

National Security Law

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This article surveys relevant 2013 developments in national security law for international lawyers.¹

I. CFIUS Activity

The Committee on Foreign Investment in the United States (CFIUS) is a federal inter-agency committee chaired by the Department of Treasury and whose members consist of the Departments of Justice, Homeland Security (DHS), Commerce, Defense, State, and Energy, as well as the Office of the U.S. Trade Representative and the Office of Science and Technology Policy.² CFIUS is charged with the authority to review any transaction that could result in foreign control of a U.S. business.³ Despite this broad authority, the

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1. For developments during 2012, see William V. Dunlap et al., *National Security Law*, 47 INT'L LAW. 453 (2013).

2. *Composition of CFIUS*, U.S. DEP'T OF THE TREASURY, <http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx> (last updated Dec. 1, 2010, 8:08 AM).

3. 50 U.S.C. app. § 2170 (2012) (authorizing CFIUS pursuant to the Defense Production Act of 1950, as amended); 31 C.F.R. Pt. 800 (2013) (containing CFIUS regulations).

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focus of CFIUS's review is to identify and address transactions that raise national security implications.⁴

The term "national security" is not defined by CFIUS's authorizing legislation or implementing regulations. But, in 2013, CFIUS reviewed a foreign investment that stretched the boundaries of that term. Specifically, in June 2013, Shuanghui International Holdings Limited (Shuanghui), a China-based food company, and Smithfield Foods, Inc. (Smithfield), a U.S.-based food company, filed a voluntary notice with CFIUS regarding Shuanghui's proposed acquisition of Smithfield (Smithfield Acquisition).⁵

CFIUS's review of the Smithfield Acquisition lasted the complete review period of seventy-five days.⁶ During the review, the U.S. Senate Committee on Agriculture, Nutrition, and Forestry held a hearing to discuss the implications of the Smithfield Acquisition.⁷ Despite the extended review and congressional scrutiny, CFIUS approved the Smithfield Acquisition without any conditions.⁸

Throughout 2013, CFIUS also engaged in reviews of transactions involving traditional notions of national security. In January, CFIUS approved the acquisition of A123 Systems Inc. (A123) by the Chinese auto-parts maker, Wanxiang Group Co. (Wanxiang).⁹ A123 manufactured commercial batteries for automotive use and also held several U.S. government defense contracts. In a preemptive move to mitigate CFIUS concerns, Wanxiang did not purchase A123's government contracts; that portion of A123's business was purchased by Navitas Systems LLC, an Illinois-based battery firm.¹⁰

In February 2013, CFIUS approved the acquisition by CNOOC Limited (CNOOC), a Hong Kong-based energy company, of Nexen Inc. (Nexen), a Canadian-based energy company with locations in the United States.¹¹ A reported condition of CNOOC's acquisition mandates that CNOOC not have any operational control of Nexen's assets that are

4. *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEP'T OF THE TREASURY, <http://www.treasury.gov/resource-center/international/Pages/Committee-on-Foreign-Investment-in-US.aspx> (last updated Dec. 20, 2012).

5. Christopher Doering, *Secretive U.S. Panel Eyes China's Smithfield Deal*, USA TODAY (June 10, 2013, 9:45 AM), <http://www.usatoday.com/story/money/business/2013/06/09/smithfield-foods-pork-foreign-investment/2396187/>.

6. Press Release, Smithfield Foods, Smithfield Foods Announces Update on CFIUS Process (July 24, 2013), available at <http://investors.smithfieldfoods.com/releasedetail.cfm?ReleaseID=779949>.

7. *Smithfield and Beyond: Examining Foreign Purchases of American Food Companies: Hearing Before the S. Comm. on Agric., Nutrition & Forestry*, 113th Cong. (2013) (statement of Chairwoman Debbie Stabenow, Chairwoman, S. Comm. on Agric., Nutrition & Forestry), available at <http://www.ag.senate.gov/download/?id=7a3ffabe-482e-4479-b022-be19b13b1641>.

8. The Deal, *The Deal: No CFIUS Strings Attached to Smithfield Deal*, THE STREET (Sept. 9, 2013, 5:02 PM), <http://www.thestreet.com/story/12031338/1/the-deal-no-cfius-strings-attached-to-smithfield-deal.html>.

9. William McConnell, *CFIUS Approval of A123 Systems Deal Draws Critics*, THE DEAL PIPELINE (Jan. 30, 2013, 9:37 AM), <http://www.thedeal.com/content/regulatory/cfius-approval-of-a123-systems-deal-draws-critics.php>.

10. Press Release, Navitas Systems, Navitas Systems LLC Completes the Acquisition of A123 Systems' Government Business (Jan. 29, 2013), available at <http://www.navitassys.com/2013/09/08/navitas-systems-llc-completes-the-acquisition-of-a123-systems-government-business/>.

11. Rebecca Penty & Sara Forden, *Cnooc Said to Cede Control of Nexen's U.S. Gulf Assets*, BLOOMBERG (Mar. 1, 2013, 6:43 PM), <http://www.bloomberg.com/news/2013-03-01/cnooc-said-to-cede-control-of-nexen-s-u-s-gulf-assets.html>.

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close to U.S. military installations.¹² CNOOC will retain ownership of and revenue generated from such platforms but will be removed from operational decisions.¹³

Following a CFIUS review in 2012, Ralls Corporation (Ralls), a Chinese-owned Delaware entity, was ordered by President Obama to divest itself of an ownership interest in four wind farms located near a naval base in Oregon.¹⁴ Ralls filed suit challenging the President's decision. But, on October 10, 2013, the U.S. District Court for the District of Columbia upheld the President's authority by dismissing the Ralls suit.¹⁵

In 2013, CFIUS asserted its authority to review transactions post-closing. In September 2013, CFIUS ordered India's Polaris Financial Technology Ltd. to divest its 85.3 percent ownership interest in IdenTrust Inc. (IdenTrust), following a post-closing review of the deal.¹⁶ IdenTrust provides digital identification, authentication, and encryption services to banks and U.S. government agencies, among other entities.

On November 22, 2012, Lincoln Mining Corporation (Lincoln), a Canadian company with U.S. operations, announced a sale of shares to Procon Mining and Tunnelling Ltd. (Procon).¹⁷ Procon is indirectly owned by a Chinese entity.¹⁸ Lincoln and Procon did not file a joint voluntary notice with CFIUS until after the sale was completed. Subsequently, the companies withdrew their voluntary notice and, by letter to CFIUS, Procon implemented two remedial steps. First, Procon committed to divesting its entire investment in Lincoln to a third party. Second, Procon committed to limiting the access to Lincoln's U.S.-based locations at Bell Mountain, Pine Groven and Oro Cruz properties, as these locations are near the Fallon Naval Air Station in Nevada and the Marine Air Corps Station in Yuma, Arizona.¹⁹

12. *Id.*

13. *Id.*

14. Presidential Statement on Order Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, 2012 DAILY COMP. PRES. DOC. (Sept. 28, 2012).

