

DIGEST OF  
UNITED STATES PRACTICE  
IN INTERNATIONAL LAW

2018

## **A Note About this Online Publication of the *Digest***

I am pleased to present this online version of the *Digest of United States Practice in International Law* for the calendar year 2018.

This is the twenty first edition of the *Digest* published by the International Law Institute, and the sixth edition published online by ILI. Each year the U.S. Department of State has published the *Digest of United States Practice in International Law*. From 1989 to 2010 ILI and the State Department co-published a hard bound edition of the *Digest* through the active participation of the Department's Office of the Legal Advisor. During the latter part of that period, Oxford University Press joined as co-publisher with ILI and State. Beginning in 2011, the State Department has posted the entire edition of the *Digest* on its website. That year ILI and Oxford University Press also published the *Digest* as a hard bound edition, and for the year 2012 ILI published a hard bound edition jointly with the American Society of International Law.

In light of the general worldwide trend towards online publishing and the increased reliance on online materials for legal research, ILI has suspended publication of a hard bound edition of the *Digest* and in lieu thereof is presenting this online version of the 2018 *Digest* on ILI's website.

This online version exactly duplicates the *Digest* for 2018 published by the State Department on State's website. Selections of materials in this *Digest* were made solely by the Office of the Legal Advisor of the State Department, based on judgments as to the significance of the issues, their possible relevance to future situations, and their likely interest to government lawyers, their foreign counterparts, scholars and other academics, and private practitioners.

It is my hope that practitioners and scholars will find this new edition of the *Digest*, tracking the most important developments in the state practice of the United States during 2018, to be useful.

Don Wallace, Jr.  
*Chairman*  
*International Law Institute*

**DIGEST OF  
UNITED STATES PRACTICE  
IN INTERNATIONAL LAW**

2018

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*Editor*

Office of the Legal Adviser  
United States Department of State

## Introduction

It is my pleasure to introduce the 2018 edition of the *Digest of United States Practice in International Law*. This volume reflects the work of the Office of the Legal Adviser during calendar year 2018, under the leadership of Legal Adviser Jennifer Newstead. The *Digest* also covers some international legal developments within the purview of other departments and agencies of the United States, such as the U.S. Trade Representative, the Department of the Treasury, the Department of Justice, and others with whom the Office of the Legal Adviser collaborates. The State Department publishes the online *Digest* to make U.S. views on international law quickly and readily accessible to our counterparts in other governments, and to international organizations, scholars, students, and other users, both within the United States and around the world.

This volume features explanations of U.S. international legal views in 2018 delivered by representatives of the U.S. government. The Trump administration announced a new U.S. policy regarding the International Criminal Court (“ICC”), advising that it would use any means necessary to protect citizens of the United States, and other non-parties to the Rome Statute, from unjust prosecution by the ICC. The United States formally commented on two projects of the International Law Commission (“ILC”) in 2018: the Draft Conclusions on the Identification of Customary International Law and the Draft Conclusions on Subsequent Agreements and Subsequent Practice. Jennifer Newstead also delivered remarks on the ILC’s 70<sup>th</sup> anniversary, addressing concerns regarding the working methods of the ILC, discussing generally the topics on its current program of work, and expressing concerns about some new proposed areas of work. The State Department repeated U.S. support for the territorial integrity of Ukraine and again condemned Russia’s purported annexation of Crimea in a 2018 statement, “Crimea is Ukraine” and Secretary of State Pompeo’s “Crimea Declaration,” as well as several statements at the UN. The State Department released a report documenting atrocities committed against residents in Burma’s northern Rakhine State during the course of violence in the previous two years. The President provided a report to Congress on the “legal and policy frameworks guiding the United States’ use of military force and related national security operations,” updating the previous report provided in 2016. The administration’s views were also conveyed in Congressional communications, including letters regarding U.S. authority to prosecute the campaign against ISIS.

There were numerous developments in 2018 relating to U.S. international agreements, treaties and other arrangements. U.S. extradition treaties with the Republic of Kosovo and the Republic of Serbia received the U.S. Senate’s advice and consent to ratification. U.S. maritime boundary treaties with Kiribati and Micronesia also received advice and consent to ratification in 2018. The U.S.-Mexico-Canada Agreement (“USMCA”) was concluded to replace the North American Free Trade Agreement (“NAFTA”). The United States, Mexico, and Canada also concluded a trilateral agreement on environmental cooperation. The Department of State provided testimony to the Senate in support of the Marrakesh Treaty to Facilitate Access to Public Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. The United

