the reservations are discretionary and not automatic or mandatory. The provision, moreover, does not provide any guide to the manner of applying the reservations in a discriminatory manner, as for example, by requiring that the resulting discrimination be subject to the rule of most-favored-nation treatment.

(2) This exception has been customary in United States agreements on trade relations since the inception of the reciprocal trade agreements program. See, for example, Article XII of Reciprocal Trade Agreement

of 1935 with Canada (49 Stat. 3960; 6 Bevans 74); Article 45(a)(iv) of the proposed Havana Charter for an International Trade Organization; and Article XX(I)(b) of the General Agreement on Tariffs and Trade.

The reservation is limited to importation and exportation. The right of an alien national or company to exploit gold or silver as a natural resource would be governed by the provisions of Article VII so long as the product of such exploitation is sold in the domestic market.

It may be noted that this reservation was adopted at a time when the United States maintained restrictions on the holding of monetary gold by private interests pursuant to the Gold Reserve Act of 1934 (48 Stat. 337) and supplementary legislation.

(3) This reservation is derived from Article 99(1)(b)(i) of the proposed ITO Charter and Article XXI(b)(i) of GATT.

(4) This provision was included in the treaty to make the coverage more complete and more consistent in terminology with the provisions of the Atomic Energy Act of 1946 (60 Stat. 755) and subsequent legislation on this subject.

(5) The Atomic Energy Act of 1954, as amended, imposes alienage restrictions with respect to the issuance of licenses for commercial development (42 U.S.C. 2133(d)) and also for medical therapy, research and development (42 U.S.C. 2134(d)). Both the statute and the administrative regulations (10 C.F.R. 50) make provision for piercing the corporate veil.

(6) This reservation is derived from the provisions of reciprocal trade agreements. (See Article XII of the 1935 Agreement with Canada, Article 99(1)(b)(ii) of the proposed ITO Charter, and Article XXI(b)(ii) of GATT.)

(7) The provision extending the reservation to the production of aims, ammunition and implements of war was added to the treaty to make it clear that the reservation applied to matters dealt with in the establishment provisions of the treaty as well as the trade provisions. It is not contained in the corresponding provisions of the proposed ITO Charter or of GATT.

(8) The traffic in other materials for the purpose of supplying a military establishment is intended to include all materials, even if not necessarily of a warlike nature, such as foodstuffs, furniture for an army cantonment, or communications gear. The crucial element is the intended use. There does not appear to have been any consideration of whether this provision extends to supplies for post exchanges, officers' clubs and other amenities, but it might be held that the term "indirectly" could be construed to cover such articles.

(9) The intent of this reservation is to preserve the right of the treaty partners to carry out their obligations under the Charter of the United Nations. It is derived indirectly from Article 99(1)(c) of the proposed ITO Charter and more explicitly from Article XX(1)(c) of GATT.

(10) The national security reservation is broader than the comparable reservations in the proposed ITO Charter (Article 99(1)(b)(iii)) and GATT (Article XXI(c)), which are limited by their terms to times of war or of emergency in international relations. Presumably the reservation would be invoked in most cases in emergency situations but this formulation avoids, for example, such complications as the legal definition of national emergency and the procedural requirements for declaring a state of emergency.

(11) This reservation preserves the right of each treaty partner to depart from national and from most-favored-nation treatment in appropriate circumstances.

(12) This reservation covers export and import regulations on strategic materials, and United States export controls affecting such materials are deemed to be justified by this reservation.

(13) The broad freedom of action extended to each treaty partner by the essential security reservation was explicitly questioned in only one negotiation, where the matter was disposed of by an unwritten understanding to the effect that each treaty partner recognized the potential for discriminatory actions running counter to treaty objectives but would apply the reservation in such a manner as to avoid impairment of the treaty partner's interests to the maximum degree possible.

(14) This reservation is a provision for piercing the corporate veil with the objective of preventing nationals or companies of third parties from obtaining rights under the treaty through the device of obtaining and exercising interests in companies of the treaty partner. Such corporate interests in effect would be obtaining a "free ride" inasmuch as they would be able to obtain advantages for which their own government was unwilling to negotiate. Absent such a provision, such corporate interests could take advantage of the definition of "companies" in Article XXII(3), which establishes place of incorporation as the sole test of the nationality of a corporation. Article XXII(3) does not impose a "seat" test or test based on "siege sociale" or place of principal establishment, which contain some elements of piercing the corporate veil, as the determinant of a company's nationality. Accordingly, third party corporate interests could indirectly but effectively obtain useful treaty rights by taking advantage of liberal incorporation laws in the territories of the treaty partner. This reservation leaves each treaty partner

free to take protective measures against such an eventuality by piercing the corporate veil of companies chartered under the laws of the other treaty partner.

To date the United States has not chosen to exercise its rights under this provision. If it chose to do so, it would be entitled to latitude of interpretation in the sense that it could examine not only the ostensible management and direction of the company but could also look behind the superficialities to ascertain the real control as well as the identity of the interests on behalf of which or for whose actual benefit control was being exercised.

It may be noted that the first four clauses of Article XXI(1) involve matters primarily of Federal responsibility. The fifth clause, however, involves corporation laws, which are enacted mainly by the States.

(15) In this context control means ownership or its equivalent.

(16) The reference to "advantages" is intended to apply to rights that would accrue to companies under the treaty in their capacity as companies. It thus should be distinguished from the provision (Protocol, paragraph 2) relating to the protection of indirect interests in expropriated property. The later provision is stated in terms of property and not of companies, and the nationality of the entity holding or controlling the property is immaterial. The material fact is the ownership of an interest, however indirect, in that property by a United States citizen or company.

(17) The exception to the third party rule is based on the consideration that a company of the treaty partner has a right to be accepted as a legal entity and allowed

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Your 1716 Article II-2 Proposed addition repetitive. Right to enforce internal safety regulations amply covered by II-3. Security interests also provided for in II-1-D. Additional phrase adds nothing, and would create misunderstanding as to intent in II-2 and II-3. You may give written statement for negotiation records, if necessary, that enforcement internal security regulations connection travel and residence covered II-3. Treaty fully recognizes paramount right state take measures to protect itself and public safety.

Article XII Comma required before and after QUOTE who UNQUOTE.

DEPARTMENT OF STATE L/T FEB 16 1955 TREATY BRANCH OFFICE OF THE LEGAL ADVISER

DULLES

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D
(Office Only)

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Clearances: L/E L/T GTI

COMMERCE

80TH CONGRESS } SENATE { EXECUTIVE
1st Session } { J

FRIENDSHIP, COMMERCE, AND NAVIGATION WITH CHINA

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

A TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF CHINA, TOGETHER WITH A PROTOCOL THERETO, SIGNED AT NANKING ON NOVEMBER 4, 1946

MARCH 20, 1947.—Treaty and accompanying protocol were read the first time and the injunction of secrecy was removed therefrom. The treaty and protocol were referred to the Committee on Foreign Relations and, together with the message of transmittal and the accompanying report, were ordered to be printed for the use of the Senate

THE WHITE HOUSE, *March 20, 1947.*

To the Senate of the United States.

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith a treaty of friendship, commerce, and navigation between the United States of America and the Republic of China, together with a protocol thereto, signed at Nanking on November 4, 1946. The enclosed treaty is a comprehensive instrument which takes into account the developments in international relationships during the past century and is intended to meet effectively the needs of the present day.

I transmit also, for the information of the Senate, a report on the treaty made to me by the Acting Secretary of State.

HARRY S. TRUMAN.

(Enclosures: (1) Report of the Acting Secretary of State; (2) treaty of friendship, commerce, and navigation with China, with protocol, signed at Nanking, November 4, 1946.)

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DEPARTMENT OF STATE,
Washington, March 18, 1947.

The PRESIDENT,
The White House:

The undersigned, the Acting Secretary of State, has the honor to lay before the President, with a view to its transmission to the Senate to receive the advice and consent of that body to ratification, if his judgment approve thereof, a treaty of friendship, commerce, and navigation between the United States of America and the Republic of China, together with a protocol thereto, signed at Nanking on November 4, 1946.

Negotiation of the treaty was carried out pursuant to that part of article VII of the treaty between the United States of America and the Republic of China for the relinquishment of extraterritorial rights in China and the regulation of related matters, signed at Washington on January 11, 1943 (57 Stat., pt. 2, 771), which provides that the two Governments—

> will enter into negotiations for the conclusion of a comprehensive modern treaty of friendship, commerce, navigation and consular rights, upon the request of either Government or in any case within six months after the cessation of the hostilities in the war against the common enemies.

In accordance with the provision quoted above, the enclosed treaty includes provisions with respect to the rights of individuals and corporations and with respect to commerce and navigation. It is intended that consular provisions be set forth in a separate instrument.

The present instrument includes provisions which were drafted in the light of suggestions from representative private organizations which have been active in the promotion of cultural and commercial relations with China. Departments and agencies of the Federal Government which deal directly with the subjects covered by the treaty were consulted and gave their assistance in the preparations for the negotiations.

The enclosed treaty, which is basically similar to treaties of friendship, commerce, and navigation now in force between the United States and various other countries, is intended to provide a comprehensive legal framework for relations between the United States and China. It is believed that the treaty offers an adequate basis for the development of cultural, business, and trade relationships to the mutual advantage of the two countries. During the negotiations the Department's endeavor was to draw up an instrument which would be responsive to the needs growing out of the problems and practices of present-day international relationships, particularly to the changes in economic and commercial practices resulting from increasing use of the corporate form of business enterprise. Thus this treaty, as compared with earlier commercial treaties, contains somewhat broadened and modernized provisions, so as to make more specific and detailed the rights and privileges of corporations. The wording of the commercial provisions reflects recent experience in the drafting of provisions to protect American exports from the many new and complex forms of trade restriction and exchange control which have come into use since the early 1930's.

The articles of the treaty may be classified, according to subject matter, into the following categories:

(1) rights of individuals and corporations;
(2) exchange of goods;
(3) navigation; and
(4) general matters.

These categories may be summarized as follows:

(1) *Rights of individuals and corporations.*—As is customary in treaties of friendship, commerce, and navigation, provisions are included with respect to entry, travel, residence, the conduct of designated activities (including those of a commercial, manufacturing, scientific, educational, religious, and philanthropic nature), freedom of worship, protection of property against uncompensated expropriation, access to courts, freedom from unreasonable searches and seizures, compulsory military service, and landholding. Provisions with respect to commercial arbitration are for the first time included in this treaty. More extensive safeguards are afforded against discriminatory exchange control, and greater protection is provided with respect to literary, artistic, and industrial property.

(2) *Exchange of goods.*—In addition to the provisions relating to most-favored-nation treatment as to import and export duties and national treatment as to internal taxation of imported articles, usually included in treaties of this type, the provisions with respect to the exchange of goods include rules applicable to customs administration, quotas and their allocation, exchange control, public monopolies as they may affect trade between the United States and China, and the awarding of public contracts and concessions. With respect to the provisions relating to the exchange of goods, most-favored-nation treatment is generally provided. In accordance with customary practice in the case of treaties of friendship, commerce, and navigation, the present instrument does not contain schedules of duty concessions.

(3) *Navigation.*—Standard articles on navigation, relating to such matters as entry of vessels into ports, freedom from discriminatory port charges, and most-favored-nation treatment with respect to the coasting trade, are contained in the present treaty, in a somewhat revised form. The rules set forth are designed to be applied to public vessels which may be engaged in commerce, as well as to private vessels.

(4) *General matters.*—The treaty provides for certain exceptions to its application, including the usual provisions regarding sanitary regulations and moral and humanitarian measures. Exceptions also are included to give the two parties the requisite freedom of action in times of national emergency and to keep the instrument in general conformity with the articles of agreement of the International Monetary Fund. Other provisions relate to such matters as the territories to which the treaty is to apply, the submission to the International Court of Justice of disputes concerning questions of interpretation or application, and the superseding of provisions of certain treaties now in force between the United States and China.

Provision is made in the treaty for its entry into force on the day of the exchange of ratifications and for its continuance in force for a period of 5 years from that day and thereafter, subject to termination at any time following the 5 year period on 1 year's notice by either Government to the other Government.

It should be noted that the present instrument will not limit or restrict the rights, privileges, and advantages accorded by the treaty between the United States of America and the Republic of China for the relinquishment of extraterritorial rights in China and the regulation of related matters and accompanying exchange of notes, signed at Washington on January 11, 1943.

The protocol, which is to have the same validity as if its provisions were inserted in the text of the treaty, is intended for the purpose of clarifying and construing certain provisions of the treaty.

Approval of the treaty was given by the Legislative Yuan of China on November 9, 1946.

Respectfully submitted,

DEAN ACHESON.

(Enclosure: Treaty of friendship, commerce, and navigation with China, with protocol, signed at Nanking, November 4, 1946.)

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF CHINA

The United States of America and the Republic of China, desirous of strengthening the bond of peace and the ties of friendship which have happily long prevailed between the two countries by arrangements designed to promote friendly intercourse between their respective territories through provisions responsive to the spiritual, cultural, economic and commercial aspirations of the peoples thereof, have resolved to conclude a Treaty of Friendship, Commerce and Navigation, and for that purpose have appointed as their Plenipotentiaries,

The President of the United States of America:

Dr. J. Leighton Stuart, Ambassador Extraordinary and Plenipotentiary of the United States of America to the Republic of China, and

Mr. Robert Lacy Smyth, Special Commissioner and Consul General of the United States of America at Tientsin; and,

The President of the National Government of the Republic of China:

Dr. Wang Shih-chieh, Minister for Foreign Affairs of the Republic of China, and

Dr. Wang Hua-cheng, Director of the Treaty Department of the Ministry of Foreign Affairs of the Republic of China;

Who, having communicated to each other their full powers found to be in due form, have agreed upon the following Articles:

ARTICLE I

1. There shall be constant peace and firm and lasting friendship between the United States of America and the Republic of China.

2. The Government of each High Contracting Party shall have the right to send to the Government of the other High Contracting Party duly accredited diplomatic representatives, who shall be received and, upon the basis of reciprocity, shall enjoy in the territories of such other High Contracting Party the rights, privileges, exemptions and immunities accorded under generally recognized principles of international law.

FRIENDSHIP, COMMERCE, AND NAVIGATION WITH CHINA

HEARING

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE

EIGHTIETH CONGRESS

SECOND SESSION

ON

A TREATY OF FRIENDSHIP, COMMERCE, AND NAVIG. ..ON BETWEEN THE UNITED STATES OF AMA. .A AND THE REPUBLIC OF CHINA, TO-G. HER WITH A PROTOCOL THERETO, SIGNED AT NANKING ON NOVEMBER 4, 1946

APRIL 26, 1948

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Mr. BOHLEN. We do not consider that the areas at present under Chinese Communist control are in any way separated from the sovereignty of the present Chinese National Government.

Senator SMITH. Where do you classify Manchuria?

Mr. BOHLEN. It is in our view a part of the territory of the Republic of China under the National Government.

Senator SMITH. How about Korea?