15. *Ralls Corp. v. Comm. on Foreign Inv. in the United States*, No. 12-1513(ABJ), 2013 WL 5583847 (D.D.C. Oct. 10, 2013).

16. *Foreign Investment Regulation and National Security in M&A*, RR DONNELLEY, 4 (Nov. 2013), http://mergermarketgroup.com/wp-content/uploads/2013/11/RRD_November-2013_CFIUS_Final-LR.pdf.

17. Press Release, Lincoln Mining Corp., Lincoln Mining Closes Procon Transactions With \$3.4 Million Financing and Director Changes (Nov. 22, 2013), available at http://www.lincolnmining.com/news/index.php?&content_id=223.

18. Press Release, Lincoln Mining Corp., Divestment of Procon Investment in Lincoln Mining Required as a Result of US Regulatory Review (June 18, 2013), available at http://www.lincolnmining.com/news/index.php?&content_id=255.

19. *Id.*

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II. International Response to Iran's Nuclear Program

A. DIPLOMATIC BREAKTHROUGHS

Though sanctions on Iran²⁰ continued to take their economic toll through 2013,²¹ in late November, the so-called P5+1²² and Iran signed an historic, albeit short term (*i.e.* a six-month term), agreement.²³ The agreement capped continuing efforts throughout the year between the P5+1 and Iran, coming on the heels of the fifth round of talks in 2013.²⁴ It also concluded a dramatic turnabout in the rhetoric between the United States and Iran, which began after the June election of Iranian President Hassan Rouhani.²⁵

The terms of the agreement were broadly available at the time of this writing. In summary, Iran agreed to halt progress on its enrichment program²⁶ and to permit intrusive monitoring by the International Atomic Energy Agency (IAEA).²⁷ The P5+1 agreed to provide "limited, temporary, targeted, and reversible" sanction relief, while maintaining

20. The tension between Iran and the international community stems from disagreement over Iran's obligations to implement nuclear safeguards under the so-called "Safeguards Agreement." Int'l Atomic Energy Agency [IAEA], *Agreement Between Iran and the IAEA for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, IAEA Doc. INF/CIRC/214 (May 15, 1974), available at <http://www.iaea.org/Publications/Documents/Infcirc/Others/infcirc214.pdf>. See also James D. Carlson et al., *National Security Law*, 47 A.B.A. SEC. INT'L L. YEAR IN REV. 453, 456 n. 26–28 (2013).

21. See, e.g., Beheshteh Farshneshani, *In Iran, the Wrong People Are Suffering*, N.Y. TIMES (last updated Jan. 22, 2014, 5:20 PM), <http://www.nytimes.com/roomfordebate/2013/11/19/sanctions-successes-and-failures/in-iran-sanctions-hurt-the-wrong-people>; Jay Loschky, *Most Iranians Say Sanctions Hurting Their Livelihoods*, GALLUP WORLD (Nov. 6, 2013), <http://www.gallup.com/poll/165743/iranians-say-sanctions-hurting-livelihoods.aspx>.

22. The five permanent members of the United Nations (U.N.) Security Council (*i.e.*, the United States, Russia, the United Kingdom, France, and China), which are commonly known as the "P5," plus Germany. See, e.g., Zachary Laub, *The UN Security Council*, CFR.ORG, <http://www.cfr.org/international-organizations-and-alliances/un-security-council/p31649> (Dec. 6, 2013).

23. Joint Statement by EU High Representative Catherine Ashton and Iran Foreign Minister Zarif Geneva (Nov. 24, 2013), available at http://eeas.europa.eu/statements/docs/2013/131124_02_en.pdf.

24. *Timeline of Nuclear Diplomacy with Iran*, ARMS CONTROL ASS'N (last visited Feb. 4, 2014), <http://www.armscontrol.org/factsheet/Timeline-of-Nuclear-Diplomacy-With-Iran#2013> (showing talks were held in 2013 on Feb. 26–27 and Apr. 5–6 in Almaty Kazakhstan, Oct. 15–16, Nov. 7–10, and Nov. 20–24 in Geneva); Laura Rozen, *US, Iran Teams Head to Istanbul for Nuclear-Experts Talks*, AL MONITOR (last visited Feb. 4, 2014), <http://www.al-monitor.com/pulse/fa/contents/articles/originals/2013/03/iran-us-nuclear-technical-talks-p51-istanbul.html> (showing expert level talks were held in Istanbul on Mar. 17–18, 2013).

25. See, e.g., Jeff Mason & Louis Charbonneau, *Obama, Iran's Rouhani Hold Historic Phone Call*, REUTERS (Sept. 28, 2013, 12:56 AM), <http://www.reuters.com/article/2013/09/28/us-un-assembly-iran-idUSBRE98Q16S20130928>; President Rouhani's Twitter Feed, TWITTER, <http://twitter.com/HassanRouhani> (last visited Feb. 4, 2014).

26. Press Release, The White House, Fact Sheet: First Step Understandings Regarding the Islamic Republic of Iran's Nuclear Program (Nov. 23, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/11/23/fact-sheet-first-step-understandings-regarding-islamic-republic-iran-s-n> [hereinafter WH Press Release] (stating that Iran is permitted to continue enrichment of low-level uranium); Jason Rezaian, *Iran's Top Officials Hail Nuclear Deal as Beginning of a New Era*, WASHINGTON POST (Nov. 24, 2013), available at http://www.washingtonpost.com/world/tehran-satisfied-with-nuclear-deal/2013/11/24/2836224e-5506-11e3-bdbf-097ab2a3dc2b_story.html (Iranian President Rouhani seems to confirm the temporary nature of the halting of enrichment activity, declaring "[l]et anyone make his own reading, but this right is clearly stated in the text of the agreement that Iran can continue its enrichment, and I announce to our people that our enrichment activities will continue as before.").