States terminated, withdrew from, suspended its obligations or participation under, or announced its withdrawal from: the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes; the U.S.-Iran Treaty of Amity, Economic Relations, and Consular Rights; the Universal Postal Union; the Intermediate-Range Nuclear Forces (“INF”) Treaty; the U.S.-Ecuador Bilateral Investment Treaty; and the Joint Comprehensive Plan of Action (“JCPOA”) with Iran. The United States entered into new arrangements in 2018, including new air transport agreements with the Netherlands with regard to Bonaire, St. Eustatius, and Saba; Grenada; Belize; the United Kingdom; and Haiti. The United States and Canada began a series of negotiations in 2018 to modernize the Columbia River Treaty regime. The United States extended two international agreements and entered into one new agreement pursuant to the 1970 UNESCO Cultural Property Convention. And the UN Convention on International Settlement Agreements Resulting from Mediation was concluded at the 68<sup>th</sup> session of UNCITRAL Working Group II in 2018 with U.S. support.

In the area of diplomatic relations, the United States reestablished a permanent diplomatic presence in Somalia in 2018. Representatives of the United States government actively and repeatedly called out the Maduro regime in Venezuela through statements and resolutions at the Organization of American States, the UN, and through U.S. sanctions. The Department of State declared the chargé d’affaires of the Venezuelan Embassy and the deputy consul general of the Venezuelan Consulate in Houston *personae non grata*. The ordered departure of U.S. Embassy Havana staff instituted in 2017 ended on March 4, 2018, when a new staffing plan went into effect. The State Department announced the expulsion of 48 Russian officials serving at Russia’s bilateral mission to the United States and twelve intelligence operatives as well as the required closure of the Russian Consulate General in Seattle in response to several destabilizing actions taken by the Russian government. As announced in 2017, the United States proceeded with the opening of the U.S. Embassy to Israel in Jerusalem and the merger of U.S. Embassy Jerusalem and U.S. Consulate General Jerusalem in 2018.

The U.S. government participated in litigation in U.S. courts in 2018 involving issues related to foreign policy and international law. In *Trump v. Hawaii*, the Supreme Court held that Proclamation 9645 was a lawful exercise of the broad discretion granted to the President to suspend the entry of aliens into the United States. The executive branch complied with a federal court’s preliminary injunction by extending Temporary Protected Status (“TPS”) for Sudan, Nicaragua, Haiti, and El Salvador. In *Animal Science Products v. Hebei Welcome Pharmaceutical Co.*, the United States filed an amicus brief in the Supreme Court and the Supreme Court determined the proper weight to give to a foreign government’s representation of its law. The Supreme Court held in *Jesner v. Arab Bank* that foreign corporations are not proper defendants in actions under the Alien Tort Statute. The Supreme Court issued its opinion in *Rubin v. Iran*, agreeing with the U.S. view that Section 1610(g) of the FSIA does not provide a freestanding basis for attaching and executing against the property of a foreign state. The United States filed briefs in several cases in which courts are considering whether they may dismiss, or decline to exercise jurisdiction over, claims based on the doctrines of international comity and *forum non conveniens*, even when the claims are brought under the expropriation exception in the FSIA. The United States filed a brief opposing a petition for certiorari in

*Paracha v. Trump*, a case brought by a detainee at Naval Station Guantanamo Bay, and the Supreme Court denied the petition for certiorari.

The United States government also participated in a variety of international court proceedings and arbitrations in 2018. The United States made non-disputing party submissions in dispute settlement proceedings in cases in 2018 under NAFTA, the Dominican Republic-Central America-United States-Free Trade Agreement (“CAFTA-DR”), and the United States-Panama Trade Promotion Agreement (“U.S.-Panama TPA”). The Iran-U.S. Claims Tribunal began a series of hearings in 2018 on Case B/1, pertaining to Iran’s former participation in the U.S. Foreign Military Sales program. The United States was very active at the International Court of Justice (“ICJ”) in 2018. The United States made oral submissions at The Hague in two cases brought by Iran against the United States: *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* and *Certain Iranian Assets*. Legal Adviser Jennifer Newstead urged the ICJ to dismiss a case brought against the United States by the Palestinians (*Relocation of the U.S. Embassy to Jerusalem*) because consent to the Court’s jurisdiction is lacking in the absence of treaty relations between the United States and the Palestinians. And the United States submitted two written statements and made an oral presentation in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, a case instituted upon a request for an advisory opinion, which was also discussed in *Digest 2017*.

The *Digest* also discusses U.S. participation in international organizations, institutions, and initiatives. At the 61<sup>st</sup> UN Commission on Narcotic Drugs, the United States advocated for a global response to the opioid crisis. Later in the year, the United States co-hosted a high-level event at the UN to announce the “Global Call to Action on the World Drug Problem.” The United States withdrew from the Human Rights Council. The United States continued its active participation in the Organization of American States’ Inter-American Commission on Human Rights through written submissions and participation in a number of hearings.