Mr. BOHLEN. Korea is under a different status. Under the wartime agreements—in the Cairo Conference, I believe—it was stated that Korea would achieve her independence in due course. I think these were the words. It is not regarded as under the authority of the Chinese Government, so therefore this treaty would not apply in any case to Korea.

Senator SMITH. I think it would be a different status there.

REFERENCE OF DISPUTES TO INTERNATIONAL COURT OF JUSTICE

In article XXVIII here, you provide for reference of disputes to the International Court of Justice. Is there any conflict with our resolution which I recall having had the privilege of voting for, of August 2, 1946, which excludes matters essentially within the domestic jurisdiction of the United States as determined by the United States?

In other words, certain domestic questions that we exclude from our acceptance of the voluntary jurisdiction of the Court?

Mr. BOHLEN. No, sir; we do not see any conflict in that. The fact that it is the International Court of Justice really means that is the body that is selected in many treaties of this kind. Provision is also made for arbitration of disputes arising under the treaty. I should like to submit a statement for the record on this matter:

(The matter referred to is as follows:)

RELATIONSHIP OF ARTICLE XXVIII OF THE TREATY BETWEEN THE UNITED STATES AND CHINA, SIGNED NOVEMBER 4, 1946, TO SENATE RESOLUTION 196 OF AUGUST 2, 1946

Article XXVIII of the treaty provides that any dispute between the governments of the two high contracting parties as to the interpretation or the application of this treaty, which the high contracting parties cannot satisfactorily adjust by diplomacy, shall be submitted to the International Court of Justice unless the high contracting parties shall agree to settlement by some other pacific means.

Senate Resolution 196 of August 2, 1946, is the resolution by which the Senate gave its advice and consent to the deposit with the Secretary General of the United Nations of a declaration under paragraph 2 of article 36 of the statute of the International Court of Justice recognizing as compulsory the jurisdiction of the International Court of Justice in all legal disputes arising concerning (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; and (d) the nature or extent of the reparation to be made for the breach of an international obligation.

In giving its advice and consent to the deposit of the declaration, the Senate qualified the agreement to accept compulsory jurisdiction of the Court by adding a proviso that the declaration should not apply to (a) disputes which the parties might, pursuant to existing or future agreements entrust to other tribunals; (b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States; or (c) disputes arising under a multilateral treaty except under certain specified conditions. It was further provided in the resolution that the declaration should

remain in force for a period of 5 years and thereafter until the expiration of 6 months after notice of termination.

The negotiations which resulted in the signing of the present treaty began in February 1946. In May the present text of article XXVIII was discussed informally by officers of the Department of State with the then chairman and other members of the Foreign Relations Committee. This fact is referred to not for the purpose of suggesting that there is any permanent commitment by those Senators in favor of the language of this article but as indicating that the Department was then seeking to develop a sound and generally acceptable compromissory clause for treaties of this type. The text of the article was submitted to the Chinese negotiators on June 6, and no question of its acceptance by China was raised in the negotiations. Senate Resolution 196 was adopted August 2, and the treaty was signed November 4, 1946.

It would appear that the only part of the resolution which is significant insofar as article XXVIII of this treaty is concerned is item (b) of the first proviso, which states that the declaration accepting compulsory jurisdiction of the Court shall not apply to disputes with regard to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States. There is, of course, no provision similar to this in the treaty. The Department of State feels that questions arising under this treaty are matters which the United States would wish to see submitted to the International Court of Justice, and that it would be in the public interest for the United States to be able to bring, without restriction, before that Court any disputes arising because of the interpretation or application by China of the provisions of this treaty in such a way as to be detrimental to the interests of the United States.

It is thought that article XXVIII of the treaty is not in conflict with the intent and purpose of Senate Resolution 196. It is to be noted that the exception in item (b) applies with respect to the acceptance of compulsory jurisdiction as to four extensive categories of questions of which the interpretation of a treaty is only one. In this broad context, the exception stands as a possible protection against this country's being cited before the Court by any one of a large number of states, some of which might conceivably try to bring before the Court, as related to a question of international law, questions such as our policy as to immigration, the Continental Shelf, or some other domestic matter.

The compromissary clause (article XXVIII) of the treaty with China, however, is limited to questions of the interpretation or application of this treaty; i. e., it is a special not a general compromissary clause. It applies to a treaty on the negotiation of which there is voluminous documentation indicating the intent of the parties. This treaty deals with subjects which are common to a large number of treaties, concluded over a long period of time by nearly all nations. Much of the general subject matter—and in some cases almost identical language—has been adjudicated in the courts of this and other countries. The authorities for the interpretation of this treaty are, therefore, to a considerable extent established and well known. Furthermore, certain important subjects, notably immigration, traffic in military supplies, and the "essential interests of the country in time of national emergency," are specifically excepted from the purview of the treaty. In view of the above, it is difficult to conceive how article XXVIII could result in this Government's being impleaded in a matter in which it might be embarrassed.

It may be added, in conclusion, that there is at least one precedent for this type of compromissary provision. It is contained in articles 84 and 86 of the International Civil Aviation Convention (Treaties and Other International Acts, Series 1591), which was ratified by the President August 6, 1946. It would also appear that the jurisdiction of the Court in questions arising under the constitution of the International Labor Organization (Treaty Series, No. 874) is not limited by any conditions such as are established in Senate Resolution 196.

Senator SMITH. Any issue that arises under this treaty or its interpretation, we would look to the International Court to interpret for us, if it did not involve a domestic question?

Mr. BOHLEN. Yes, sir.

Senator THOMAS. May I add a sentence there?

Senator SMITH. Yes, indeed.

Senator THOMAS. Under our Federal system, the conflicts in jurisdiction between State and Nation, even in international affairs, there

will always be a question of domestic concern legally in various cases. The Federal Government is powerless to step into States even though the Federal Government has a treaty granting such rights and privileges.

If we should always keep in mind the fact of our Federal system in our own interpretation of what is a domestic question we would have a law without amendment to the Court protocol, in the practice of our own country, and all that we would generally need in every case, and every governor of every State would stand on his complete rights, and no one knows it better than the Federal Government itself.

So that a problem, like so many of the problems we fear, are problems which have not bothered us in the past because of our government system.

Mr. BROWN. I think we could add, Senator, that this, of course, is limited to the disputes arising under this treaty, and the treaty deals with familiar subject matter and it is a thoroughly documented treaty, and a great deal of the language in it has already been subject to international interpretation, and such matters as immigration and military security and mineral rights, et cetera, are withheld from it. So that we do not anticipate that there is likely to be any possible difficulty in the question of getting something into the Court that would be——

Senator THOMAS. I hope that will be the case. But so long as you are dealing with China the simple facts of allowing people to travel through our country are enough to open up any one of these subjects, the fact of trade, the fact of building, the fact of staying. It is right for us to remember those things in dealing with the treaty and to be honest with everybody about it.

Senator SMITH. I think that is a very valuable contribution.

Mr. BROWN. Senator Smith, could I add a word on that?

Senator SMITH. Yes.

Mr. BROWN. There is a precedent for this type of clause in articles LXXXIV and LXXXVI of the International Civil Aviation Convention of which the Senate advised ratification on July 25, 1946.

COMMERCIAL ARBITRATION

Senator SMITH. Article VI, section 4 provides apparently for commercial arbitration. Is this provision a new one and is it satisfactory to the interested parties?

Mr. BROWN. It is a new one and it was discussed at considerable length with the American Arbitration Association. We have had some friendly words about it from them. So I think as far as they are concerned it is satisfactory.

We have also discussed it with other business groups and received the general impression it is favorably regarded.

Senator SMITH. Is this a new approach, to go in other treaties?

Mr. BROWN. Yes, sir.

Senator SMITH. It is something we are adding to our general commercial treaties.

Mr. BROWN. Yes, sir. We think it is very important and hope to get it in future treaties of this kind.

Senator THOMAS. Is it novel or is it an extension of the old Bryan arbitration treaties? We must not lose sight of our history here.

has to deal with the relation between the nationals of the two countries.

Mr. BOHLEN. Yes, sir. It would not deal with the rights and privileges of American nationals and reciprocal rights on the territory of the two countries.

Senator SMITH. Then in the negotiation of treaties of this type with all the countries of the world, you do not feel that that group of treaties will in any way interfere with the Economic Cooperation Act of 1948?

Mr. BOHLEN. No, sir.

Senator SMITH. I think you are right, but I want to get it in the record to show that clear distinction—that in promoting these two treaties you had in mind the other act, so that there can be no conflict in other areas—for instance, in the area of currency stabilization.

Mr. BOHLEN. No, sir. We see no ground for any conflict.

Mr. BROWN. In fact, I think you could say, Senator, that it was an additional factor in helping out the purposes of the European Cooperation Act to have the ground work laid for future stability in the relations between the two countries.

Senator SMITH. I think that is very fine to have it come in in the spirit of the ECA.

I think that is all I have at this stage, Mr. Chairman.

Senator THOMAS. Mr. Bohlen, may I make two requests of you?

Mr. BOHLEN. Yes, sir.

Senator THOMAS. First, that we have throughout the hearing some Chinese expert here with us.

Mr. BOHLEN. Yes, sir.

COMPARISON WITH PREVIOUS TREATIES

Senator THOMAS. We made a statement at the opening of the hearing that this is the first commercial treaty since 1938 that we have negotiated.

Mr. BOHLEN. Yes, sir.

Senator THOMAS. We made the point that this treaty was somewhat different from the old treaties and that we were plotting a new course, as it were.

Will you formally work out for me a statement which will show the different steps that have been taken in the negotiation in the preparation of this treaty which we can contrast with what you ordinarily have done in treaties of commerce and friendship in the past?

Mr. BOHLEN. Yes, sir.

Senator THOMAS. Maybe the statement I made was too strong; I do not know. But I got it from the statement you sent up.

Mr. BOHLEN. I would like to make one very general comment, sir. They are basically a continuance of the main type of treaty that has been made before in an attempt to broaden them and expand them to take in new commerce, economic, and financial developments which have occurred in the last decade or so in connection with international trade. They are really an expansion to meet modern conditions, with the same principles which underlie the treaties of friendship, commerce, and navigation which we have traditionally made.

Senator THOMAS. May I go so far as to say that the treaty supplements those things which we have found good in the past treaties?

Mr. BOHLEN. I think that is correct, sir.

Senator THOMAS. It does not abrogate?

Mr. BOHLEN. There is one place which is a new field, and that is the question of the status and rights of corporation, which is the development of a corporate form of business enterprise, which has been very greatly extended during the past few years, or longer than that, which were not present when the original eighteenth-century treaties of commerce and navigation were made. There it was much more of individuals than of corporations.

There is also the problem of the question of nationalization and greater safeguards in the field of compensation in the event of governmental action, such as nationalization of certain industries.

But I will see that there is a more detailed statement prepared, sir.

(The matter referred to is as follows:)

COMPARISON OF THE TREATY WITH CHINA, SIGNED NOVEMBER 4, 1946, WITH PREVIOUS TREATIES OF FRIENDSHIP, COMMERCE, AND NAVIGATION CONCLUDED BY THE UNITED STATES

In the period from 1923 to 1938, during which the Department of State was engaged in an extensive program directed to the conclusion of treaties of friendship, commerce, and navigation, about a dozen treaties of this general type were concluded, including treaties with Germany (1923), Austria (1928), El Salvador (1926), Finland (1934), Honduras (1927), Hungary (1925), Norway (1928), Latvia (1928), Poland (1931), Siam (1937), and Liberia (1938). These treaties differ among themselves as to detail, but are generally similar. The last two in the group, the treaties with Siam and Liberia, have more points in common with the treaty with China now under consideration than do the earlier ones in the group.

For the purpose of more detailed comparison with the treaty with China, the treaty with Norway, signed at Washington June 5, 1928, may be taken as representative of the group enumerated in the preceding paragraph. There are a few quite obvious differences between the two treaties. The Norway treaty deals extensively with consular rights. This is true of most, but not all, of the treaties in the 1923-38 group. It is now the practice of the Department of State to deal with these matters in separate consular conventions.

Much subject matter is common to the two treaties and the standards of treatment established is the same in a large number of the provisions. In the treaty with China, however, most of the provisions have been restated with the object of making them more specific, more explicit, of adapting them more fully to the coverage of situations which experience has indicated are likely to arise, and of bringing them wherever practicable into more complete accord with United States law and judicial decisions thereunder.

The following specific differences in content between the two treaties may be noted. With respect to the rights of corporations, the treaty with Norway merely provides for the recognition of the juridical status of foreign corporations and their access to courts. The performance of their corporate functions is made wholly subject to the local law. The right of foreigners and foreign corporations to participate in domestic corporations is placed upon a most-favored-nation basis, but the right of corporations participated in by foreigners to carry on activities is made wholly subject to the local law. The treaty with China, on the other hand accords rights to foreign corporations and domestic corporations participated in by foreigners to carry on activities, and the rights specified in many articles throughout the treaty are to be enjoyed by corporations as well as natural persons.

The treaty with Norway contains no provision respecting the acquisition and holding of real property other than a provision that an alien shall have at least 3 years in which to dispose of real property which may come to him by descent, testamentary succession, or donation, and which he is disqualified by law from holding because of his alienage. The treaty with China accords limited most-favored-nation treatment to United States nationals and corporations with respect to the acquisition and holding of land in China.

The treaty with Norway does not contain any provision relating to the protection of industrial, literary, or artistic property. These subjects are dealt with in article IX of the treaty with China.

In the treaty with Norway, each party agrees to accord unconditional most-favored-nation treatment generally with regard to the treatment of products of the other in commerce, but the treaty contains no provisions dealing specifically with quantitative restrictions, exchange controls, and trading by public agencies and monopolies, as does the treaty with China.

There are a number of minor differences as to substance between the treaty with Norway and the treaty with China.

Senator THOMAS. We will stand in recess until 2 o'clock this afternoon.

(Thereupon, at 11:55 a. m., the committee adjourned, to reconvene at 2 p. m.)

AFTER RECESS

The committee reconvened at 2 o'clock p. m., upon the expiration of the recess.

Senator THOMAS. Mr. Blaisdell, please.

For the record, Mr. Blaisdell, will you state who and what you are?

STATEMENTS OF THOMAS C. BLAISDELL, DIRECTOR, OFFICE OF INTERNATIONAL TRADE, UNITED STATES DEPARTMENT OF COMMERCE; MICHAEL LEE, CHIEF, FAR EASTERN BRANCH; AND MILTON A. BERGER, ACTING CHIEF, CHINA LEGAL SECTION, FAR EASTERN BRANCH, OFFICE OF INTERNATIONAL TRADE, UNITED STATES DEPARTMENT OF COMMERCE

Mr. BLAISDELL. Mr. Chairman, I am Thomas C. Blaisdell, Jr. I am Assistant to the Secretary of Commerce for International Trade. I am also Director of the Office of International Trade in the Department of Commerce.

Senator THOMAS. You are speaking today for the Department of Commerce?

Mr. BLAISDELL. I am speaking today for the Department of Commerce in support of the proposed treaty of friendship, commerce, and navigation, with China.

Senator THOMAS. Did the Department have a representative in the negotiation of the treaty?