27. WH Press Release, *supra* note 26.

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the vast bulk of sanctions, including the oil, finance, and banking sanctions architecture.²⁸ The IAEA will perform many of the verification aspects of the agreement, consistent with their ongoing inspection role.²⁹ Additionally, the P5+1 and Iran will establish a joint commission to work with the IAEA to monitor the implementation of the agreement, address any issues that arise under the agreement, and work to resolve ongoing concerns regarding Iran's nuclear program (including the possible military dimension of the program and Iran's activities at Iran's military complex at Parchin).³⁰ The agreement is not without its critics,³¹ and Iran's right to enrich uranium remains at issue.³²

In addition to the P5+1's efforts, the IAEA continued its diplomatic efforts with Iran. The recurring engagement amounted to little more than continued validation of Iranian intransience,³³ though November also saw progress on this front. On November 11, 2013, the IAEA Director General, Yukiya Amano, and the Vice President of Iran and President of the Atomic Energy Organization of Iran, Ali Akbar Salehi, signed a "Joint Statement on a Framework for Cooperation."³⁴ Iran and the IAEA agreed to "cooperate further with respect to verification activities to be undertaken by the IAEA to resolve all present and past issues."³⁵ As a first step, Iran agreed to six practical measures to occur within three months, with progress monitored by the IAEA:

1. [p]roviding mutually agreed relevant information and managed access to the Gchine mine in Bandar Abbas;
2. [p]roviding mutually agreed relevant information and managed access to the Heavy Water Production Plant;
3. [p]roviding information on all new research reactors;
4. [p]roviding information with regard to the identification of [sixteen] sites designated for the construction of nuclear power plants;
5. [clarifying] the announcement made by Iran regarding additional enrichment facilities; [and]
6. [f]urther clarif[y]ing the announcement made by Iran with respect to laser enrichment technology.³⁶

28. *Id.*

29. *Id.*

30. *Id.*; see also IAEA, *Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions in the Islamic Republic of Iran, Report by the Director General*, IAEA Doc. GOV/2011/65, Annex, ¶¶ 49–50 (Nov. 18, 2011).

31. See, e.g., Bernie Becker, *Top Democrats, Republicans Blast Obama's Nuclear Deal with Iran*, THE HILL (Nov. 24, 2013, 2:31 PM), <http://thehill.com/blogs/global-affairs/middle-eastnorth-africa/191286-bipartisan-skepticism-meets-iran-deal>.

32. WH Press Release, *supra* note 26.

33. UN, *Iran Nuclear Talks 'Going Around in Circles'—UN Official*, UN NEWS CENTRE (June 3, 2013), http://www.un.org/apps/news/story.asp/html/www.unama-afg.org/news/_pc/_english/2008/html/story.asp?NewsID=45068&Cr=nuclear&Cr1=iran#.UpBrR8QXQ-s.

34. Press Release, IAEA, IAEA, Iran Sign Joint Statement on Framework for Cooperation (Nov. 11, 2013), available at <http://www.iaea.org/newscenter/pressreleases/2013/prn201321.html>.

35. *Id.*

36. *Id.*

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B. CONTINUED SANCTION ACTIVITY

Two thousand thirteen opened with President Obama signing the National Defense Authorization Act for Fiscal Year 2013,³⁷ which includes the Iran Freedom and Counter-Proliferation Act of 2012 (IFCDA).³⁸ The IFCDA imposed new sanctions against Iran's energy, shipping, shipbuilding, and port industries, or upon anyone who provides support or underwriting services to individuals or entities within those industries.³⁹ Also noteworthy, in June, President Obama signed Executive Order 13645 imposing sanctions on Iran's currency, the rial.⁴⁰

In late 2012, the Council of the European Union passed Council Regulation No. 1263,⁴¹ which amends Regulation No. 267/2012 concerning restrictive measures against Iran.⁴² It lists items to give effect to earlier trade restrictions on key equipment and technology that may be used in the petroleum industry (e.g., natural gas, graphite, raw or semi-finished metals, and software for industrial processes) and that are relevant to Iran's nuclear, military, or ballistic missile program, or those controlled by the Islamic Revolutionary Guard Corps.⁴³ Exceptions and exemptions are also provided.⁴⁴

III. Nuclear Arms Control

In December 2012, the United Nations (UN) General Assembly voted 147 to four to establish an "open ended working group" (OEWG) to develop proposals for negotiations leading to "the achievement and maintenance of a world without nuclear weapons."⁴⁵ The four negative votes were cast by the United States, Russia, United Kingdom, and France.⁴⁶ In a joint statement, the United States, the United Kingdom, and France acknowledged the existence of an impasse in nuclear disarmament negotiations through established channels but rejected participation in the OEWG "or any outcome it may produce."⁴⁷

The establishment of the OEWG followed decades of increasing tension between the original nuclear powers⁴⁸ and non-nuclear weapons States over the implementation of the

37. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632.

38. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, tit. XII(D), 126 Stat. 1645.

39. *Id.* art. 1244-46.

40. Exec. Order No. 13,645, 78 Fed. Reg. 33,945 (June 3, 2013).

41. Council Regulation 1263/2012, Amending Regulation (EU) No 267/2012 Concerning Restrictive Measures Against Iran, 2012 O.J. (L356) 34 (EU), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:356:FULL:EN:PDF>.

42. Council Regulation 267/2012, Concerning Restrictive Measures Against Iran and Repealing Regulation (EU) No 961/2010, 2012 O.J. (L88) 1 (EU), available at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2012:088:SOM:EN:HTML>.

43. Council Regulation 1263/2012, *supra* note 41, at 34.

44. *Id.* at 35.

45. G.A. Res. 67/56, 1, U.N. Doc. A/RES/67/56 (Jan. 4, 2013), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/481/96/PDF/N1248196.pdf?OpenElement>.

46. John Burroughs, *UN Votes to Establish Working Group on Nuclear Disarmament*, US PEACE COUNCIL, <http://uspeacecouncil.org/?p=2212> (last visited Feb. 19, 2014).

47. *Id.*

48. See *Nuclear Weapons: Who Has What at a Glance*, ARMS CONTROL ASS'N, <http://www.armscontrol.org/factsheets/Nuclearweaponswhohaswhat> (last updated Nov. 2013).

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Non-Proliferation Treaty (NPT), which was signed in 1968 and entered into force in 1970.⁴⁹ Under Article II of the NPT, the non-nuclear weapons states agreed “not to manufacture or otherwise acquire nuclear weapons.”⁵⁰ Under Article VI, all parties, including the P5,⁵¹ agreed “to pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament.”⁵² Subsequently, the P5 repeatedly acknowledged their “unequivocal undertaking to accomplish . . . the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all State parties are committed under [A]rticle VI of the [NPT],” but they have rejected all requests by the non-nuclear weapons States to set a definite time line.⁵³

The OEWG held a series of meetings in Geneva in 2013, and submitted a report⁵⁴ discussing such proposals as “comprehensive” multilateral negotiations on a convention banning nuclear weapons, interim disarmament agreements “with clearly defined benchmarks and timelines,” and a moratorium on “development of new types of nuclear weapons or upgrading current nuclear weapons systems,” and reducing the operational readiness of nuclear weapons to reduce the risk of war by accident or miscalculation.⁵⁵

In October 2013, the UN General Assembly’s First Committee⁵⁶ adopted a resolution that “welcomes” the report of the OEWG and calls on the next UN General Assembly session to “further explore options for taking forward multilateral nuclear disarmament negotiations, including if necessary through the [OEWG].”⁵⁷ The vote was 151 to four, with the United States, Russia, the United Kingdom, and France again casting the only negative votes.⁵⁸

49. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T 483, 729 U.N.T.S. 161.