Many attorneys in the Office of the Legal Adviser collaborate in the annual effort to compile the *Digest*. For the 2018 volume, attorneys whose early and voluntary contributions to the *Digest* were particularly significant include Violanda Botet, Mike Coffee, Jeremy Freeman, Jennifer Gergen, Peter Guthrie, Meredith Johnston, Emily Kimball, Benjamin Levin, Oliver Lewis, Michael Mattler, Shana Rogers, Shubha Shastry, and Gene Smilansky. Sean Elliott at the Foreign Claims Settlement Commission also once again provided valuable input. I express very special thanks to Mae Bowen, Andrew Bulovsky, Jarrod Carman, Rebecca Childress, Emma DiNapoli, Mahad Ghani, and Rodolfo Martinez-Don for their review of the *Digest* chapters, and to Jerry Drake, Rickita Smith, and Nicholas Stampono for their technical assistance in transforming drafts into the final published version of the *Digest*. Finally, I thank CarrieLyn Guymon for her continuing, outstanding work as editor of the *Digest*.

*Marik String*  
*Acting Legal Adviser*  
*Department of State*

## Note from the Editor

The official version of the *Digest of United States Practice in International Law* for calendar year 2018 is published exclusively on-line on the State Department's website. I would like to thank my colleagues in the Office of the Legal Adviser and those in other offices and departments in the U.S. government who make this cooperative venture possible and aided in the release of this year's *Digest*.

The 2018 volume follows the general organization and approach of past volumes. We rely on the texts of relevant original source documents introduced by relatively brief explanatory commentary to provide context. Introductions (in Calibri font) prepared by the editor are distinguishable from excerpts (in Times Roman font), which come from the original sources. Some of the litigation-related entries do not include excerpts from the court opinions because most U.S. federal courts now post their opinions on their websites. In excerpted material, four asterisks are used to indicate deleted paragraphs, and ellipses are used to indicate deleted text within paragraphs. Bracketed insertions indicate editorial clarification or correction to the original text.

Entries in each annual *Digest* pertain to material from the relevant year, although some updates (through May 2019) are provided in footnotes. For example, we note the release of U.S. Supreme Court and other court decisions, as well as other noteworthy developments occurring during the first several months of 2019 where they relate to the discussion of developments in 2018.

Updates on most other 2019 developments are not provided, and as a general matter readers are advised to check for updates. This volume also continues the practice of providing cross-references to related entries within the volume and to prior volumes of the *Digest*.

As in previous volumes, our goal is to ensure that the full texts of documents excerpted in this volume are available to the reader to the extent possible. For many documents we have provided a specific internet citation in the text. We realize that internet citations are subject to change, but we have provided the best address available at the time of publication. Where documents are not readily accessible elsewhere, we have placed them on the State Department website, which was updated in 2019, at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>, where links to the documents are organized by the chapter in which they are referenced.

Other documents are available from multiple public sources, both in hard copy and from various online services. The United Nations Official Document System makes UN documents available to the public without charge at <https://www.un.org/en/sections/general/documents/index.html>. For UN-related information generally, the UN's home page at [www.un.org](http://www.un.org) also remains a valuable source. Legal texts of the World Trade Organization ("WTO") may be accessed through the WTO's website, at [https://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](https://www.wto.org/english/docs_e/legal_e/legal_e.htm).

The U.S. Government Printing Office ("GPO") provides electronic access to government publications, including the Federal Register and Code of Federal Regulations; the Congressional Record and other congressional documents and reports;

the U.S. Code, Public and Private Laws, and Statutes at Large; Public Papers of the President; and the Daily Compilation of Presidential Documents. The Federal Digital System, available at <https://www.govinfo.gov>, is GPO's online site for U.S. government materials.

On treaty issues, this site offers Senate Treaty Documents (for the President's transmittal of treaties to the Senate for advice and consent, with related materials), available at <https://www.govinfo.gov/app/collection/CDOC>, and Senate Executive Reports (for the reports on treaties prepared by the Senate Committee on Foreign Relations), available at <https://www.govinfo.gov/app/collection/CRPT>. In addition, the Office of the Legal Adviser provides a wide range of current treaty information at <https://www.state.gov/bureaus-offices/treaty-affairs/> and the Library of Congress provides extensive treaty and other legislative resources at <https://www.congress.gov>.

The U.S. government's official web portal is <https://www.usa.gov>, with links to government agencies and other sites. The State Department's home page (recently modernized in 2019) is <http://www.state.gov>. The website of the U.S. Mission to the UN (also recently modernized) is <https://usun.usmission.gov>.