Mr. BLAISDELL. Yes, sir. The staff of the Department worked with the State Department all during the negotiations. Mr. Lee and Mr. Berger, who are here with me, participated actively in that work.

Mr. Lee would like to elaborate as to his participation and that of the departmental representatives in the work on the treaty.

Senator THOMAS. Mr. Lee?

Mr. LEE. We did not participate directly in China, but we were consulted and worked in close cooperation with the State Department in Washington.

Senator THOMAS. You are a Department of Commerce employee?

Mr. LEE. That is right.

Senator THOMAS. You worked here in Washington but you did not go to China?

Mr. LEE. That is right, sir.

Senator THOMAS. Did anyone go to China? Part of the negotiations were carried on in China, were they not?

Mr. LEE. Yes, sir.

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Mr KNOWLAND. That is my purpose, in the hope of being able to expedite the transaction of the business of the Senate, and at the same time to maintain the sound public policy, which I believe is important, to have both a quorum call and a yea-and-nay vote in the case of the treaties.

Mr. President, let me inquire if there is further routine morning business.

The PRESIDING OFFICER. If there is no further routine morning business, morning business is concluded.

EXECUTIVE SESSION

Mr. KNOWLAND. Mr. President, I now move that the Senate proceed to consider executive business.

The motion was agreed to; and the Senate proceeded to the consideration of executive business.

TREATIES OF FRIENDSHIP, COMMERCE, AND NAVIGATION

The Senate, as in Committee of the Whole, proceeded to consider the treaty, Executive R (82d Cong., 1st sess.), a treaty of friendship, commerce, and navigation between the United States of America and Israel, together with a protocol and an exchange of notes relating thereto, signed at Washington on August 23, 1951 (with a reservation).

Mr. HICKENLOOPER. Mr. President, let me ask the acting majority leader whether he has requested that the treaties be considered en bloc; or does he believe it will be proper to make that request at a later time.

Mr. KNOWLAND. While the Senator from Iowa was out of the Chamber, that question was raised. The suggestion was made that the distinguished Senator from Iowa, who is handling the treaties for the Foreign Relations Committee, might explain each one. At that time I assume that the reservations regarding the various treaties will be discussed. It has been proposed that after the explanations have been made, a request be made to have the treaties acted upon in two groups, one to be composed of the treaties with reservations, and the other to be composed of the treaties without reservations.

Mr. HICKENLOOPER. Very well.

Mr. JOHNSON of Colorado rose.

Mr. HICKENLOOPER. I yield to the Senator from Colorado.

Mr. JOHNSON of Colorado. I should like to ask the acting majority leader whether he believes it would be practicable and possible to have a time set for voting on the treaties.

Mr. KNOWLAND. I may say to the distinguished Senator from Colorado that, before the debate has even started on the treaties, I would not like to suggest a time at which a vote be taken. I do not know how much time the Senator from Iowa will require for the explanation. I do not know how much additional debate Senators may desire to have. I therefore would not want in any degree, by setting a definite time for the vote, to foreclose debate at this time, before the Senate has even had a chance to hear an explanation of the treaties.

Mr. JOHNSON of Colorado. I may say it would greatly convenience all Senators if that could be done. The acting majority leader knows that many Senators are engaged in the discharge of other important duties, and that they are interested in being present to vote on the treaties.

Mr. KNOWLAND. I would say to the Senator from Colorado that I have already given assurance to the Senate that at the conclusion of the explanation and the debate, I shall ask for a quorum call, following which, I shall ask for the yeas and nays on the respective treaties, so that Senators will be on notice prior to the votes.

Mr. HICKENLOOPER. I may say to the Senator from Colorado in reference to his inquiry addressed to the acting majority leader, that so far as I know, every substantial objection to the treaties has been resolved. There may be objections of which I do not know; though it has occurred to me that there probably will not be prolonged debate on the treaties.

Mr. President, in discussing the treaty, Executive R, 82d Congress, 1st session, which is a treaty of friendship, commerce, and navigation between the United States of America and Israel, together with a protocol and an exchange of notes relating thereto, signed at Washington on August 23, 1951, and which was reported with a reservation, the statement I propose to make will apply generally to all the treaties to which reservations are recommended.

Mr. President, the eight treaties now before the Senate are part of a comprehensive series of modern commercial treaties being negotiated between the United States and other nations with which we carry on trade. More than 130 treaties of this type have been concluded since 1778. Congress has asked that treaties of this kind be negotiated in order to promote private investment.

The Mutual Security Act of 1952 contained an amendment which read, in part, as follows:

> The Department of State * * * shall accelerate a program of negotiating treaties of commerce and trade * * * which shall include provisions to encourage and facilitate the flow of private investment to countries participating in programs under this act.

The treaties now before the Senate, as well as several double tax conventions approved a week ago, are part and parcel of efforts being made to help American business develop markets abroad, service those markets, and arrange for the investment of American funds abroad. The Secretary of Commerce has pointed up the need for conventions of this type. He wrote to the committee on July 13, in part as follows:

> American businessmen who have investment or trade relations with these countries, or who are contemplating such relationships, have a genuine stake in numerous provisions in these treaties * * *
>
> The President has made the encouragement of American private foreign investment abroad one of the keystones of his foreign economic policy. Success in this phase of our policy will largely be dependent upon the degree to which other countries can be prevailed upon to take actions designed to improve the climate for investment.

I ask unanimous consent that the letter of July 13, written by the Secretary of Commerce, be inserted in my remarks at this point.

The PRESIDING OFFICER. Is there objection?

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

> THE SECRETARY OF COMMERCE,
> *Washington, July 13, 1953.*
>
> The Honorable ALEXANDER WILEY,
> *Chairman, Committee on Foreign Relations, United States Senate, Washington, D. C.*
>
> DEAR MR. CHAIRMAN: I appreciate this opportunity to join in recommending to your committee that it report favorably on the several commercial treaties now under consideration.
>
> For a number of years the business community has urged this Government to proceed as rapidly as possible with the program for modernizing our treaty arrangements with the countries with which we enjoy friendly and mutually profitable trade relationships. More recently, the Congress in section 516 of the Mutual Security Act of 1951, as amended, has directed the executive branch to expedite this program.
>
> American businessmen who have investment or trade relations with these countries, or who are contemplating such relationships, have a genuine stake in numerous provisions of these treaties. These provisions include the ones which concern the protection of their persons and property in the other countries involved, the permitted range of trade and business activities in those areas, the conditions of investment and remittance of investment proceeds, and the treatment of imports and exports.
>
> The President has made the encouragement of American private foreign investment abroad one of the keystones of his foreign economic policy. Success in this phase of our policy will largely be dependent upon the degree to which other countries can be prevailed upon to take actions designed to improve the climate for investment. The treaties before your committee take a necessary first step in the direction of establishing agreed standards for the treatment of those American businessmen who are willing to venture their capital and technology abroad.
>
> These commercial treaties can do no more, of course, than establish the standards to be applied reciprocally by the contracting governments in these matters. Various other favorable conditions must be present before individual firms will launch ventures where these assurances can come into play. However, our discussions with American businessmen have revealed their belief that the conclusion of commercial treaties of the type now before your committee is one of the most useful steps the Government can take to aid private United States foreign investors.
>
> Particular mention should be made of the proposals before your committee to advise and consent to the ratification of a treaty with Japan and to the revival of the 1923 treaty with Germany. Now that we have reestablished friendly political relationships with these important bulwarks of the free world, it is both appropriate and timely to reestablish a framework for our commercial and other business relationships with these countries.
>
> It is my hope that your committee will see fit to report favorably on the several treaties now under consideration.
>
> Sincerely yours,
>
> SINCLAIR WEEKS,
> *Secretary of Commerce.*

GENERAL NATURE OF THE CONVENTIONS

Mr. HICKENLOOPER. In considering these treaties, Mr. President, it must

chiefly in the interests of encouraging more investment in the less-developed countries.

However, it involves the important issue of taxation prerogatives, the question of whether one country is to forego what it considers its legitimate revenue rights in the interest of other countries. Treaties for the avoidance of double taxation do not, as a general rule, provide that one country relinquish taxing rights, but they set standards determining how much of a taxable income will be taxed by either of two countries.

SINGLE TAXATION STRESSED

In explaining the requirements for inducing foreign private investment, Mr. Alvord, the chamber's representative, told United Nations delegates that investors essentially were not too concerned about taxes, so long as income was taxed only once.

In addition, he emphasized, taxation, while important, was not the only consideration in attracting foreign capital. Even double taxation treaties, while an essential instrument for clearing up taxation uncertainties, were not in themselves designed to attract foreign investment, he noted.

More fundamental than any other consideration, the American asserted, was the need for foreign Governments to provide, in effect, the same freedom of action, treatment, and fair return on investment as is enjoyed by capital in this country. While the policy of taxation only in one country—the income-producing country—was one that this country should endorse, he said, it was doubtful that Congress would ever approve such a complete relinquishment of taxing rights.

However, he advised, primary reliance on private investment as the means of raising the economic standards of less-developed countries, offers the surest road to accomplishments.

Mr. HICKENLOOPER. Mr. President, I do not know what the pleasure of the majority leader may be now. As I understood the statement made earlier, it might be acceptable to vote on the treaties in two classes; first, those without reservations might be considered and voted on en bloc; then those with reservations might be considered and voted on en bloc.

The PRESIDING OFFICER. That is the understanding of the Chair.

Mr. HICKENLOOPER. I shall be happy to attempt to answer any questions which might be of interest to any Senator.

If there are no questions, I shall yield the floor, with the understanding that the acting majority leader will settle the matter of whether the treaties will be voted upon en bloc.

Mr. WILEY. Mr. President, since 1778, when the United States concluded its first commercial treaty with France, more than 130 treaties of commerce and navigation have been concluded by this Government. Many of the treaties have been terminated for one reason or another, and others, though still in effect, have provisions which are obsolete today.

The Department of State in recent years, and at the suggestion of the Congress, has been modernizing these commercial conventions. In this process it has been possible to include new provisions which assist Americans in their activities in foreign countries.

I might say parenthetically that our great country is indeed fortunate that its foreign commerce amounts to between 3 percent and 5 percent of its overall commerce, whereas the foreign commerce of such countries as Great Britain, and some others, is as high as 40 percent of their total commerce. So the United States is certainly blessed, in that our great economic life and strength are within our own borders.

The eight treaties which the Foreign Relations Committee reported without objection to the Senate on July 17 are similar to three conventions which were approved in 1949 and 1950. They have been considered by two subcommittees of the Committee on Foreign Relations, one under the chairmanship of Senator SPARKMAN who held hearings on certain of the conventions last year, and the second subcommittee under the chairmanship of Senator HICKENLOOPER who held hearings in early July this year. It is remarkable that in these hearings no one objected in principle to the conclusion of this type of agreement. There were, however, a few suggestions made relative to specific provisions and these suggestions have been taken into consideration and are discussed in the report of the committee.

I wish to invite the attention of my colleagues, Mr. President, to the treaties with Japan and Germany, since those treaties were concluded with countries with which we were recently at war.

The treaty with Germany is simple. It merely reactivates a commercial treaty which was signed at Washington in 1923. That 1923 agreement served as a model for many of the commercial treaties concluded in the 1920's and the 1930's. It has stood the test of time and no particular questions are raised now in reactivating that convention. I should call to your attention the fact, however, that the 1923 convention is out of date in some respects, and it is the intention of the United States and the Federal Republic of Germany to negotiate a new convention in the near future.

The treaty with Japan is similar in most respects to recent modern commercial conventions which we have concluded. It will have the effect, in the words of Deputy Assistant Secretary of State for Far Eastern Affairs, Mr. Johnson, of helping to develop "a close and friendly relationship between the United States and Japan." It replaces a commercial convention between the United States and Japan which was concluded in 1911. The treaty is of special significance because of the size of potential United States investment in and trade with Japan.

This simply shows how vital our Constitution is. By means of reservations, we have met the question of whether there was any interference with the rights of the States. We did not have to rely upon an amendment to the Constitution. The power is there, and we utilized it. The committee approved the reservations, as has been fully discussed by the distinguished Senator from Iowa [Mr. HICKENLOOPER].

In concluding my remarks in support of Senate approval of these conventions, I want to commend my colleague, Senator HICKENLOOPER, who has been assiduous in his work on these treaties. As the report of the committee notes, certain reservations have been proposed with respect to provisions which might have had the effect of impairing State laws with respect to requiring citizenship on the part of aliens practicing certain professions in the United States. I think the interests of the United States will be served by the reservations proposed by the Committee on Foreign Relations and I urge Members of the Senate to support these agreements.

Mr. President, we have had a hard year in foreign relations. At this time I wish not only to compliment the Senator from Iowa, but to compliment both Democratic and Republican members of the committee for being very assiduous in taking care of the work with which the Committee on Foreign Relations has been confronted. We have practically cleared our calendar. Today we held a meeting and ordered a number of other matters to be reported. I think that is an evidence of what cooperation and collaboration can do when we are faced with tough problems.

Mr. President, I ask that these treaties be ratified.

Mr. HICKENLOOPER. Mr. President, I thank the Senator from Wisconsin for this kind words. I should like to make a brief statement for the legislative RECORD, because I think it is important in connection with the security of the United States.

These treaties have been formulated in such manner as to avoid any interference with or qualifications of the right of the United States to apply such security measures as it may find necessary. In developing the standard provisions of these treaties, the State Department consulted with the Defense establishments, the Atomic Energy Commission, the Commerce Department and other interested agencies to assure that this result was adequately achieved.

Each of the treaties, as below indicated, contains a general reservation making it clear that nothing in the treaty shall be deemed to affect the right of either party to apply measures "necessary to protect its essential security interests." This clause is contained in the several treaties as follows: Israel, article XXI, paragraph 1 (d); Japan, article XXI, paragraph 1 (d); Denmark, article XXI, paragraph 1 (d); Greece, article XXIII, paragraph 1 (d); Ethiopia, article XVI, paragraph 1 (d); Germany, article III (1).

In the German case, this reservation is made applicable to the 1923 treaty. In the case of Italy, the treaty of 1948, which the present agreement merely supplements as an integral part thereof, already contains a suitable reservation ("necessary for the protection of the essential interests of such High Contracting Party in time of national emergency," article XXIV, paragraph 1 (e)).

These treaties, moreover, do not create rights with respect to such sensitive matters as entry of persons in conflict with our laws respecting immigration, aviation, telecommunications, the arms traffic, atomic energy, or political activities. Using Israel treaty as example, see article II, paragraphs 1 (b) and 3; article VII, paragraph 2; article XXI, paragraphs 1 (b), 1 (c) 4, and 5.

I make that clear because we were especially zealous to see that these treaties in no way offended or destroyed our inherent right to make such regulations or to continue such regulations for our

own internal security as we felt were justified. By the same token, the other countries have the same right.

I thank the acting majority leader.