50. *Id.* art. II.

51. “P5” refers to the permanent members of the U.N. Security Council, i.e., the United States, Russia, the United Kingdom, France, and China. *See, e.g.,* Zachary Laub, *supra* note 22.

52. *Id.* art. VI.

53. 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, May 2010, *Final Document*, ¶ 79, U.N. Doc. NPT/CONF.2010/50 (Vol. I), Part 1 (June 18, 2010) *available at* [http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50%20\(VOL.I\)](http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50%20(VOL.I)).

54. U.N. Secretary-General, *Proposals to Take Forward Multilateral Nuclear Disarmament Negotiations for the Achievement and Maintenance of a World Without Nuclear Weapons*, transmitted by Note of the Secretary-General, U.N. Doc. A/68/514 (Oct. 9, 2013), *available at* [https://disarmament-library.un.org/UNODA/Library.nsf/a45bed59c24a1b6085257b100050103a/82cb5e94fd7a3f2e85257bab0067ef80/\\$FILE/A%2068%20514.pdf](https://disarmament-library.un.org/UNODA/Library.nsf/a45bed59c24a1b6085257b100050103a/82cb5e94fd7a3f2e85257bab0067ef80/$FILE/A%2068%20514.pdf).

55. *Id.* at 9–10; John Hallam et al., *Abolition 2000 Campaign “Convention/Step One: De-Alerting” A Global Campaign to De-Alert Nuclear Weapons*, ABOLITION2000, http://www.abolition2000.org/?page_id=1325 (last visited Feb. 4, 2014).

56. The First Committee, consisting of all U.N. member States, “considers all disarmament and international security matters within the scope of the [U.N.] Charter.” *Disarmament and International Security*, GEN. ASSEMBLY OF THE U.N., <http://www.un.org/en/ga/first/> (last visited Feb. 19, 2014). First Committee resolutions are normally adopted as a matter of course by the General Assembly when it meets in plenary session.

57. U.N. First Committee Res., Taking Forward Multilateral Nuclear Disarmament Negotiations, 68th Sess., U.N. Doc. A/C.1/68/L.34, ¶ 9 (Oct. 18, 2013) *available at* <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com13/resolutions/L34.pdf>.

58. Voting Record Search, UNBISNET.UN.ORG, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?&profile=voting&menu=search&submenu=power> (search by “Keyword”; then search for “Taking Forward Multilateral Nuclear Disarmament Negotiations”).

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In September 2013, the UN General Assembly held its first-ever High Level Meeting (HLM) on nuclear disarmament.⁵⁹ The HLM, at which many States (but not the P5) were represented at the head of government or foreign minister level, produced numerous statements calling for the total elimination of nuclear weapons.⁶⁰ As a follow up to the work done at the HLM, on November 4, 2013, the First Committee, by a vote of 129 to twenty-eight, adopted a resolution sponsored by the Non-Aligned Movement, calling for the “urgent commencement” in the UN Conference on Disarmament of negotiations leading to the “‘early conclusion’ of a comprehensive convention” prohibiting nuclear weapons.⁶¹ Russia, the United States, the United Kingdom, France, and their allies voted against the resolution.⁶² Also, the United States, the United Kingdom, and France issued a joint statement asserting that “a practical step[-]by[-]step process is the only way to make real progress’ on disarmament and that ‘there are no shortcuts.’”⁶³

In early December 2013, the UN General Assembly followed up on the First Committee’s work, as well its own work through the HLM, adopting five resolutions based, at least in part, on the work done in those fora.⁶⁴ This includes the First Committee’s draft resolution III, the express follow-up to the 2013 HLM of the UN General Assembly on Nuclear Disarmament, adopted by a vote of 137 to twenty-eight, with twenty abstentions.⁶⁵ It calls “for the urgent commencement of negotiations, in the Conference on Disarmament, for the early conclusion of a comprehensive convention on nuclear weapons.”⁶⁶ The UN General Assembly also adopted the First Committee’s draft resolution X titled “Towards a Nuclear-Weapon-Free World: Accelerating the Implementation of Nuclear Disarmament Commitments,”⁶⁷ and draft resolution XVIII titled “Nuclear Disarmament.”⁶⁸

On other fronts, in March 2013, the government of Norway hosted a conference on the humanitarian impact of nuclear weapons, in which 127 countries and numerous interna-

59. *High-Level Meetings of the 68th Session of the General Assembly Nuclear Disarmament, 26 September 2013*, GEN. ASSEMBLY OF THE UNITED NATIONS, <http://www.un.org/en/ga/68/meetings/nucleardisarmament/> (last visited Feb. 4, 2014).

60. See Archive of Statements from the High-Level Meeting of the General Assembly on Nuclear Disarmament (26 September 2013), UN.ORG, <https://www.un.org/en/ga/68/meetings/nucleardisarmament/statements.shtml> (last visited Feb. 4, 2014).

61. Tom Z. Collina, *UN Vote Backs Talks on Nuclear Arms Ban*, ARMS CONTROL ASS’N (Dec. 2013), <http://www.armscontrol.org/print/6060>.

62. *Id.*

63. *Id.*

64. See Press Release, GAOR, Capping Intensive Disarmament Comm. Gen. Assembly Adopts 53 Texts on Wide Range of Pressing Int’l Security Concerns (Dec. 5, 2013), *available at* <http://www.un.org/News/Press/docs/2013/ga11463.doc.htm>. Though the resolutions adopted by the General Assembly were not officially released as of this writing, they may be viewed as recommended by the First Committee in Report of November 13, 2013. Report of the First Comm., First Comm., 68th Sess., First Comm. Res. II, X, XVII, XVIII, XXII, XXIII, U.N. Doc. A/68/411 (Nov. 13, 2013) [hereinafter First Committee Report], *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/68/411.

65. Press Release, GAOR, *supra* note 64.

66. First Committee Report, *supra* note 64, at 48 ¶ 4.

67. *Id.* at 64.

68. *Id.* at 85.