Mr. PURTELL. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk called the roll, and the following Senators answered to their names:

Aiken	Gore	McClellan
Anderson	Green	Millikin
Barrett	Hayden	Monroney
Beall	Hendrickson	Morse
Bennett	Hennings	Mundt
Bricker	Hickenlooper	Murray
Bush	Hill	Neely
Butler, Md.	Hoey	Pastore
Butler, Nebr.	Holland	Payne
Byrd	Humphrey	Potter
Capehart	Hunt	Purtell
Carlson	Ives	Robertson
Case	Jackson	Russell
Chavez	Jenner	Saltonstall
Clements	Johnson, Colo.	Schoeppel
Cooper	Johnson, Tex.	Smathers
Cordon	Johnson, S. C.	Smith, Maine
Daniel	Kefauver	Smith, N. J.
Dirksen	Knowland	Sparkman
Douglas	Langer	Stennis
Duff	Lehman	Symington
Dworshak	Lennon	Thye
Eastland	Long	Tobey
Ellender	Magnuson	Watkins
Flanders	Malone	Welker
Frear	Mansfield	Wiley
Fulbright	Martin	Williams
George	Maybank	Young
Gillette	McCarran	
Goldwater	McCarthy	

Mr. SALTONSTALL. I announce that the Senator from Michigan [Mr. FERGUSON], the Senator from Nebraska [Mr. GRISWOLD], and the Senator from California [Mr. KUCHEL] are absent on official business.

The Senator from New Hampshire [Mr. BRIDGES] is absent because of illness.

The Senator from Ohio [Mr. TAFT] is necessarily absent.

Mr. CLEMENTS. I announce that the Senator from Massachusetts [Mr. KENNEDY] and the Senator from Oklahoma [Mr. KERR] are absent on official business.

The Senator from West Virginia [Mr. KILGORE] is absent by leave of the Senate.

The PRESIDING OFFICER. A quorum is present.

Mr. KNOWLAND. Mr. President, I should like to call the attention of the Senator from New York [Mr. LEHMAN] to the procedure. I understand he requests a yea-and-nay vote on the treaties. The Senate has two groups of treaties before it, one group to which reservations have been attached, and another group to which no reservations have been attached. I was wondering whether the distinguished Senator from New York would have any objection to voting en bloc on the two different groups of treaties.

Mr. LEHMAN. I may say to the distinguished acting majority leader that I have no objection whatever to such procedure. In raising the question my interest was exclusively in establishing the principle that in the future treaties and constitutional amendments shall be acted on by the Senate by a yea-and-nay vote following the establishment of the presence of a quorum. I am very grateful to the leaders of the two parties for their acquiescence in that principle. Certainly I have no objection to having all the treaties passed on en bloc. I am very happy that we have established the principle I have been urging.

The PRESIDING OFFICER. If there is no objection, the treaties will be considered as having passed through their various parliamentary stages up to and including the presentation of the respective resolutions of ratification with the accompanying reservations of the committee.

Without objection, the reservations will be printed in the RECORD at a later point without being read. The question is on agreeing to the respective reservations.

Mr. HICKENLOOPER. Mr. President, I understood the Senate would vote on the treaties en bloc. When the time comes to vote, all the treaties with reservations will be voted on by a yea-and-nay vote, en bloc.

Mr. LEHMAN. Mr. President, all that the Senate would be voting on by voice vote would be the reservations. The treaties themselves will be voted on by yea-and-nay vote, as I understand.

Mr. KNOWLAND. The Senator is correct.

Mr. HICKENLOOPER. The Senator is correct.

The PRESIDING OFFICER. The question is on agreeing to the respective reservations. [Putting the question.]

The reservations were agreed to en bloc.

The resolutions of ratification, with the reservations and understanding, appear in the RECORD following the announcement of the vote.

The PRESIDING OFFICER. The question now is on the respective resolutions of ratification, as amended, on the six treaties to which reservations are attached.

Mr. HICKENLOOPER. I thought we were voting on all of them at one time. Is there objection to voting on them all at once?

Mr. KNOWLAND. The plan was to vote on all the treaties with reservations in one group.

Mr. HICKENLOOPER. The adoption of the reservations to the treaties, to which reservations attach, can be had by voice vote prior to the submission of the question of agreeing to the resolutions of ratification of the treaties with the reservations or understandings attached.

The PRESIDING OFFICER. The question is, as the Chair has just stated, on the six treaties to which reservations have been attached.

Mr. KNOWLAND. Mr. President, on this question I ask for the yeas and nays.

Mr. HICKENLOOPER. On the eight treaties?

The PRESIDING OFFICER. That cannot be done. We must vote first on the six treaties which have reservations, and then vote on the other two.

Mr. KNOWLAND. Mr. President, I ask for the yeas and nays.

The yeas and nays were ordered.

Mr. JACKSON. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator from Washington will state it.

Mr. JACKSON. If the reservations have already been agreed to, is not it possible to vote on all the treaties en bloc, including the treaties without reservations?

The PRESIDING OFFICER. The Chair is advised that that is not possible.

Mr. JACKSON. Can it not be done by *unanimous* consent?

The PRESIDING OFFICER. Yes; it can be done by unanimous consent.

Mr. KNOWLAND. Now that the reservations have been adopted, in the case of the treaties to which reservations apply, I ask unanimous consent that all eight of the treaties be voted on en bloc, by yea-and-nay vote.

The PRESIDING OFFICER. Is there objection to the request of the Senator from California? The Chair hears none, and it is so ordered.

The question now is on agreeing to the respective resolutions of ratification, as amended, in the case of 6 of the treaties, and to the respective resolutions of ratification without amendment or reservation in the case of the other 2 treaties. On this question, the yeas and nays have been ordered, and the clerk will call the roll.

The Chief Clerk called the roll.

Mr. SALTONSTALL. I announce that the Senator from Michigan [Mr. FERGUSON], the Senator from Nebraska [Mr. GRISWOLD], and the Senator from California [Mr. KUCHEL] are absent on official business.

If present and voting, the Senator from Michigan [Mr. FERGUSON] and the Senator from California [Mr. KUCHEL] would each vote "yea."

I also announce that the Senator from New Hampshire [Mr. BRIDGES] is absent because of illness and the Senator from Ohio [Mr. TAFT] is necessarily absent. If present and voting the Senator from New Hampshire [Mr. BRIDGES] would vote "yea."

Mr. CLEMENTS. I announce that the Senator from Massachusetts [Mr. KENNEDY], the Senator from Oklahoma [Mr. KERR], and the Senator from Montana [Mr. MANSFIELD] are absent on official business.

The Senator from West Virginia [Mr. KILGORE] is absent by leave of the Senate.

I announce further that if present and voting, the Senator from Massachusetts [Mr. KENNEDY], the Senator from Oklahoma [Mr. KERR], the Senator from West Virginia [Mr. KILGORE], and the Senator from Montana [Mr. MANSFIELD] would each vote "yea."

The yeas and nays resulted—yeas 86, nays 1, as follows:

YEAS—86

Aiken	Dworshak	Jackson
Anderson	Eastland	Jenner
Barrett	Ellender	Johnson, Colo.
Beall	Flanders	Johnson, Tex.
Bennett	Frear	Johnston, S. C.
Bricker	Fulbright	Kefauver
Bush	George	Knowland
Butler, Md.	Gillette	Langer
Butler, Nebr.	Goldwater	Lehman
Byrd	Gore	Lennon
Capehart	Green	Long
Carlson	Hayden	Magnuson
Case	Hendrickson	Malone
Chavez	Hennings	Martin
Clements	Hickenlooper	Maybank
Cooper	Hill	McCarthy
Cordon	Hoey	McClellan
Daniel	Holland	Millikin
Dirksen	Humphrey	Monroney
Douglas	Hunt	Morse
Duff	Ives	Mundt

Article XIX (Navigation)

It was agreed that there would be added to Protocol Paragraph 4-ter (relating to definition of cargoes) the following words "as well as goods" in order to complete the balance of the provision. It was agreed that the national fisheries reservation in paragraph 3 would be consolidated with that in Article XIV (6) and be incorporated in Article XXI. It would be drafted in such a manner so as to provide no more and no less than previously.

The Dutch reverted to their earlier-expressed wish to include some provision or declaration of principle regarding air transport or civil aviation. The U.S. side repeated the views previously set forth in informal discussions to the effect that this subject was inappropriate to a Treaty of this kind, and that the door was presumably always open for discussion of civil air transport between the United States and the Netherlands within the framework of normal air agreements. The Dutch said that they would concede that air transport could not be dealt with in specific terms in the FCN Treaty, but that they felt that there would be something lacking if this very important means of communication, which plays a key role in the Netherlands in the international sphere, were not mentioned in any way at all, especially in view of the otherwise general comprehensive scope of the Treaty. They said what they now had in mind was some kind of simple, general language of principle, and suggested that Article I, paragraph 2 afforded an appropriate precedent (interchange and use of scientific and technical knowledge). The U.S. side remarked that in its opinion, the justification for including Article I, paragraph 2 was entirely different from putting in material about the very specialized and complex subject of air transport, with respect to which there exists an appropriate and entirely adequate bilateral vehicle (such as Bilateral Air Transport Agreements). The Dutch said they nevertheless would offer some specific language to indicate what they would propose on the subject of aviation in the Treaty, and added that they hoped the U.S. side would transmit it to the Department for consideration. The U.S. side responded by saying that they would of course do so, and that the Department undoubtedly would give the matter very careful consideration. They added that it would be very unlikely, however, that anything could be worked out on the subject in the FCN (see Embassy despatch 107 of August 3, 1954).

Article XXI (General Exceptions)

Security Reservation, paragraph 1 (d). The Dutch said that they were going to propose an expanded wording of the security reservation, modelled upon language found in the Statute of Barcelona

which would emphasize that security measures were to be taken only in exceptional circumstances for reasons of genuinely vital concern, and were not to be prolonged any longer than the circumstances calling for them existed. They said that they wanted to emphasize that the security reservation ought to be strictly construed so as not to open it to abuses.

The U.S. side indicated that they concurred in the thought that this reservation was to be used for serious reasons, and was not intended to be a loophole through which arbitrary actions would or could be taken so as to defeat the purposes of the Treaty. The U.S. side emphasized that the presence in the Treaty of an ample security reservation is, however, deemed essential by the United States. They added that they could see no advantage whatsoever in trying to elaborate on the present wording, and that any attempt to elaborate on it would give rise to misapprehensions lest its scope was being narrowed to the detriment of the United States to take the measures it might consider essential or vital to national security. It was stressed that there must not be the slightest implication that the United States is committing itself to abandon any of its present security controls, even though it is unlikely that these controls are actually inconsistent with any of the provisions of the Treaty as regards U.S.-Netherlands relations. They emphasized that each Party would have to determine, according to its own discretion, what was essential from the viewpoint of its security interests. The Dutch said that they did not question the proposition that each Party would have to make its own determinations, but that they wanted to lay down some "guide posts." (The Dutch subsequently offered revised wording of the type which they had mentioned. The U.S. side stated that the revision was unacceptable. After discussion, it was very tentatively agreed that an appropriately-worded Minute provision might be possible to indicate that the security reservation was not intended to be abused and that each Party would make its own determinations as to what measures were essential for its security interests. The U.S. side drafted some wording which was reviewed in a discussion at which the Dutch attempted to give primary emphasis to the first element. An agreed ad referendum redraft is contained in the text of the consolidated Minutes reported in Embassy despatches 107 of August 3 and 147 of August 17, 1954.)

Paragraph 1(e). The Dutch said that they would like to elaborate on this provision by providing that it could be invoked in the case of any given company only so long as the third-party control existed, and that disabilities would be lifted as soon as treaty-party control had been established. The U.S. side said that no words were necessary to carry out that thought because it was axiomatic throughout the Treaty that no temporal references were necessary since the intent was that

Folder 4

AIR POUCH

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(Security Classification)

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FOREIGN SERVICE DESPATCH

FROM : HICOG BONN

2254
DESP. NO.

TO : THE DEPARTMENT OF STATE, WASHINGTON

February 17, 1954
DATE

REF : OURDES 2233, February 12, 1954, and previous

RETURN TO L/T

For Dept. Use Only	ACTION	DEPT.
	E-4	REP-2, DC/R-2, GER-4, OLI-6, L-2
	REC'D 2/26	OTHER CIA-5, COM-8, TR-3

SUBJECT: New Treaty of Friendship, Commerce and Navigation: Report on February 15, 1954 Meeting with German Negotiators

The 24th meeting for the negotiation of the subject treaty was held at the Foreign Office on February 15, 1954. Dr. RECKER, absent from the past several meetings because of illness, again served as chairman of the German team. The United States side was the same as that reported in the reference despatch.

The February 15 meeting was devoted to a detailed discussion of United States Article XXI on general exceptions.

Discussion of Paragraph 1, United States Article XXI

Regarding clause (a), the Germans asked whether this reservation could not be expanded to include platinum as well as gold and silver on the ground that, for them, the generic term for precious metals normally included platinum. In reply to a United States question, they stated that at present platinum was not being used in Germany in connection with coinage or backing for the currency. The United States side reserved its position on the German suggestion, pending receipt of instructions from the Department. The Germans accepted this position, adding that any modification of clause (a) would also necessitate a similar change in the exchange of letters proposed by them in connection with United States Article XIV (see despatch 2089, January 29, 1954).

With respect to clause (b), (c) and (d), the Germans noted that these provisions resembled similar provisions in GATT Article XXI, and that only clause (d) needed clarification. Specifically, they inquired whether that clause contained in fact two exceptions. This question was answered in the affirmative by the United States side, which explained that the first reservation was designed notably to cover United Nations' requirements, such as action taken by the United States in response to a UNO resolution, e.g., the Korean action, whereas the second reservation was a national exception. In response to another German question whether a clear meaning or definition was available for the words "to protect its essential security interests", the United States side commented that no precise delineation or interpretation existed for this expression and that the language had been drafted in such a manner as to leave a wide area of discretion to both parties in order to allow for necessary action over an indefinite future. They added that no serious consequences

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DEPARTMENT OF STATE
L/T
MAR 3 1954
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OFFICE OF THE LEGAL ADVISER

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Annex 220

were expected from this reservation so long as the relations between both countries remained friendly, and stressed the word "necessary" and "essential" had been added to emphasize that the reservation was not to be invoked in a frivolous manner.

The Germans stated that they were glad to hear the last point, as they did not believe a security reservation ought to be made the excuse for economic measures not genuinely based on real security considerations.

They then asked whether the clause was justiciable. The United States side replied that offhand it knew of no international court precedents, but believed national as well as international courts would probably give very heavy weight to arguments presented by the government invoking the reservation and would have difficulty in finding a justiciable issue. Reference was made to the Senate debate of July 21, 1953, in which the importance of the reservation and the latitude it allowed each Party had been emphasized. Both sides then noted that they knew of no precedents on this point in the national courts of their countries, and concurred in the thought that the question would tend to be regarded as "political" rather than "legal" by the courts.

The Germans requested clarification whether the clause could be applied to justify a United States export embargo of certain machinery to Germany, for instance, on the assumption that it might be reexported by Germany to a third country. The United States team explained that insofar as any United States embargo was equally applied to all nations, the most-favored-nation principle would pertain without need of resort to the security reservation. In this connection they noted that the FCN treaty under discussion was not so ambitious as the GATT which aimed to eliminate embargoes. Insofar as import and export regulations on strategic materials might differ between countries, however, the security reservation contained in clause (d) would be applicable; and they added that current United States import-export regulations were deemed to be justified by the security reservation. The Germans thereupon accepted clauses (b), (c), and (d).

Regarding clause (e), the Germans agreed in principle with its content but asked for a definition of "controlling interest". The United States side commented that these words most appropriately reflected United States nomenclature, and were designed to describe the group or interest to which the majority of the board of directors were beholden. Ordinarily, this would be the group owning 51 percent of the common stock. However, the possibility exists (at least in the United States) where stockholders owning less than 51 percent of the stock might actually exercise domination. This might be the case for large companies with very widespread and scattered stock ownership. Hence, "controlling" had been used rather than "majority" in the treaty. They added, however, that in international business practices the typical, usual and practical case was that of the majority ownership situation. The Germans thereupon accepted clause (e).

German Suggestion to Transfer Fisheries Exception to Paragraph 1

The Germans suggested that paragraph 6 (a) of U.S. Article XIV should, in

individual also holds an interest in the partnership that is not an interest in a limited partnership as a limited partner (as defined in paragraph (e)(3)(i) of this section), such as a state-law general partnership interest, at all times during the entity's taxable year ending with or within the individual's taxable year (or the portion of the entity's taxable year during which the individual (directly or indirectly) owns such interest in a limited partnership as a limited partner).

(4) *Effective/applicability date.* This section applies to taxable years beginning on or after the date of publication of the Treasury decision adopting these rules as a final regulation in the **Federal Register.**

* * * * *

Par. 4. Section 1.469–5T paragraph (e) is revised to read as follows:

§ 1.469–5T Material participation (temporary).

* * * * *

(e) *Treatment of Limited Partners.* [Reserved]. See § 1.469–5(e) for rules relating to this paragraph (e).

* * * * *

Par. 5. Section 1.469–9 paragraph (f)(1) is revised to read as follows:

§ 1.469–9 Rules for certain rental real estate activities.

* * * * *

(f) *Limited partnership interests in rental real estate activities*—(1) *In general.* If a taxpayer elects under paragraph (g) of this section to treat all interests in rental real estate as a single rental real estate activity, and at least one interest in rental real estate is held by the taxpayer as an interest in a limited partnership as a limited partner (within the meaning of § 1.469–5(e)(3)), the combined rental real estate activity of the taxpayer will be treated as an interest in a limited partnership as a limited partner for purposes of determining material participation. Accordingly, the taxpayer will not be treated under this section as materially participating in the combined rental real estate activity unless the taxpayer materially participates in the activity under the tests listed in § 1.469–5(e)(2) (dealing with the tests for determining the material participation of a limited partner).

* * * * *

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2011–30611 Filed 11–25–11; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

31 CFR Chapter X

RIN 1506–AB16

Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations—Imposition of Special Measure Against the Islamic Republic of Iran as a Jurisdiction of Primary Money Laundering Concern

AGENCY: Financial Crimes Enforcement Network, Treasury ("FinCEN"), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: In a notice of finding published elsewhere in this issue of the **Federal Register**, the Secretary of the Treasury, through his delegate, the Director of FinCEN, found that reasonable grounds exist for concluding that the Islamic Republic of Iran ("Iran") is a jurisdiction of primary money laundering concern pursuant to 31 U.S.C. 5318A. FinCEN is issuing this notice of proposed rulemaking to impose a special measure against Iran.

DATES: Written comments on the notice of proposed rulemaking must be submitted on or before January 27, 2012.

ADDRESSES: You may submit comments, identified by RIN 1506–AB16, by any of the following methods:

- *Federal E-rulemaking Portal: http:/www.regulations.gov.* Follow the instructions for submitting comments. Include 1506–AB16 in the submission. Refer to Docket Number FINCEN–2011–0008.
- *Mail:* The Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183. Include RIN 1506–AB16 in the body of the text. Please submit comments by one method only.

Comments submitted in response to this NPRM will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.

Inspection of comments: Public comments received electronically or through the U. S. Postal Service sent in response to a notice and request for comment will be made available for public review as soon as possible on *http://www.regulations.gov.* Comments received may be physically inspected in the FinCEN reading room located in Vienna, Virginia. Reading room appointments are available weekdays (excluding holidays) between 10 a.m. and 3 p.m., by calling the Disclosure Officer at (703) 905–5034 (not a toll-free call).

FOR FUTHER INFORMATION CONTACT: The FinCEN regulatory helpline at (800) 949–2732 and select Option 6.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Provisions

On October 26, 2001, the President signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the "USA PATRIOT Act"), Public Law 107–56. Title III of the USA PATRIOT Act amends the anti-money laundering provisions of the Bank Secrecy Act ("BSA"), codified at 12 U.S.C. 1829b and 1951–1959, and 31 U.S.C. 5311–5314, and 5316–5332, to promote the prevention, detection, and prosecution of international money laundering and the financing of terrorism. Regulations implementing the BSA appear at 31 CFR Chapter X. The authority of the Secretary of the Treasury (the "Secretary") to administer the BSA and its implementing regulations has been delegated to the Director of FinCEN.[1]

Section 311 of the USA PATRIOT Act ("section 311") added section 5318A to the BSA, granting the Secretary the authority, upon finding that reasonable grounds exist for concluding that a foreign jurisdiction, institution, class of transaction, or type of account is of "primary money laundering concern," to require domestic financial institutions and financial agencies to take certain "special measures" against the primary money laundering concern. Section 311 identifies factors for the Secretary to consider and Federal agencies to consult before the Secretary may conclude that a jurisdiction, institution, class of transaction, or type of account is of primary money laundering concern. The statute also provides similar procedures, *i.e.,* factors and consultation requirements, for selecting the specific special measures to be imposed against the primary money laundering concern.

Taken as a whole, section 311 provides the Secretary with a range of options that can be adapted to target specific money laundering and terrorist financing concerns most effectively. These options give the Secretary the authority to bring additional pressure on those jurisdictions and institutions that pose money laundering threats. Through the imposition of various special measures, the Secretary can gain more information about the jurisdictions, institutions, transactions, or accounts of concern; can more effectively monitor the respective jurisdictions, institutions,

[1] Therefore, references to the authority of the Secretary of the Treasury under section 311 of the USA PATRIOT Act apply equally to the Director of FinCEN.

transactions, or accounts; or can protect U.S. financial institutions from involvement with jurisdictions, institutions, transactions, or accounts that are of money laundering concern.

Before making a finding that reasonable grounds exist for concluding that a jurisdiction is of primary money laundering concern, the Secretary is required to consult with both the Secretary of State and the Attorney General. The Secretary is also required by section 311, as amended,[2] to consider ''such information as the Secretary determines to be relevant, including the following potentially relevant factors,'' which extend the Secretary's consideration beyond traditional money laundering concerns to issues involving, inter alia, terrorist financing and weapons proliferation:

- Evidence that organized criminal groups, international terrorists, or entities involved in the proliferation of weapons of mass destruction or missiles, have transacted business in that jurisdiction;
- The extent to which that jurisdiction or financial institutions operating in that jurisdiction offer bank secrecy or special regulatory advantages to nonresidents or nondomiciliaries of that jurisdiction;
- The substance and quality of administration of the bank supervisory and counter-money laundering laws of that jurisdiction;
- The relationship between the volume of financial transactions occurring in that jurisdiction and the size of the economy of the jurisdiction;
- The extent to which that jurisdiction is characterized as an offshore banking or secrecy haven by credible international organizations or multilateral expert groups;
- Whether the United States has a mutual legal assistance treaty with that jurisdiction, and the experience of United States law enforcement officials and regulatory officials in obtaining information about transactions originating in or routed through or to such jurisdiction; and
- The extent to which that jurisdiction is characterized by high levels of official or institutional corruption.

If the Secretary determines that reasonable grounds exist for concluding that a jurisdiction is of primary money laundering concern, the Secretary must determine the appropriate special measure(s) to address the specific money laundering risks. Section 311 provides a range of special measures that can be imposed individually, jointly, in any combination, and in any sequence.[3] The Secretary's imposition of special measures requires additional consultations to be made and factors to be considered. The statute requires the Secretary to consult with appropriate federal agencies and other interested parties[4] and to consider the following specific factors:

- Whether similar action has been or is being taken by other nations or multilateral groups;
- Whether the imposition of any particular special measures would create a significant competitive disadvantage, including any undue cost or burden associated with compliance, for financial institutions organized or licensed in the United States;
- The extent to which the action or the timing of the action would have a significant adverse systemic impact on the international payment, clearance, and settlement system, or on legitimate business activities involving the particular jurisdiction; and
- The effect of the action on United States national security and foreign policy.

B. Finding

Today, as detailed elsewhere in this part,[5] based upon a review and analysis of the administrative record in this matter, consultations with relevant Federal agencies and departments, and after consideration of the factors enumerated in section 311, the Director of FinCEN has determined that reasonable grounds exist for concluding that the Islamic Republic of Iran is a jurisdiction of primary money laundering concern.[6]

II. Imposition of Special Measure Against the Islamic Republic of Iran as a Jurisdiction of Primary Money Laundering Concern, Including the Central Bank of Iran Within the Definition of Iranian Banking Institution

As a result of that finding, and based upon the additional consultations and the consideration of all relevant factors discussed in the finding and in this notice of proposed rulemaking, the Director of FinCEN has determined that reasonable grounds exist for the imposition of the fifth special measure authorized by section 5318A(b)(5).[7] That special measure authorizes a prohibition against the opening or maintaining of correspondent accounts[8] by any domestic financial institution or agency for or on behalf of a foreign banking institution, if the correspondent account involves the targeted jurisdiction. A discussion of the section 311 factors relevant to imposing this particular special measure follows.

1. Whether Similar Actions Have Been or Will Be Taken by Other Nations or Multilateral Groups Against Iran

The United Nations Security Council has adopted multiple resolutions imposing sanctions on Iran for its refusal to comply with international nuclear obligations and proliferation sensitive activities, including United Nations Security Council resolutions (''UNSCRs'') 1696,[9] 1737,[10] 1747,[11]

[2] 31 U.S.C. 5318A was amended by section 501 of the Iran Freedom Support Act of 2006, Public Law 109–293.

[3] Available special measures include requiring: (1) Recordkeeping and reporting of certain financial transactions; (2) collection of information relating to beneficial ownership; (3) collection of information relating to certain payable-through accounts; (4) collection of information relating to certain correspondent accounts; and (5) prohibition or conditions on the opening or maintaining of correspondent or payable through accounts. 31 U.S.C. 5318A(b)(l)–(5). For a complete discussion of the range of possible countermeasures, *see* 68 FR 18917 (April 17, 2003) (proposing special measures against Nauru).

[4] Section 5318A(a)(4)(A) requires the Secretary to consult with the Chairman of the Board of Governors of the Federal Reserve System, any other appropriate Federal banking agency, the Secretary of State, the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission (CFTC), the National Credit Union Administration (NCUA), and, in the sole discretion of the Secretary, ''such other agencies and interested parties as the Secretary may find to be appropriate.'' The consultation process must also include the Attorney General, if the Secretary is considering prohibiting or imposing conditions on domestic financial institutions opening or maintaining correspondent account relationships with the designated jurisdiction.

[5] *See* the notice of this finding published elsewhere today in the **Federal Register**.

[6] Classified information used in support of a section 311 finding and measure(s) may be submitted by Treasury to a reviewing court *ex parte* and *in camera*. *See* section 376 of the Intelligence Authorization Act for fiscal year 2004, Public Law 108–177 (amending 31 U.S.C. 5318A by adding new paragraph (f)).

[7] In connection with this action, FinCEN consulted with staffs of the Federal functional regulators, the Department of Justice, and the Department of State.

[8] For purposes of the proposed rule, a correspondent account is defined as an account established to receive deposits from, or make payments or other disbursements on behalf of, a foreign bank, or handle other financial transactions related to the foreign bank.

[9] For a complete discussion of the sanctions adopted by UNSCR 1696, *see* ''Resolution 1696,'' United Nations Security Council, July 31, 2006 (*http://www.un.org/Docs/sc/unsc_resolutions06.htm*).

[10] For a complete discussion of the sanctions adopted by UNSCR 1737, *see* ''Resolution 1737,'' United Nations Security Council, December 23, 2006 (*http://www.un.org/Docs/sc/unsc_resolutions06.htm*).

[11] For a complete discussion of the sanctions adopted by UNSCR 1747, *see* ''Resolution 1747,'' United Nations Security Council, March 24, 2007 (*http://www.un.org/Docs/sc/unsc_resolutions07.htm*).

1803,[12] and 1929.[13] All resolutions were reaffirmed in 2008, 2009, and 2010 through UNSCRs 1835,[14] 1887,[15] and 1929,[16] respectively.

Iran's serious deficiencies with respect to anti-money laundering/countering the financing of terrorism (''AML/CFT'') controls have long been highlighted by numerous international bodies and government agencies. Starting in October 2007, the Financial Action Task Force (''FATF'') has issued a series of public statements expressing its concern that Iran's lack of a comprehensive AML/CFT regime represents a significant vulnerability within the international financial system. The statements further called upon Iran to address those deficiencies with urgency, and called upon FATF-member countries to advise their institutions to conduct enhanced due diligence with respect to the risks associated with Iran's deficiencies.[17]

The FATF has been particularly concerned with Iran's failure to address the risk of terrorist financing, and starting in February 2009, the FATF called upon its members and urged all jurisdictions to apply effective countermeasures to protect their financial sectors from the terrorist financing risks emanating from Iran.[18] In addition, the FATF advised jurisdictions to protect correspondent relationships from being used to bypass or evade countermeasures and risk mitigation practices, and to take into account money laundering and financing of terrorism risks when considering requests by Iranian financial institutions to open branches and subsidiaries in their jurisdictions.[19] The FATF also called on its members and other jurisdictions to advise their financial institutions to give special attention to business relationships and transactions with Iran, including Iranian companies and financial institutions.[20] Over the past three years, the FATF has repeatedly reiterated these concerns and reaffirmed its call for FATF-member countries and all jurisdictions to implement countermeasures to protect the international financial system from the terrorist financing risk emanating from Iran. In response, numerous countries, including all G7 countries, have issued advisories to their financial institutions.[21]

The FATF's most recent statement in October 2011 reiterated, with a renewed urgency, its concern regarding Iran's failure to address the risk of terrorist financing and the serious threat this poses to the integrity to the international financial system.[22] The FATF reaffirmed its February 2009 call to apply effective countermeasures to protect their financial sectors from ML/FT risks emanating from Iran, and further called upon its members to consider the steps already taken and possible additional safeguards or strengthen existing ones.[23] In addition, the FATF stated that, if Iran fails to take concrete steps to improve its AML/CFT regime, the FATF will consider calling on its members and urging all jurisdictions to strengthen countermeasures in February 2012.[24] The numerous calls by the FATF for Iran to urgently address its terrorist financing vulnerability, coupled with the extensive record of Iranian entities using the financial system to finance terrorism, proliferation activities, and other illicit activity,[25] raises significant concern over the willingness or ability of Iran to establish adequate controls to counter terrorist financing.