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tional organizations participated.⁶⁹ The P5 did not attend but issued a joint statement expressing concern “that the Oslo Conference will divert attention away from practical steps to create conditions for further nuclear weapons reductions.”⁷⁰ The report of the Oslo Conference concluded it is unlikely that any State or international organization could mount an effective humanitarian response to a nuclear weapon detonation.⁷¹ A conference to follow up on the work in Oslo will be hosted by the government of Mexico in February 2014.⁷²

IV. Syria and Chemical Weapons

At the request of President Obama,⁷³ Congress proposed a joint resolution that would authorize the President to use limited and specific military action against targets in Syria in response to the August 21, 2013, chemical weapons attack that killed over 1,000 people in the suburbs of Damascus.⁷⁴ On September 6, 2013, Senate Majority Leader Harry Reid filed Senate Joint Resolution 21 (S.J. Res. 21) titled “Authorization for the Use of Military Force Against the Government of Syria to Respond to Use of Chemical Weapons.”⁷⁵ Subsection (a) of S.J. Res. 21 authorizes the President to use military power⁷⁶—under certain conditions and limitations⁷⁷—to “respond to the use of weapons of mass destruction by the [government of Syria in the conflict in Syria]” and, *inter alia*, “to protect the national security interests of the United States and to protect [U.S.] allies and partners against the use of such weapons.”⁷⁸ The preamble states that the use of chemical weapons by Syria constituted a direct contravention of its “legal obligations under the [UN] Charter, the Geneva Conventions, and the Protocol to the Hague Convention on the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare.”⁷⁹ In addition, the resolution states that the chemical weapons attack violated the norms set forth in the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their

69. Press Release, Norwegian Minister of Foreign Affairs, Conference: Humanitarian Impact of Nuclear Weapons (March 4–5, 2013), available at http://www.regjeringen.no/en/dep/ud/selected-topics/humanitarian-efforts/humimpact_2013.html?id=708603.

70. *Joint Statement of China, France, the Russian Federation, the United Kingdom and the United States*, REACHING CRITICAL WILL (2013), http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/oslo-2013/P5_Oslo.pdf.

71. Press Release, *supra* note 69.

72. *Mexico Announces Conference on Humanitarian Impact of Nuclear Weapons*, INT’L CAMPAIGN TO ABOLISH NUCLEAR WEAPONS (Sept. 27, 2013), <http://www.icanw.org/campaign-news/mexico-announces-conference-on-humanitarian-impact-of-nuclear-weapons/>.

73. Peter Baker & Jonathan Weisman, *Obama Seeks Approval by Congress for Syria Strike*, N.Y. TIMES, Sept. 1, 2013, at A1, available at <http://www.nytimes.com/2013/09/01/world/middleeast/syria.html>.

74. S.J. Res. 21, 113th Cong. Preamble (2013), available at <http://beta.congress.gov/113/bills/sjres21/BILLS-113sjres21pcs.pdf>.

75. *Id.* § 1; Ramsey Cox, *Reid Files Resolution to Authorize Force Against Syria*, THE HILL (Sept. 6, 2013), <http://thehill.com/blogs/floor-action/senate/320695-reid-files-use-of-force-resolution-against-syria>.

76. S.J. Res. 21 § 2(a).

77. *Id.* §§ 3–7.

78. *Id.* § 2(a)(1)–(2).

79. *Id.* pmb1.

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Destruction (CWC).⁸⁰ S.J. Res. 21 would constitute specific statutory authority under the War Powers Resolution.⁸¹

The Senate delayed a vote on S.J. Res. 21 at the request of President Obama on September 10, 2013.⁸² In its alternative, the United States entered into a joint framework agreement with Russia on September 14, 2013, to submit special procedures to the Executive Council of the Organization for the Prohibition of Chemical Weapons (OPCW) for the expeditious and safe destruction of the Syrian chemical weapons program and the establishment of proper verification procedures.⁸³ The agreement, titled “Framework for the Elimination of Syrian Chemical Weapons” (Framework), took into account Syria’s decision to accede to the CWC and provisionally apply the CWC prior to its entry into force.⁸⁴ The United States and Russia agreed in the Framework that a future U.N. Security Council resolution should provide for a regular review of Syria’s implementation of the decision made by the Executive Council of the OPCW, and, “in the event of non-compliance, including unauthorized transfer, or any use of chemical weapons by anyone in Syria, the UN Security Council should impose measures under Chapter VII of the UN Charter.”⁸⁵ Chapter VII of the UN Charter enables the Security Council to take military and non-military measures necessary to restore international peace and security.⁸⁶

On September 14, 2013—the same day the Framework entered into force—Syria filed instruments of accession to the CWC with the UN Secretary-General and declared to provisionally apply the CWC during Syria’s pending entry to the CWC.⁸⁷ The CWC prohibits, *inter alia*, the production, development, stockpiling, acquisition, transfer, and use of chemical weapons by State parties.⁸⁸ The CWC entered into force in Syria on October 14, 2013.⁸⁹

The UN recognizes the OPCW as responsible for activities related to the prohibition of chemical weapons in accordance with the CWC.⁹⁰ In particular, under Article II of the relationship agreement, the OPCW is required to work with the UN Secretary-General “in cases of the alleged use of chemical weapons involving a State not party to the [CWC]

80. *Id.*

81. *Id.* § 2(c)(1).

82. Mark Landler & Jonathan Weisman, *Obama Delays Strike to Focus on a Russian Plan*, N.Y. TIMES, Sept. 11, 2013, at A1, available at http://www.nytimes.com/2013/09/11/world/middleeast/syrian-chemical-arsenal.html?_r=0.

83. Media Note, U.S. Dep’t of State, Framework for Elimination of Syrian Chemical Weapons (Sept. 14, 2013) (on file with author), available at <http://www.state.gov/r/pa/prs/ps/2013/09/214247.htm>.

84. *Id.* Annex A, ¶ 3.

85. *Id.* at 1.

86. U.N. Charter art. 39; see also *id.* arts. 40–51.

87. Organization for the Prohibition of Chemical Weapons [hereinafter OPCW], *Decision: Destruction of Syrian Chemical Weapons*, at 2, Exec. Council Doc. No. EC-M-33/DEC.1 (Sept. 27, 2013), available at http://www.opcw.org/fileadmin/OPCW/EC/M-33/ecm33dec01_e_.pdf [hereinafter OPCW, *Decision*].

88. OPCW, *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, art. I, (Jan. 13, 1993), available at http://www.opcw.org/index.php?eID=dam_frontend_push&docID=6357 [hereinafter OPCW, *Convention*].

89. OPCW, *Decision*, supra note 87, at 2; OPCW, *Status of Participation in the Chemical Weapons Convention as of 14 October 2013*, Office of the Legal Advisor Doc. No. S/1131/2013 (Oct. 14, 2013) (listing State Parties to the CWC), available at http://www.opcw.org/index.php?eID=dam_frontend_push&docID=16815.

90. U.N. Secretary-General, *Agreement Concerning the Relationship Between the United Nations and the Organization for the Prohibition of Chemical Weapons*, Annex, art. I, ¶ 1, U.N. Doc. A/55/988 (June 18, 2001), available at <http://www.un.org/documents/ga/docs/55/a55988.pdf>.

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or in a territory not controlled by a State [p]arty to the [CWC].”⁹¹ Further, the UN and OPCW agreed to “explore possibilities for cooperation in the provision of assistance to States concerned in cases of the use or serious threat of use of chemical weapons, as provided for in paragraph 10 of Article X of the [CSC].”⁹²

On September 27, 2013, the UN Security Council adopted Resolution 2118 and, in doing so, it endorsed the OPCW Executive Council Decision, EC-M-33/DEC.1, on the destruction of Syrian chemical weapons.⁹³ Resolution 2118 welcomed the Framework agreed upon by the United States and Russia.⁹⁴ The OPCW Decision, as part of Resolution 2118, requires Syria to allow for the initiation of verification activities by October 1, 2013, submit a declaration pursuant to Article III of the CWC by October 27, 2013, destroy all chemical weapons production and mixing/filling equipment by November 1, 2013, and eliminate all chemical material and equipment in the first half of 2014.⁹⁵ On November 15, 2013, the OPCW Executive Council approved detailed requirements for the destruction of the Syrian chemical weapons stockpile in the first half of 2014 and set removal procedures for certain chemical weapons from Syria for destruction in another state.⁹⁶

V. Information and Intelligence

A. EDWARD SNOWDEN AND THE NSA

On June 14, 2013, the U.S. Department of Justice filed criminal charges in the Eastern District of Virginia against former National Security Agency (NSA) contractor Edward Snowden, which included “[w]illful [c]ommunication of [e]classified [c]ommunications [i]ntelligence [i]nformation to an [u]nauthorized [p]erson” in violation of 18 U.S.C. § 798(a)(3).⁹⁷ The classified communications intelligence that Mr. Snowden allegedly released included documents discussing the NSA’s vast metadata collection program, which attempted to track domestic and international calls made by Americans from 2006 through 2013.⁹⁸ Although the content of each call was not recorded, the time, duration, and numbers were stored in a database, code-named “Pinwale,” for later analysis.⁹⁹ The released documents demonstrated the evolution of technological developments that al-

91. *Id.* Annex, art. II, ¶ 2(c); see Jean Pascal Zanders & Ralf Trapp, *Ridding Syria of Chemical Weapons: Next Steps*, ARMS CONTROL TODAY (Nov. 2013), http://www.armscontrol.org/act/2013_11/Ridding-Syria-of-Chemical-Weapons-Next-Steps.

92. U.N. Secretary-General, *supra* note 90, at Annex, art. II, ¶ 2(d).

93. S.C. Res. 2118, at 2, U.N. Doc. S/RES/2118 (Sept. 27, 2013), available at [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2118\(2013\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2118(2013)).

94. *Id.*

95. *Id.* Annex I, 1; OPCW, *Decision*, *supra* note 87, at 3; see UN-OPCW Joint Mission, *Mandates and Time-lines*, <http://opcw.unmissions.org/Default.aspx?tabid=6577&language=en-US> (last visited Feb. 19, 2014).

96. OPCW, *Decision, Detailed Requirements for the Destruction of Syrian Chemical Weapons and Syrian Chemical Weapons Production Facilities*, Exec. Council EC-M-34/DEC.1 (Nov. 15, 2013), available at http://www.opcw.org/index.php?eID=dam_frontend_push&docID=16875.

97. *United States v. Snowden*, No. 1:13 CR 265 (CMH) (E.D. Va. Filed June 14, 2013), available at <http://apps.washingtonpost.com/g/documents/world/us-vs-edward-j-snowden-criminal-complaint/496/>.

98. James Bamford, *They've Got Your Number*, TIME Jan. 1, 2013, at 12 (part of a special edition entitled *America's Secret Agencies Inside the Covert World of the CIA, FBI and Special Ops*).

99. *Id.* at 13–15.

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lowed this collection as well as ongoing cooperation between telecommunication companies, the NSA, and foreign governments.¹⁰⁰ Other documents revealed programs dedicated to collecting data from internet and e-mail service providers. The revelations of the NSA's many surveillance programs renewed the debate between national security and privacy and the legality of the methods used to conduct domestic and international surveillance.¹⁰¹

B. FOREIGN INTELLIGENCE SURVEILLANCE COURT

The Foreign Intelligence Surveillance Act (FISA) sets forth a statutory framework that enables government agencies to obtain authorization of the Foreign Intelligence Surveillance Court (FISC) to conduct intelligence-gathering operations.¹⁰²

On November 18, 2013, the U.S. Supreme Court declined to review the order by the FISC that required Verizon to produce telephone records to the NSA.¹⁰³ The petition, *In re Elec. Privacy Information Center, U.S., No. 13-58*,¹⁰⁴ stemmed from the secret NSA surveillance programs made public by Edward Snowden. The order was pursuant to FISA, as amended by section 215 of the USA Patriot Act.¹⁰⁵

Currently, certifications made to the FISC are presumed valid and are only subject to disclosure in specific circumstances in which there is a "misrepresentation of fact" or "vague identification of the persons to be surve[y]ed," as such "disclosure might compromise the ability of the United States to gather foreign intelligence effectively."¹⁰⁶

C. SURVEILLANCE OVERSIGHT

The FISC has acknowledged that, while the data collected is broad, any use of the information received would have to be strictly tailored to identify terrorist communication and subject to protection of U.S. persons under Attorney General approved guidelines.¹⁰⁷ The FISC continues to grant orders authorizing bulk collection of metadata and restricts

100. *Id.* at 15.

101. David Von Drehle, *The Surveillance Society*, TIME, Aug. 1, 2013, at 33. An April 2013 poll shows that 81 percent favored increased powers of investigation that law enforcement agencies might use against suspected terrorists, which would also affect civil liberties. Also, 38 percent favored monitoring cell phones and emails. The margin of error is +/- 4. *Poll*, CNN, TIME, AND ORC (May 1, 2013), <http://i2.cdn.turner.com/cnn/2013/images/05/01/top5.pdf>.

102. EDWARD C. LIU, CONG. RESEARCH SERV., R42725 REAUTHORIZATION OF THE FISA AMENDMENTS ACT (2012).

103. Ariane de Vogue, *Supreme Court Declines Challenge to NSA on Verizon Records, for Now*, ABC NEWS (Nov. 18, 2013), <http://abcnews.go.com/blogs/politics/2013/11/supreme-court-declines-challenge-to-nsa-on-verizon-records-for-now/>.

104. *In re Elec. Privacy Info. Ctr.*, 134 S. Ct. 638 (2013).

105. 50 U.S.C. § 1861 (2012).

106. *United States v. Rosen*, 447 F. Supp. 2d 538, 546 (E.D. Va. 2006) (citing *United States v. Belfield*, 692 F.2d 141, 147 (D.C. Cir. 1982)).

107. *In re F.B.I. for an Order Requiring Prod. of Tangible Things from Redacted*, BR 13-109, 6-7 2013 WL 5741573 (Foreign Intel. Surv. Ct. Aug. 29, 2013).