Although none of these actions to sanction Iran prohibit domestic financial institutions and agencies from opening or maintaining a correspondent account for or on behalf of any financial institution in Iran, or require the type of special due diligence outlined in this proposed rulemaking, FinCEN encourages other countries or multilateral groups to take similar action based on the findings contained in this rulemaking.

2. Whether the Imposition of the Fifth Special Measure Would Create a Significant Competitive Disadvantage, Including Any Undue Cost or Burden Associated With Compliance, for Financial Institutions Organized or Licensed in the United States

The fifth special measure sought to be imposed by this rulemaking would prohibit covered financial institutions from opening and maintaining correspondent accounts for, or on behalf of, Iranian banking institutions. As a corollary to this measure, covered financial institutions also would be required to take reasonable steps to apply special due diligence, as set forth below, to all of their correspondent accounts to help ensure that no such account is being used indirectly to provide services to an Iranian banking institution. FinCEN does not expect the burden associated with these requirements to be significant given that U.S. financial institutions have long been subject to sanctions regulations prohibiting the provision of correspondent account services for banking institutions in Iran. There is a minimal burden involved in transmitting a one-time notice to certain correspondent account holders concerning the prohibition on indirectly providing services to Iranian banking institutions. In addition, U.S. financial

[12] For a complete discussion of the sanctions adopted by UNSCR 1803, see ''Resolution 1803,'' United Nations Security Council, March 3, 2008 (*http://www.un.org/Docs/sc/unsc_resolutions08.htm*).

[13] For a complete discussion of the sanctions adopted by UNSCR 1929, *see* ''Resolution 1929,'' United Nations Security Council, June 9, 2010 (*http://www.un.org/Docs/sc/unsc_resolutions10.htm*).

[14] *See* ''Resolution 1835,'' United Nations Security Council, September 27, 2008 (*http://www.un.org/Docs/sc/unsc_resolutions08.htm*).

[15] *See* ''Resolution 1887,'' United Nations Security Council, September 24, 2009 (*http://www.un.org/Docs/sc/unsc_resolutions09.htm*).

[16] *See* ''Resolution 1929,'' United Nations Security Council, June 9, 2010 (*http://www.un org/Docs/sc/unsc_resolutions10.htm*).

[17] In response to concerns raised by these FATF and IMF reports, FinCEN issued an advisory on October 16, 2007 to financial institutions regarding the heightened risk of Iranian ''money laundering, terrorist financing, and weapons of mass destruction proliferation financing.'' The advisory further cautioned institutions that there may be an increased effort by Iranian entities to circumvent international sanctions and related financial community scrutiny through the use of deceptive practices. *See* ''Guidance to Financial Institutions on the Increasing Money Laundering Threat Involving Illicit Iranian Activity,'' FinCEN, October 16, 2007 (*http://www.fincen.gov/statutes_regs/guidance/pdf/guidance_fi_increasing_mlt_iranian pdf*). The FATF simultaneously published guidance to assist countries with implementation of UNSCRs 1737 and 1747. *See* ''Guidance Regarding the Implementation of Activity-Based Financial Prohibitions of United Nations Security Council Resolution 1737,'' October 12, 2007 (*http://www.fatf-gafi.org/dataoecd/43/17/39494050.pdf*) and ''Guidance Regarding the Implementation of Financial Provisions of the United Nations Security Council Resolutions to Counter the Proliferation of Weapons of Mass Destruction,'' September 5, 2007 (*http://www fatf-gafi.org/dataoecd/23/16/39318680.pdf*).

[18] *See* ''FATF Statement on Iran,'' The Financial Action Task Force, February 25, 2009 (*http://www.fatf-gafi.org/dataoecd/18/28/42242615.pdf*).

[19] *Id.*

[20] *Id.*

[21] *See* ''Circular 13/2008 (GW)—Statement of the FATF of 16 October 2008,'' November 7, 2008 (*http://www.bafin.de/cln_171/nn_721228/SharedDocs/Veroeffentlichungen/EN/Service/Circulars/rs_0813_gw.html?_nnn=true*); ''February 27, 2009 FINTRAC Advisory,'' February 27, 2009 (*http://www.fintrac-canafe.gc.ca/publications/avs/2009-02-27-eng.asp*); ''HM Treasury warns businesses of serious threats posed to the international financial system,'' March 11, 2009 (*http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/press_26_09.htm*); ''Letter from French Minister of Economy,'' (*http://www2.economie.gouv.fr/directions_services/dgtpe/sanctions/sanctions iran php*); and ''Bank of Italy Circular,'' (*http://www.dt.tesoro it/it/prevenzione_reati_finanziari/*).

[22] *See* ''FATF Public Statement,'' The Financial Action Task Force, October 28, 2011 (*http://www.fatf-gafi.org/document/55/0,3746,en_32250379_32236992_48966519_1_1_1_1,00.html*).

[23] *Id.*

[24] *Id.*

[25] ''Update on the Continuing Illicit Finance Threat Emanating From Iran,'' FinCEN, June 22, 2010 (*http://www.fincen.gov/statutes_regs/guidance/html/fin-2010-a008.html*).

institutions generally apply some degree of due diligence in screening their transactions and accounts, often through the use of commercially available software such as that used for compliance with the economic sanctions programs administered by the Office of Foreign Assets Control (OFAC) of the Department of the Treasury. As explained in more detail in the section-by-section analysis below, financial institutions should, if necessary, be able to easily adapt their current screening procedures to comply with this special measure. Thus, the special due diligence that would be required by this rulemaking is not expected to impose a significant additional burden upon U.S. financial institutions.

3. The Extent To Which the Proposed Action or Timing of the Action Will Have a Significant Adverse Systemic Impact on the International Payment, Clearance, and Settlement System, or on Legitimate Business Activities of Iran

Banking institutions in Iran generally are not major participants in the international payment system and are not relied upon by the international banking community for clearance or settlement services. Additionally, given the preexisting OFAC and international sanctions on Iran and certain Iranian banking institutions, it is unlikely that these new measures or the timing of the new measures will have a significant impact on the international payment, clearance, and settlement system. Financial transactions between the United States and Iran pertaining to licensed agricultural and medical exports to Iran, as well as other licensed transactions or transactions exempted or not prohibited from the scope of OFAC sanctions, may continue under the rule as proposed.[26] Legitimate pre-existing personal investments held by Iranian residents in the United States that do not involve Iranian banking institutions will be unaffected. Consequently, in light of the reasons for imposing this special measure, FinCEN does not believe that it will impose an undue burden on legitimate business activities.

4. The Effect of the Proposed Action on United States National Security and Foreign Policy

The exclusion from the U.S. financial system of jurisdictions that serve as conduits for significant money laundering activity, for the financing of terrorism or weapons of mass destruction or their delivery systems, and for other financial crimes enhances U.S. national security by making it more difficult for terrorists and money launderers to access the substantial resources of the U.S. financial system. To the extent that this action serves as an additional tool in preventing Iran from accessing the U.S. financial system, the proposed action supports and upholds U.S. national security and foreign policy goals. More generally, the imposition of the fifth special measure would complement the U.S. Government's worldwide efforts to expose and disrupt international money laundering and terrorist financing.

Therefore, pursuant to the finding of the Director of FinCEN that Iran is a jurisdiction of primary money laundering concern, and after conducting the required consultations and weighing the relevant factors, FinCEN has determined that reasonable grounds exist for imposing the fifth special measure authorized by 31 U.S.C. 5318A(b)(5) against Iran.

III. Section-by-Section Analysis

The proposed rule would prohibit covered financial institutions from establishing, maintaining, or managing in the United States any correspondent account for, or on behalf of, banking institutions in Iran. As a corollary to this prohibition, covered financial institutions would be required to apply special due diligence to their correspondent accounts to guard against their improper indirect use by Iranian banking institutions. At a minimum, that special due diligence must include two elements. First, a covered financial institution must notify those correspondent account holders that the covered financial institution knows or has reason to know provide services to Iranian banking institutions, that such correspondents may not provide Iranian banking institutions with access to the correspondent account maintained at the covered financial institution. Second, a covered financial institution must take reasonable steps to identify any indirect use of its correspondent accounts by Iranian banking institutions, to the extent that such indirect use can be determined from transactional records maintained by the covered financial institution in the normal course of business. A covered financial institution should take a risk-based approach when deciding what, if any, additional due diligence measures it should adopt to guard against the improper indirect use of its correspondent accounts by Iranian banking institutions, based on risk factors such as the type of services it offers and the geographic locations of its correspondents.

A. 1010.657(a)—Definitions

1. Correspondent Account

Section 1010.657(a)(1) defines the term ''correspondent account'' by reference to the definition contained in 31 CFR 1010.605(c)(1)(ii). Section 1010.605(c)(1)(ii) defines a correspondent account to mean:

- An account established to receive deposits from, or make payments or other disbursements on behalf of, a foreign bank, or handle other financial transactions related to the foreign bank.

In the case of a U.S. depository institution, this broad definition includes most types of banking relationships between a U.S. depository institution and a foreign bank that are established to provide regular services, dealings, and other financial transactions including demand deposit, savings deposit, or other transaction or asset accounts, and credit accounts or other extensions of credit.[27]

In the case of securities broker-dealers, futures commission merchants, introducing brokers in commodities, and investment companies that are open-end companies (mutual funds), we are using the same definition of ''account'' for purposes of this rule as was established in the final rule implementing section 312 of the USA PATRIOT Act.[28]

2. Covered Financial Institution

Section 1010.657(a)(2) of the proposed rule defines ''covered financial institution'' with the same definition used in the final rule implementing section 312 of the USA PATRIOT Act,[29] which in general includes the following:

- An insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h));
- A commercial bank;
- An agency or branch of a foreign bank in the United States;
- A federally insured credit union;
- A credit union;
- A savings association;
- A corporation acting under section 25A of the Federal Reserve Act (12 U.S.C. 611);
- A trust bank or trust company that is federally regulated and is subject to an anti-money laundering program requirements;
- A broker or dealer in securities registered, or required to be registered,

[26] For a more complete discussion of prohibited and non-prohibited transactions, *see http://www.treas.gov/ofac.*

[27] *See* 31 CFR 1010.605(c)(2)(i)(A)–(B).

[28] *See* 31 CFR 1010.605(c)(2)(ii)–(iv).

[29] *See* 31 CFR 1010.605(f)(1)–(2).

with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), except persons who register pursuant to section 15(b)(11) of the Securities Exchange Act of 1934;

- A futures commission merchant or an introducing broker registered, or required to be registered, with the Commodity Futures Trading Commission under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), except persons who register pursuant to section 4(f)(a)(2) of the Commodity Exchange Act;
- A private banker; and
- A mutual fund.

3. Iranian Banking Institution

Section 1010.657(a)(3) of the proposed rule defines a foreign bank as that term is defined in 1010.100(u). An Iranian banking institution shall mean any foreign bank chartered by Iran, including any branches, offices, or subsidiaries of such bank operating in any jurisdiction, and any branch or office within Iran of any foreign bank licensed by Iran. In addition, the Central Bank of Iran (Bank Markazi Iran),[30] as well as any foreign bank of which more than 50 percent of the voting stock or analogous interest is owned by two or more foreign banks chartered by Iran, shall be considered an Iranian banking institution. For purposes of this rule, a subsidiary shall mean a company of which more than 50 percent of the voting stock or analogous interest is directly or indirectly owned by another company.

A covered financial institution should take commercially reasonable measures to determine whether it maintains a correspondent account for an Iranian banking institution, including a branch, office, or subsidiary of an Iranian banking institution.

B. 1010.657(b)—Requirements for Covered Financial Institutions

For purposes of complying with the proposed rule's prohibition on the opening or maintaining of correspondent accounts for, or on behalf of, Iranian banking institutions, FinCEN expects that a covered financial institution will take such steps that a reasonable and prudent financial institution would take to protect itself from loan fraud or other fraud or loss based on misidentification of a person's status.

1. Prohibition on Direct Use of Correspondent Accounts

Section 1010.657(b)(1) of the proposed rule requires all covered financial institutions to terminate any correspondent account that is established, maintained, administered, or managed in the United States for, or on behalf of, Iranian banking institutions, provided that the account is not blocked under any Executive Order issued pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA) or under 31 CFR Chapter V. The prohibition would require all covered financial institutions to review their account records to ensure that they maintain no accounts directly for, or on behalf of, an Iranian banking institution.

2. Special Due Diligence of Correspondent Accounts To Prohibit Improper Indirect Use

As a corollary to the prohibition on maintaining correspondent accounts directly for Iranian banking institutions, proposed section 1010.657(b)(2) requires a covered financial institution to apply special due diligence to its correspondent accounts [31] that is reasonably designed to guard against their improper indirect use by Iranian banking institutions. At a minimum, that special due diligence must include notifying those correspondent account holders that the covered financial institution knows or has reason to know provide services to Iranian banking institutions, that such correspondents generally may not provide Iranian banking institutions with access to the correspondent account maintained at the covered financial institution. A covered financial institution would, for example, have knowledge that the correspondents provide such access to Iranian banking institutions through transaction screening software or through the processing of Iranian transactions under OFAC licenses. A covered financial institution may satisfy this requirement by transmitting the following notice to its correspondent account holders that it knows or has reason to know provide services to Iranian banking institutions:

> Notice: Pursuant to U.S. regulations issued under section 311 of the USA PATRIOT Act, 31 CFR 1010.657, we are prohibited from establishing, maintaining, administering or managing a correspondent account for, or on behalf of, an Iranian banking institution or any of its subsidiaries. The regulations also require us to notify you that you may not provide an Iranian banking institution or any of its subsidiaries with access to the correspondent account you hold at our financial institution other than for the purpose of processing transactions that are authorized, exempt, or not prohibited pursuant to any Executive Order issued under the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) or 31 C F.R. Chapter V. If we become aware that an Iranian banking institution or any of its subsidiaries is indirectly using the correspondent account you hold at our financial institution for transactions other than those specified above, we will be required to take appropriate steps to prevent such access, including terminating your account.

The purpose of the notice requirement is to help ensure cooperation from correspondent account holders in denying Iranian banking institutions access to the U.S. financial system. However, FinCEN does not require or expect a covered financial institution to obtain a certification from any of its correspondent account holders that indirect access will not be provided in order to comply with this notice requirement. Instead, methods of compliance with the notice requirement could include, for example, transmitting a one-time notice by mail, fax, or email to certain of the covered financial institution's correspondent account customers, informing them that they may not provide Iranian banking institutions with access to the covered financial institution's correspondent account, or including such information in the next regularly occurring transmittal from the covered financial institution to those correspondent account holders. FinCEN specifically solicits comments on the form and scope of the notice that would be required under the rule. FinCEN also requests comment as to whether a one-time notice will be sufficient to ensure cooperation from correspondent account holders in denying Iranian banking institutions access to the financial system, as well as the incremental costs that financial institutions would incur if this rule required an annual notice.

A covered financial institution also would be required under this rulemaking to take reasonable steps to identify any indirect use of its correspondent accounts by Iranian

[30] Prior regulations that have applied Section 311 special measures to jurisdictions of primary money laundering concern have not included the jurisdiction's central bank within the scope of the regulation. However, in the case of the Islamic Republic of Iran, this inclusion is justified due to the deceptive practices the Central Bank of Iran engages in and encourages among Iranian state-owned banks. This behavior is discussed in the notice of finding that the Islamic Republic of Iran is a jurisdiction of primary money laundering concern published elsewhere today in the **Federal Register**. *See* footnote 5, *supra*.

[31] Again, for purposes of the proposed rule, a correspondent account is defined as an account established to receive deposits from, or make payments or other disbursements on behalf of, a foreign bank, or handle other financial transactions related to the foreign bank.

banking institutions, to the extent that such indirect use can be determined from transactional records maintained by the covered financial institution in the normal course of business. For example, a covered financial institution would be expected to apply an appropriate screening mechanism to be able to identify a funds transfer order that on its face listed an Iranian banking institution as the originator's or beneficiary's financial institution, or otherwise referenced an Iranian banking institution in a manner detectable under the financial institution's normal screening processes. An appropriate screening mechanism could be the mechanism used by a covered financial institution to comply with various legal requirements, such as the commercially available software programs used to comply with the economic sanctions programs administered by OFAC. FinCEN specifically solicits comments on the requirement under the proposed rule that covered financial institutions take reasonable steps to screen their correspondent accounts in order to identify any indirect use of such accounts by Iranian banking institutions.

Notifying certain correspondent account holders and taking reasonable steps to identify any indirect use of its correspondent accounts by Iranian banking institutions in the manner discussed above are the minimum due diligence requirements under the proposed rule. Beyond these minimum steps, a covered financial institution should adopt a risk-based approach for determining what, if any, additional due diligence measures it should implement to guard against the improper indirect use of its correspondent accounts by Iranian banking institutions, based on risk factors such as the type of services it offers and the geographic locations of its correspondent account holders.

A covered financial institution that obtains knowledge that a correspondent account is being used by a foreign bank to provide indirect access to an Iranian banking institution must take all appropriate steps to prevent such indirect access, including the notification of its correspondent account holder per section 1010.657(b)(2)(i)(A) and, where necessary, terminating the correspondent account. However, this provision does not require financial institutions to prevent indirect access to correspondent accounts when such access is necessary to conduct transactions involving Iranian banking institutions that are: (1) Authorized pursuant to Executive Orders issued under IEEPA or pursuant to 31 CFR Chapter V, including transactions authorized by the Office of Foreign Assets Control; (2), exempted from the prohibitions of such authority; or (3) not prohibited by such authority.

A covered financial institution may afford the foreign bank a reasonable opportunity to take corrective action prior to terminating the correspondent account. Should the foreign bank refuse to comply, or if the covered financial institution cannot obtain adequate assurances that Iranian banking institutions will no longer be able to improperly access the correspondent account, the covered financial institution must terminate the account within a commercially reasonable time. This means that the covered financial institution should not permit the foreign bank to establish any new positions or execute any transactions through the account, other than those necessary to close the account. A covered financial institution may reestablish an account closed under the proposed rule if it determines that the account will not be used to provide improper indirect access to an Iranian banking institution. FinCEN specifically solicits comments on the requirement under the proposed rule that covered financial institutions prevent improper indirect access to Iranian banking institutions, once such indirect access is identified.

3. Reporting Not Required

Section 1010.657(b)(3) of the proposed rule clarifies that the rule does not impose any reporting requirement upon any covered financial institution that is not otherwise required by applicable law or regulation. A covered financial institution must, however, document its compliance with the requirement that it notify those correspondent account holders that the covered financial institution knows or has reason to know provide services to Iranian banking institutions, that such correspondents may not provide Iranian banking institutions with improper access to the correspondent account maintained at the covered financial institution.

IV. Request for Comments

FinCEN invites comments on all aspects of the proposal to prohibit the opening or maintaining of correspondent accounts for or on behalf of Iranian banking institutions, and specifically invites comments on the following matters:

1. The form and scope of the notice to certain correspondent account holders that would be required under the rule and whether a one-time notice will be sufficient to ensure cooperation from correspondent account holders in denying Iranian banking institutions access to the financial system, and the incremental costs that financial institutions would incur if this rule required an annual notice;

2. The appropriate scope of the proposed requirement for a covered financial institution to take reasonable steps to identify any indirect use of its correspondent accounts by Iranian banking institutions;

3. The appropriate steps a covered financial institution should take once it identifies an indirect use of one of its correspondent accounts by an Iranian banking institution; and

4. The impact of the proposed special measure upon legitimate transactions with Iran involving, in particular, U.S. persons and entities; foreign persons, entities, and governments; and multilateral organizations doing legitimate business with persons or entities operating in Iran.

V. Regulatory Flexibility Act

It is hereby certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. Given that U.S. financial institutions have long been subject to sanctions regulations prohibiting the provision of correspondent account services for banking institutions in Iran, FinCEN assesses that the prohibition on maintaining such accounts will not have a significant impact on a substantial number of small entities. In addition, all U.S. persons, including U.S. financial institutions, currently must exercise some degree of due diligence in order to comply with various legal requirements. The tools used for such purposes, including commercially available software used to comply with the economic sanctions programs administered by OFAC, can easily be modified to monitor for the use of correspondent accounts by Iranian banking institutions. Thus, the special due diligence that would be required by this rulemaking—*i.e.,* the one-time transmittal of notice to certain correspondent account holders and the screening of transactions to identify any indirect use of correspondent accounts, is not expected to impose a significant additional economic burden upon small U.S. financial institutions. FinCEN invites comments from members of the public who believe there will be a significant economic impact on small entities.

VI. Paperwork Reduction Act

The collection of information contained in this proposed rule is being submitted to the Office of Management

and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Desk Officer for the Department of Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (1506), Washington, DC 20503 (or by email to *oira_submission@omb.eop.gov*) with a copy to FinCEN by mail or email at the addresses previously specified. Comments should be submitted by one method only. Comments on the collection of information should be received by January 27, 2012. In accordance with the requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), and its implementing regulations, 5 CFR part 1320, the following information concerning the collection of information as required by 31 CFR 1010.657 is presented to assist those persons wishing to comment on the information collection.

The collection of information in this proposed rule is in 1010.657(b)(2)(i) and 1010.657(b)(3)(i). The notification requirement in 1010.657(b)(2)(i) is intended to ensure cooperation from correspondent account holders in denying Iranian banking institutions access to the U.S. financial system. The information required to be maintained by 1010.657(b)(3)(i) will be used by federal agencies and certain self-regulatory organizations to verify compliance by covered financial institutions with the provisions of 31 CFR 1010.657. The class of financial institutions affected by the notification requirement is identical to the class of financial institutions affected by the recordkeeping requirement. The collection of information is mandatory.

Description of Affected Financial Institutions: Banks, broker-dealers in securities, futures commission merchants and introducing brokers, and mutual funds maintaining correspondent accounts.

Estimated Number of Affected Financial Institutions: 5,000.

Estimated Average Annual Burden Hours per Affected Financial Institution: The estimated average burden associated with the collection of information in this proposed rule is one hour per affected financial institution.

Estimated Total Annual Burden: 5,000 hours.

FinCEN specifically invites comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the mission of FinCEN, including whether the information shall have practical utility; (b) the accuracy of FinCEN's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information required to be maintained; (d) ways to minimize the burden of the required collection of information, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to maintain the information.

VII. Executive Order 12866

The proposed rule is not a significant regulatory action for purposes of Executive Order 12866, ''Regulatory Planning and Review.''

List of Subjects in 31 CFR Chapter X

Administrative practice and procedure, Banks and banking, Brokers, Counter-money laundering, Counter-terrorism, Foreign banking, Iran.

Authority and Issuance

For the reasons set forth in the preamble, chapter X of title 31 of the Code of Federal Regulations is proposed to be amended as follows:

Chapter X—Financial Recordkeeping and Reporting of Currency and Financial Transactions

1. The authority citation for chapter X is amended to read as follows:

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314, 5316–5332 Title III, secs. 311, 312, 313, 314, 319, 326, 352, Pub. L. 107–56, 115 Stat. 307.

2. Subpart F of Chapter X is amended by adding new § 1010.657 under the undesignated center heading ''SPECIAL DUE DILIGENCE FOR CORRESPONDENT ACCOUNTS AND PRIVATE BANKING ACCOUNTS'' to read as follows:

§ 1010.657 Special measures against the Islamic Republic of Iran.

(a) *Definitions.* For purposes of this section:

(1) *Correspondent account* has the same meaning as provided in § 1010.605(c)(1)(ii).

(2) *Covered financial institution* has the same meaning as provided in § 1010.605(f)(1)–(2).

(3) *Foreign bank* has the same meaning as 1010.100(u).

(4) *Iranian banking institution* means the following:

(i) Any foreign bank chartered by Iran, including any branches, offices, or subsidiaries of such bank operating in any jurisdiction, and any branch or office within Iran of any foreign bank licensed by Iran;

(ii) The Central Bank of Iran (Bank Markazi Iran); and

(iii) Any foreign bank of which more than 50 percent of the voting stock or analogous interest is owned by two or more foreign banks chartered by Iran.

(5) *Subsidiary* means a company of which more than 50 percent of the voting stock or analogous interest is owned by another company.

(b) *Requirements for covered financial institutions.*

(1) *Prohibition on direct use of correspondent accounts.* A covered financial institution shall terminate any correspondent account that is established, maintained, administered, or managed in the United States for, or on behalf of, an Iranian banking institution, provided that the account is not blocked under any Executive Order issued pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA) or under 31 CFR Chapter V.

(2) *Special due diligence of correspondent accounts to prohibit improper indirect use.*

(i) A covered financial institution shall apply special due diligence to its correspondent accounts that is reasonably designed to guard against their improper indirect use by Iranian banking institutions. At a minimum, that special due diligence must include:

(A) Notifying those correspondent account holders that the covered financial institution knows or has reason to know provide services to Iranian banking institutions, that such correspondents generally may not provide Iranian banking institutions with access to the correspondent account maintained at the covered financial institution; and

(B) Taking reasonable steps to identify any indirect use of its correspondent accounts by Iranian banking institutions, to the extent that such indirect use can be determined from transactional records maintained in the covered financial institution's normal course of business.

(ii) A covered financial institution shall take a risk-based approach when deciding what, if any, other due diligence measures it should adopt to guard against the improper indirect use of its correspondent accounts by Iranian banking institutions.

(iii) A covered financial institution that obtains knowledge that a correspondent account is being used by the foreign bank to provide indirect access to an Iranian banking institution, shall take all appropriate steps to prevent such indirect access, including the notification of its correspondent account holder under paragraph

(b)(2)(i)(A) of this section and, where necessary, terminating the correspondent account, except to the extent that such indirect access to the correspondent accounts is necessary to conduct transactions involving Iranian banking institutions that are: (1) Authorized pursuant to Executive Orders issued under IEEPA or pursuant to 31 CFR Chapter V, including transactions authorized by the Office of Foreign Assets Control; (2), exempted from the prohibitions of such authority; or (3) not prohibited by such authority.

(3) *Recordkeeping and reporting.*

(i) A covered financial institution is required to document its compliance with the notice requirement set forth in paragraph (b)(2)(i)(A) of this section.

(ii) Nothing in this section shall require a covered financial institution to report any information not otherwise required to be reported by law or regulation.

Dated: November 18, 2011.

James H. Freis, Jr.,

Director, Financial Crimes Enforcement Network.

[FR Doc. 2011–30331 Filed 11–25–11; 8:45 am]

BILLING CODE 4810–02–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2010–0017–201014(b) & EPA–R04–OAR–2010–0018–201001(b); FRL–9495–8]

Approval and Promulgation of Air Quality Implementation Plans: South Carolina; Negative Declarations for Groups I, II, III and IV Control Techniques Guidelines; and Reasonably Available Control Technology

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve several State Implementation Plan (SIP) revisions submitted by the South Carolina Department of Health and Environmental Control (SC DHEC). These revisions establish reasonably available control technology (RACT) requirements for the three major sources located in the portion of York County, South Carolina that is within the bi-state Charlotte-Gastonia-Rock Hill, North Carolina-South Carolina 1997 8-hour ozone nonattainment area that either emit volatile organic compounds, nitrogen oxides or both. The bi-state Charlotte-Gastonia-Rock Hill 1997 8-hour ozone nonattainment area is hereinafter referred to as the ''bi-state Charlotte Area.'' In addition, South Carolina's SIP revisions include negative declarations for certain source categories for which EPA has control technique guidelines, meaning that SC DHEC has concluded that no such sources are located in that portion of the nonattainment area. EPA has evaluated the proposed revisions to South Carolina's SIP, and has preliminarily concluded that they are consistent with statutory and regulatory requirements and EPA guidance.

DATES: Written comments must be received on or before December 28, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2010–0017 and EPA–R04–OAR–2010–0018 by one of the following methods:

1. *http://www.regulations.gov:* Follow the online instructions for submitting comments.

2. *Email: benjamin.lynorae@epa.gov.*

3. *Fax:* (404) 562–9019.

4. *Mail:* ''EPA–R04–OAR–2010–0017'' for comments regarding the RACT demonstration and the negative declarations for Groups I and I CTG. ''EPA–R04–OAR–2010–0018'' for comments regarding the negative declarations for Groups III and IV CTG. Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960.

5. *Hand Delivery or Courier:* Lynorae Benjamin, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Zuri Farngalo, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Zuri Farngalo may be reached by phone at (404) 562–9152 or by electronic mail address *farngalo.zuri@epa.gov.*

SUPPLEMENTARY INFORMATION: On March 12, 2008, EPA issued a revised ozone NAAQS. See 73 FR 16436. EPA subsequently announced a reconsideration of the 2008 NAAQS, and proposed new 8-hour ozone NAAQS in January 2010. See 75 Fr 2938. In September 2011, EPA withdrew the proposed reconsidered NAAQS and began implementation of the 2008 NAAQS. The current action, however, is being taken to address requirements under the 1997 ozone NAAQS for a portion of York County, South Carolina. Requirements for the bi-state Charlotte Area under the 2008 NAAQS will be addressed in the future.

For additional information see the direct final rule which is published in the Rules Section of this **Federal Register.** In the Final Rules Section of this **Federal Register,** EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

Dated: November 7, 2011.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 2011–30297 Filed 11–25–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 99–325; DA 11–1832]

FM Asymmetric Sideband Operation and Associated Technical Studies

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission seeks comment on a request by certain private parties, identified below, that the Commission authorize voluntary asymmetric digital sideband power for

FATF Public Statement - 28 October 2011

Paris, 28 October 2011 - The Financial Action Task Force (FATF) is the global standard setting body for anti-money laundering and combating the financing of terrorism (AML/CFT). In order to protect the international financial system from ML/FT risks and to encourage greater compliance with the AML/CFT standards, the FATF identified jurisdictions that have strategic deficiencies and works with them to address those deficiencies that pose a risk to the international financial system.