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disclosure of such collections, citing the need of the program for overall national security.¹⁰⁸

The information collection debate prompted the Senate to propose legislation aimed at shielding the public from surveillance. On October 31, 2013, the Chair of the Select Committee on Intelligence, Senator Feinstein, proposed the FISA Improvement Act of 2013, which would amend Section 501 of FISA by prohibiting bulk collection of communication records that do not name or otherwise identify either individuals or facilities.¹⁰⁹ The order must comply with supplemental procedures rigorously limiting the scope of information that can be collected.¹¹⁰

Another bill, the Surveillance Transparency Act of 2013, would enhance mandatory reporting by the federal government of electronic surveillance orders.¹¹¹ It would also allow companies to voluntarily disclose the amount of FISA orders received,¹¹² which is currently prohibited.¹¹³

VI. United States and Allied Cooperation: Technology Sharing and Joint Efforts in CBRN Detection

On February 21, 2013, the American Bar Association (ABA) Section of International Law organized a blue ribbon panel titled “Critical Technology Sharing Between United States and its Allies.”¹¹⁴ The panel arose out of the need to investigate and offer solutions to problems the North Atlantic Treaty Organization (NATO) and the DHS encountered in attempting to share critical technologies that further high priority U.S. national security objectives.¹¹⁵ The problems experienced by NATO were similar, if not identical, to the problems encountered by DHS in the technology transfer process, as outlined and defined in the landmark report “Securing the Homeland.”¹¹⁶

The panel was comprised of major government stakeholders, including representatives from DHS, the Department of Defense, the Department of Commerce, the Department of State, and NATO, as well as representatives from industry and private practitioners.¹¹⁷

The panelists considered and opined on methods to resolve the transfer problems. Several suggestions emanated from a desire to institute a government exception to the United States Munitions List (USML), analogous to Strategic Trade Authorization (STA) 36 gov-

108. Matt Sledge, *A Secret Court Judge Warned the NSA It Was Close to Breaking the Law—Then Gave It More Power*, HUFFINGTON POST (Nov. 20, 2013), http://www.huffingtonpost.com/2013/11/20/nsa-fisa-court-opinion_n_4311787.html.

109. FISA Improvement Act of 2013, S. 1631, 113th Cong. § 2(a)(i) (2013).

110. *Id.*

111. Surveillance Transparency Act of 2013, S. 1452, 113th Cong. § 2(a) (2013).

112. *Id.* § 3(a)(1).

113. 50 U.S.C. § 1861(d)(1) (2012) (restricting disclosure pursuant to an order under Title V of FISA).

114. *Critical Technology Sharing Between the U.S. and Its Allies: Problems and Possible Solutions*, ABA SEC. OF INT'L LAW, http://www.americanbar.org/content/dam/aba/uncategorized/international_law/critical_technology_sharing_between_the_u_s_and_its_allies_problems_and_possible_solutions.authcheckdam.html (last visited Feb. 20, 2014).

115. *Id.*

116. Nat'l Research Council, EXPORT CONTROL CHALLENGES ASSOCIATED WITH SECURING THE HOMELAND (The Nat'l Academies Press 2012), available at http://www.nap.edu/catalog.php?record_id=13369.

117. Critical Technology Sharing Between the U.S. and Its Allies: Problems and Possible Solutions, *supra* note 114.

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ernment exceptions, in the Export Administration Regulations (EAR).¹¹⁸ But, as noted during the proceedings, it would take an act of Congress to institute an exception to the International Traffic in Arms Regulations (ITAR) or USML. Because of the restrictions, and pursuant to the suggestion of the representative from Department of Commerce, it was understood that part of the solution existed in the increasing migration of important technologies from the USML to the Commerce Control List, thereby allowing U.S. allies the ability to exploit STA 36 license exceptions in the EAR in expediting the technology transfer process.¹¹⁹

Alternately, panelists suggested implementing exceptions to the ITAR, through multi-lateral treaties, with such exceptions enjoying the full force and effect of Federal law.¹²⁰

In addressing the difficulties in critical NATO-U.S. technology transfers, the panel facilitated greater coupling and front-loading in acquiring Technical Assistance Agreements and licenses by NATO applicants. Teams from NATO and the Defense Threat Reduction Agency (DTRA) learned to better prepare packages for ITAR licensing and collaborated closely in building arguments for release. The working level now moves faster, without engaging the entire chain of command, except to provide visibility. Keeping the head shed out of the details prevents misunderstandings and avoids delays. As a result, the protective outer layers of U.S. and allied security are being strengthened.

For example, NATO is engaged in developing a Chemical, Biological, Radiological, and Nuclear (CBRN) Functional Services (FS) architecture (*i.e.*, software tool support and command/control display interfaces), which requires a Hazard Prediction and Assessment Capability (HPAC) software, which originates in the United States.¹²¹ Release of HPAC to NATO is critical to the success of joint U.S.-NATO CBRN detection initiatives.

Also as a result of the panellists' efforts, the DTRA and the Pentagon coupled in pushing for the release of the "HPAC Interface Information" document (which is about 100 pages of descriptive text) to the NATO Communications and Information Agency to be captured in the CBRN FS initial design requirements document.

Currently, the DTRA and the Pentagon are working on the release of the "HPAC Interface Codes," the actual software codes that allow NATO CBRN FS to directly interface with, and run, the HPAC software through a service-oriented architecture, which forms the backbone of the CBRN FS. The Interface Codes are the essential parts of the HPAC release. These codes will enable NATO's quick and seamless integration of the complete HPAC package into CBRN FS. Presently, HPAC is accessed using the Interface

118. For a primer on export control reform and license exceptions, see U.S. Dep't of Commerce, *Export Control Reform: Fulfilling the Promise* (July 23, 2013), http://www.bis.doc.gov/index.php/forms-documents/doc_download/795-license-exceptions-update-2013-072213.

119. See, *e.g.*, Revisions to the Export Administration Regulations: Initial Implementation of Export Control Reform. 78 Fed. Reg. 22,660 (Apr. 16, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-04-16/html/2013-08352.htm>.

120. *Export Controls & Economic Sanctions Committee*, AM. BAR ASS'N, <http://apps.americanbar.org/dch/committee.cfm?com=IC716000> (last updated Jan. 7, 2014) (follow "Critical Technology Sharing Seminar-Feb. 21, 2013-Presentations (All Speakers)" hyperlink).

121. *1st Meeting of CBRN Function Service Working Group*, JCBRN DEFENSE COE, <http://www.jcbrmcoe.cz/index.php/events-67/main-events-2013/200-1st-meeting-of-cbrn-functional-service-working-group> (last visited Feb. 20, 2014).