Jurisdictions subject to a FATF call on its members and other jurisdictions to apply counter-measures to protect the international financial system from the on-going and substantial money laundering and terrorist financing (ML/TF) risks emanating from the jurisdictions*.
Iran Democratic People's Republic of Korea (DPRK)
Jurisdictions with strategic AML/CFT deficiencies that have not made sufficient progress in addressing the deficiencies or have not committed to an action plan developed with the FATF to address the deficiencies**. The FATF calls on its members to consider the risks arising from the deficiencies associated with each jurisdiction, as described below.
Cuba** Bolivia Ethiopia Kenya Myanmar Nigeria São Tomé and Príncipe Sri Lanka Syria Turkey

** The FATF has previously issued public statements calling for counter-measures on Iran and DPRK. Those statements are updated below.*

***Cuba has not engaged with the FATF in the process.*

Iran

The FATF, with a renewed urgency, is particularly and exceptionally concerned about Iran's failure to address the risk of terrorist financing and the serious threat this poses to the integrity of the international financial system, despite Iran's engagement with the FATF.

The FATF reaffirms its call on members and urges all jurisdictions to advise their financial institutions to give special attention to business relationships and transactions with Iran, including Iranian companies and financial institutions. In addition to enhanced scrutiny, the FATF reaffirms its 25 February 2009 call on its members and urges all jurisdictions to apply effective counter-measures to protect their financial sectors from money laundering and financing of terrorism (ML/FT) risks emanating from Iran. FATF continues to urge jurisdictions to protect against correspondent relationships being used to bypass or evade counter-measures and risk mitigation practices and to take into account ML/FT risks when considering requests by Iranian financial institutions to open branches and subsidiaries in their jurisdiction. Due to the continuing terrorist financing threat emanating from Iran, jurisdictions should consider the steps already taken and possible additional safeguards or strengthen existing ones.

The FATF urges Iran to immediately and meaningfully address its AML/CFT deficiencies, in particular by criminalising terrorist financing and effectively implementing suspicious transactions reporting (STR) requirements. If Iran fails to take concrete steps to improve its CFT regime, the FATF will consider calling on its members and urging all jurisdictions to strengthen counter-measures in February 2012.

Democratic People's Republic of Korea (DPRK)

The FATF remains concerned by the DPRK's failure to address the significant deficiencies in its anti-money laundering and combating the financing of terrorism (AML/CFT) regime and the serious threat this poses to the integrity of the international financial system. The FATF urges the DPRK to immediately and meaningfully address its AML/CFT deficiencies.

The FATF reaffirms its call on its members and urges all jurisdictions to advise their financial institutions to give special attention to business relationships and transactions with the DPRK, including DPRK companies and financial institutions. In addition to enhanced scrutiny, the FATF further calls on its members and urges all jurisdictions to apply effective counter-measures to protect their financial sectors from money laundering and financing of terrorism (ML/FT) risks emanating from the

DPRK. Jurisdictions should also protect against correspondent relationships being used to bypass or evade counter-measures and risk mitigation practices, and take into account ML/FT risks when considering requests by DPRK financial institutions to open branches and subsidiaries in their jurisdiction.
The FATF remains prepared to engage directly in assisting the DPRK to address its AML/CFT deficiencies, including through the FATF Secretariat.

Cuba

Cuba has not committed to the AML/CFT international standards, nor has it constructively engaged with the FATF. The FATF has identified Cuba as having strategic AML/CFT deficiencies that pose a risk to the international financial system. The FATF urges Cuba to develop an AML/CFT regime in line with international standards, and is ready to work with the Cuban authorities to this end.

Bolivia

Bolivia has taken steps towards improving its AML/CFT regime, including by enacting new CFT legislation. However, despite Bolivia's high-level political commitment to work with the FATF and GAFISUD to address its strategic AML/CFT deficiencies, Bolivia has not made sufficient progress in implementing its action plan, and certain strategic AML/CFT deficiencies remain. Bolivia should work on addressing these deficiencies including by: (1) ensuring adequate criminalisation of money laundering (Recommendation 1); (2) adequately criminalising terrorist financing (Special Recommendation II); (3) establishing and implementing an adequate legal framework for identifying and freezing terrorist assets (Special Recommendation III); and (4) establishing a fully operational and effective Financial Intelligence Unit (Recommendation 26). The FATF encourages Bolivia to address its remaining deficiencies and continue the process of implementing its action plan.

Ethiopia

Despite Ethiopia's high-level political commitment to work with the FATF to address its strategic AML/CFT deficiencies, Ethiopia has not made sufficient progress in implementing its action plan, and certain strategic AML/CFT deficiencies remain. Ethiopia should work on addressing these deficiencies, including by: (1) adequately criminalising money laundering and terrorist financing (Recommendation 1 and Special Recommendation II); (2) establishing and implementing an adequate legal framework and procedures to identify and freeze terrorist assets (Special Recommendation III); (3) ensuring a fully operational and effectively functioning Financial Intelligence Unit (Recommendation 26); (4) raising awareness of AML/CFT issues within the law enforcement community (Recommendation 27); and (5) implementing effective, proportionate and dissuasive sanctions in order to deal with natural or legal persons that do not comply with the national AML/CFT requirements (Recommendation 17). The FATF encourages Ethiopia to address its remaining deficiencies and continue the process of implementing its action plan.

Kenya

Despite Kenya's high-level political commitment to work with the FATF and ESAAMLG to address its strategic AML/CFT deficiencies, Kenya has not made sufficient progress in implementing its action plan, and certain strategic AML/CFT deficiencies remain. Kenya should work on addressing these deficiencies, including by: (1) adequately criminalising terrorist financing (Special Recommendation II); (2) ensuring a fully operational and effectively functioning Financial Intelligence Unit (Recommendation 26); (3) establishing and implementing an adequate legal framework for identifying and freezing terrorist assets (Special Recommendation III); (4) raising awareness of AML/CFT issues within the law enforcement community (Recommendation 27); and (5) implementing effective, proportionate and dissuasive sanctions in order to deal with natural or legal persons that do not comply with the national AML/CFT requirements (Recommendation 17). The FATF encourages Kenya to address its remaining deficiencies and continue the process of implementing its action plan, including by implementing the AML legislation and setting up its FIU.

Myanmar

Despite Myanmar's high-level political commitment to work with the FATF and APG to address its strategic AML/CFT deficiencies, Myanmar has not made sufficient progress in implementing its action plan, and certain strategic AML/CFT deficiencies remain. Myanmar should work on addressing these deficiencies, including by: (1) adequately criminalising terrorist financing (Special Recommendation II); (2) establishing and implementing adequate procedures to identify and freeze terrorist assets (Special Recommendation III); (3) further strengthening the extradition framework in relation to terrorist financing (Recommendation 35 and Special Recommendation I); (4) ensuring a fully operational and effectively functioning Financial Intelligence Unit (Recommendation 26); (5) enhancing financial transparency (Recommendation 4); and (6) strengthening customer due diligence measures (Recommendation 5). The FATF encourages Myanmar to address its remaining deficiencies and continue the process of implementing its action plan.

Nigeria

Nigeria has taken steps towards improving its AML/CFT regime, including by enacting AML/CFT legislation. However, despite Nigeria's high-level political commitment to work with the FATF and GIABA to address its strategic AML/CFT deficiencies, Nigeria has not made sufficient progress in implementing its action plan, and certain strategic deficiencies remain. Nigeria should work on addressing these deficiencies, including by: (1) adequately criminalising money laundering and terrorist financing (Recommendation 1 and Special Recommendation II); (2) implementing adequate procedures to identify and freeze terrorist assets (Special Recommendation III); (3) ensuring that relevant laws or regulations address deficiencies in customer due diligence requirements and that they apply to all financial institutions (Recommendation 5); and (4) continuing to improve the overall supervisory framework for AML/CFT (Recommendation 23). The FATF encourages Nigeria to address its remaining deficiencies and continue the process of implementing its action plan.

São Tomé and Príncipe

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Despite São Tomé and Príncipe's high-level political commitment to work with the FATF to address its strategic AML/CFT deficiencies, São Tomé and Príncipe has not made sufficient progress in implementing its action plan, and certain strategic deficiencies remain. São Tomé and Príncipe should work on addressing these deficiencies, including by: (1) adequately criminalising money laundering and terrorist financing (Recommendation 1 and Special Recommendation II); (2) establishing a fully operational and effectively functioning Financial Intelligence Unit (Recommendation 26); (3) ensuring that financial institutions and DNFBPs are subject to adequate AML/CFT regulation and supervision, and that a competent authority or competent authorities have been designated to ensure compliance with AML/CFT requirements (Recommendations 23, 24 and 29); (4) implementing effective, proportionate and dissuasive sanctions in order to deal with natural or legal persons that do not comply with the national AML/CFT requirements (Recommendation 17); and (5) taking the necessary action to gain membership of GIABA. The FATF encourages São Tomé and Príncipe to address its remaining deficiencies and continue the process of implementing its action plan.

Sri Lanka

Sri Lanka has taken steps towards improving its AML/CFT regime, including by enacting AML/CFT amendments. However, despite Sri Lanka's high-level political commitment to work with the FATF and APG to address its strategic AML/CFT deficiencies, Sri Lanka has not made sufficient progress in implementing its action plan, and certain strategic AML/CFT deficiencies remain. Sri Lanka should work on addressing these deficiencies, including by: (1) adequately criminalising terrorist financing and addressing the remaining deficiencies with regard to the criminalisation of money laundering (Special Recommendation II and Recommendation 1); and (2) establishing and implementing adequate procedures to identify and freeze terrorist assets (Special Recommendation III). The FATF encourages Sri Lanka to address its remaining deficiencies and continue the process of implementing its action plan, including by continuing to work on its AML/CFT legislation.

Syria

Syria has taken significant steps towards improving its AML/CFT regime, including by improving the legal arrangements for freezing terrorist assets. However, despite Syria's high-level political commitment to work with the FATF and MENAFATF to address its strategic AML/CFT deficiencies, Syria has not made sufficient progress in implementing its action plan, and certain strategic AML/CFT deficiencies remain. Syria should work on addressing its deficiencies, including by: (1) adopting adequate measures to implement and enforce the 1999 International Convention for the Suppression of Financing of Terrorism (Special Recommendation I); (2) implementing adequate procedures for identifying and freezing terrorist assets (Special Recommendation III); (3) ensuring that financial institutions are aware of and comply with their obligations to file suspicious transaction reports in relation to ML and FT (Recommendation 13 and Special Recommendation IV); and (4) ensuring that appropriate laws and procedures are in place to provide mutual legal assistance (Recommendations 36-38, Special Recommendation V). The FATF encourages Syria to address its remaining deficiencies and continue the process of implementing its action plan.

Turkey

Turkey has taken steps towards improving its AML/CFT regime, including by submitting CFT legislation to Parliament. Despite Turkey's high-level political commitment to work with the FATF to address its strategic AML/CFT deficiencies, Turkey has not made sufficient progress in implementing its action plan, and certain strategic AML/CFT deficiencies remain. Turkey should work on addressing these deficiencies, including by: (1) adequately criminalising terrorist financing (Special Recommendation II); and (2) implementing an adequate legal framework for identifying and freezing terrorist assets (Special Recommendation III). The FATF encourages Turkey to address its remaining deficiencies and continue the process of implementing its action plan.

High-risk and non-cooperative jurisdictions

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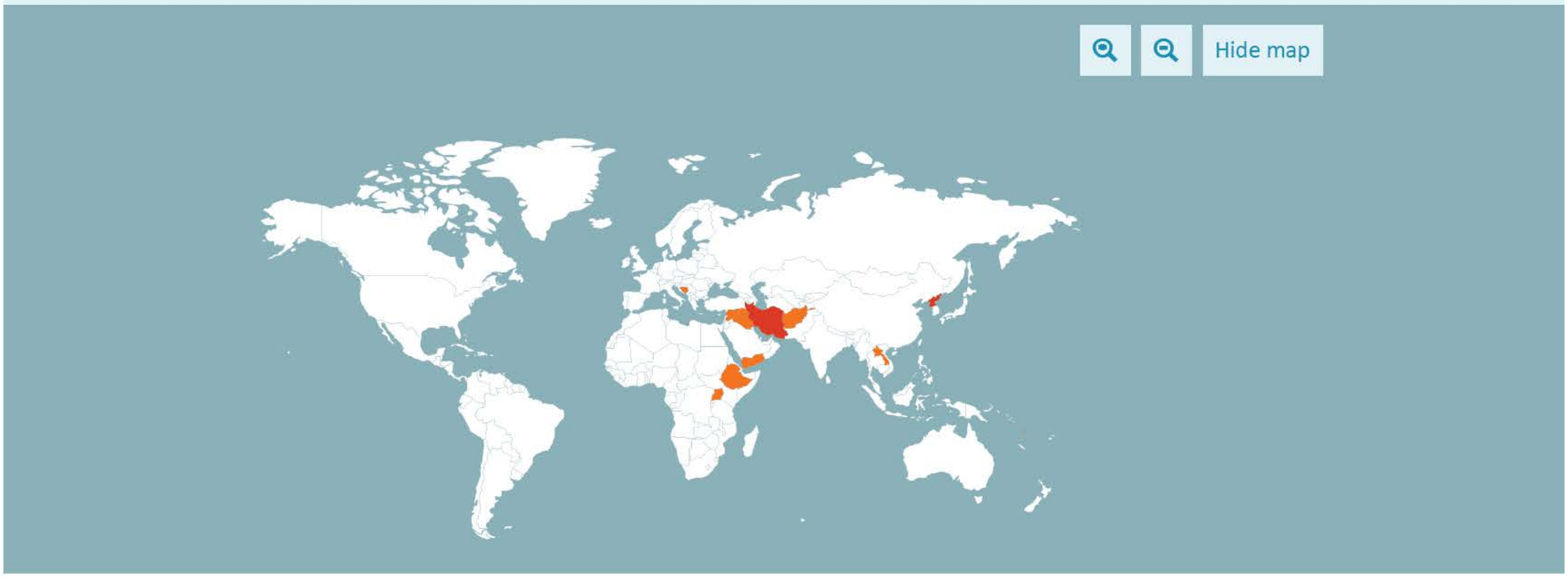

This map is for illustrative purposes and is without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or areas.

On the basis of the results of the review by the International Co-operation Review Group (ICRG), the FATF identifies jurisdictions with strategic AML/CFT deficiencies in the following public documents that are issued three times a year: FATF Public Statement (call for action) and Improving Global AML/CFT Compliance: On-going Process (other monitored jurisdictions).

Related publications

High-risk and non-cooperative jurisdictions:

	Call for action	Other monitored jurisdictions
Afghanistan		●
Bosnia and Herzegovina		●
Democratic People's Republic of Korea (DPRK)	●	
Ethiopia		●
Iran	●	
Iraq		●
Lao People's Democratic Republic		●
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FATF Annual Report: 2015-2016

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