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Codes through a U.S., vice NATO, server.¹²² The advanced version of HPAC is available to NATO and the NATO School at O'gau via U.S. personnel stationed at the Supreme Headquarters Allied Powers Europe (SHAPE), the various Joint Force Headquarters, the Reach Back Centre Element, the Joint CBRN Centre of Excellence at Vyskov, Czech Republic, and the NATO School.¹²³ U.S. officers stationed at Vyskov,¹²⁴ SHAPE, and O'gau are authorized to provide other NATO experts access to HPAC on the U.S. network until the software is released to NATO directly for integration into the alliance command/control network.

Full HPAC release to NATO's expert users in the command structure is approaching completion. At this time, the training and eventual software release is to NATO only. Future releases may include NATO plus countries,¹²⁵ thereby increasing interoperability between the United States and its allies and broadening the cooperative networks underlying future U.S.-allied security initiatives.

VII. Cybersecurity Developments

Numerous important cybersecurity developments occurred during the past year. As discussed below, these include (1) the issuance of an executive order on critical infrastructure cybersecurity, (2) the publication of a report providing evidence of widespread international cyber-hacking by the Chinese military, (3) the consideration of important cybersecurity legislation by Congress, (4) revelations that the NSA engaged in considerable cyber-surveillance of both U.S. citizens and foreign persons, (5) the subsequent review of such operations by a special advisory committee appointed by President Obama, and (6) the passage of a resolution on cybersecurity protections and surveillance limits by the ABA House of Delegates.

To address actual or potential cybersecurity threats to critical infrastructure (CI), President Obama issued Executive Order 13636 on February 12, 2013.¹²⁶ Key goals of Executive Order 13636 include (1) expanding to other CI sectors an existing DHS program for information sharing and collaboration between the government and the private sector, (2) establishing a consultative process for identifying high-priority CI warranting protection, (3) requiring that the National Institute of Standards and Technology serve as the lead entity in developing a "Cybersecurity Framework" of standards and best practices for protecting CI, and (4) directing U.S. government agencies to determine the adequacy of current requirements and their authority to establish additional requirements to address risks.¹²⁷

122. Personnel within the Joint Chiefs of Staff Force Structure, Resources, and Assessment Directorate (J-8) are closely overseeing the full release of HPAC.

123. The latest version of HPAC is used to train the students in its application; however, the software is not distributed, since the complete software release is in process.

124. Vyskov is the site of the Joint Chemical, Biological, Radiological, and Nuclear (CBRN) Centre of Excellence, which hosts the new CBRN Reach Back Coordination Element, which will be task able by the Supreme Allied Commander Europe to support NATO operations and NATO members' national civilian agencies. JCBRN DEFENSE COE, <http://jcbmcoe.cz/> (last visited Feb. 19, 2014).

125. Here, "NATO plus countries" refers to NATO, any member of NATO, Australia, Israel, Japan, New Zealand, and South Korea.

126. Exec. Order No. 13636, 78 F.R. 11739 (2013).

127. *Id.*

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Shortly after Executive Order 13636 was issued, new headlines about cybersecurity vulnerabilities were made when Mandiant Corporation (Mandiant) published a report in late February 2013, in which it asserted that the Chinese military was a driving force behind a Chinese hacking group known as APT1.¹²⁸ Specifically, Mandiant provided compelling evidence that APT1 had stolen hundreds of terabytes of data from at least 141 organizations, spanning twenty industries dating back to 2006, and that the totality of the evidence supported the conclusion that APT1 was, in fact, the Second Bureau of the People's Liberation Army General Staff Department's Third Department, which is more commonly referred to as Unit 61398.¹²⁹

Within two months of Mandiant's report, the U.S. House of Representatives passed the Cyber Intelligence Sharing and Protection Act (CISPA).¹³⁰ The main goals of this bill are to help defend against cyber-attacks on critical national infrastructure and against other Internet attacks on private firms through voluntary private sector identification and sharing of cybersecurity threat information with the U.S. government.¹³¹

Shortly after CISPA was passed by the House, Edward Snowden, a NSA contractor, fled the United States to Hong Kong (in late May 2013), and, while seeking political asylum in Hong Kong and then Russia, Snowden disclosed what is believed to be upwards of 200,000 classified NSA documents to the press.¹³² Through those documents and interviews were granted to various media sources by Snowden, who was granted political asylum by Russia on August 1, 2013, it was revealed that the NSA had engaged in massive cyber-surveillance operations on both foreign nationals, including leaders of close U.S. allies, and on U.S. citizens.¹³³

As a result of these revelations, on August 12, 2013, President Obama directed that a National Intelligence Review Group on Intelligence and Communications (Review Group) be created to review the NSA's surveillance operations.¹³⁴ On December 13, 2013, it was reported that the Review Group, which included Richard Clarke, Michael Morell, Geoffrey Stone, Cass Sunstein, and Peter Swire, planned to recommend to President Obama that certain changes be made to current surveillance operations, including, among other things, (1) requiring more direct oversight by senior White House officials as to which foreign leaders are monitored, (2) codifying and announcing steps as that will be taken to protect the privacy of foreign persons whose telephone records and Internet communications are collected by the NSA, and (3) creating an organization of legal advocates who could argue against lawyers for the NSA or other U.S. government agencies before the FISC with respect to certain surveillance requests.¹³⁵

128. MANDIANT CORP., APT1: EXPOSING ONE OF CHINA'S CYBER ESPIONAGE UNITS (2013), available at <http://intelreport.mandiant.com/>.

129. *Id.* at 2-6.

130. Cyber Intelligence Sharing and Protection Act (CISPA), H.R. 624, 113th Cong. (2013).

131. *Id.*

132. Michael Scherer, *Edward Snowden: The Dark Prophet*, TIME (Dec. 23, 2013), <http://poy.time.com/2013/12/11/runner-up-edward-snowden-the-dark-prophet/>.

133. *Id.*

134. Presidential Memorandum on Reviewing Our Global Signals and Intelligence Collection and Communications Technologies, 78 Fed. Reg. 49,653 (Aug. 15, 2013).

135. David E. Sanger, *Obama Panel Said To Urge N.S.A. Curbs*, N.Y. TIMES, Dec. 13, 2013, at A1, available at http://www.nytimes.com/2013/12/13/world/americas/obama-panel-said-to-urge-nsa-curbs.html?_r=0.

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Other organizations also urged that the U.S. government do more to protect against cybersecurity threats. For example, at the ABA's Annual Meeting that was held in San Francisco in August 2013, the ABA House of Delegates voted to adopt a cybersecurity resolution, which the ABA Section of International Law's Cybersecurity Task Force helped to draft, that "condemns . . . intrusions into the computer systems and networks utilized by lawyers and law firms" and urges federal, state and other governmental bodies to "examine" and "amend" existing laws to fight such intrusions.¹³⁶

¹³⁶ AM. BAR ASS'N, HOUSE OF DELEGATES, REPORT AND RESOLUTION 118 (2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/law_national_security/resolution_118.authcheckdam.pdf.

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