While court opinions are most readily available through commercial online services and bound volumes, individual federal courts of appeals and many federal district courts now post opinions on their websites. The following list provides the website addresses where federal courts of appeals post opinions and unpublished dispositions or both:

U.S. Court of Appeals for the District of Columbia Circuit:

<https://www.cadc.uscourts.gov/bin/opinions/allopinions.asp>;

U.S. Court of Appeals for the First Circuit:

<http://media.ca1.uscourts.gov/opinions/>;

U.S. Court of Appeals for the Second Circuit:

<http://www.ca2.uscourts.gov/decisions.html>;

U.S. Court of Appeals for the Third Circuit:

<http://www.ca3.uscourts.gov/search-opinions>;

U.S. Court of Appeals for the Fourth Circuit:

<http://www.ca4.uscourts.gov/opinions/search-opinions>;

U.S. Court of Appeals for the Fifth Circuit:

<http://www.ca5.uscourts.gov/electronic-case-filing/case-information/current-opinions>;

U.S. Court of Appeals for the Sixth Circuit:

<https://www.ca6.uscourts.gov/opinions>;

U.S. Court of Appeals for the Seventh Circuit:

<http://media.ca7.uscourts.gov/opinion.html>;

U.S. Court of Appeals for the Eighth Circuit:

<https://www.ca8.uscourts.gov/all-opinions>;

U.S. Court of Appeals for the Ninth Circuit:

<https://www.ca9.uscourts.gov/opinions/>;

U.S. Court of Appeals for the Tenth Circuit:

<https://www.ca10.uscourts.gov/opinion/search>;

U.S. Court of Appeals for the Eleventh Circuit:

<http://www.ca11.uscourts.gov/published-opinions>;

U.S. Court of Appeals for the Federal Circuit:  
<http://www.cafc.uscourts.gov/opinions-orders/0/all>.

The official U.S. Supreme Court website is maintained at [www.supremecourtus.gov](http://www.supremecourtus.gov). The Office of the Solicitor General in the Department of Justice makes its briefs filed in the Supreme Court available at <https://www.justice.gov/osg>. Many federal district courts also post their opinions on their websites, and users can access these opinions by subscribing to the Public Access to Electronic Records (“PACER”) service. Other links to individual federal court websites are available at <http://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links>.

Selections of material in this volume were made based on judgments as to the significance of the issues, their possible relevance for future situations, and their likely interest to government lawyers, especially our foreign counterparts; scholars and other academics; and private practitioners.

As always, we welcome suggestions from those who use the *Digest*.

*CarrieLyn D. Guymon*

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## Introduction

It is my pleasure to introduce the 2018 edition of the *Digest of United States Practice in International Law*. This volume reflects the work of the Office of the Legal Adviser during calendar year 2018, under the leadership of Legal Adviser Jennifer Newstead. The *Digest* also covers some international legal developments within the purview of other departments and agencies of the United States, such as the U.S. Trade Representative, the Department of the Treasury, the Department of Justice, and others with whom the Office of the Legal Adviser collaborates. The State Department publishes the online *Digest* to make U.S. views on international law quickly and readily accessible to our counterparts in other governments, and to international organizations, scholars, students, and other users, both within the United States and around the world.

This volume features explanations of U.S. international legal views in 2018 delivered by representatives of the U.S. government. The Trump administration announced a new U.S. policy regarding the International Criminal Court (“ICC”), advising that it would use any means necessary to protect citizens of the United States, and other non-parties to the Rome Statute, from unjust prosecution by the ICC. The United States formally commented on two projects of the International Law Commission (“ILC”) in 2018: the Draft Conclusions on the Identification of Customary International Law and the Draft Conclusions on Subsequent Agreements and Subsequent Practice. Jennifer Newstead also delivered remarks on the ILC’s 70<sup>th</sup> anniversary, addressing concerns regarding the working methods of the ILC, discussing generally the topics on its current program of work, and expressing concerns about some new proposed areas of work. The State Department repeated U.S. support for the territorial integrity of Ukraine and again condemned Russia’s purported annexation of Crimea in a 2018 statement, “Crimea is Ukraine” and Secretary of State Pompeo’s “Crimea Declaration,” as well as several statements at the UN. The State Department released a report documenting atrocities committed against residents in Burma’s northern Rakhine State during the course of violence in the previous two years. The President provided a report to Congress on the “legal and policy frameworks guiding the United States’ use of military force and related national security operations,” updating the previous report provided in 2016. The administration’s views were also conveyed in Congressional communications, including letters regarding U.S. authority to prosecute the campaign against ISIS.

There were numerous developments in 2018 relating to U.S. international agreements, treaties and other arrangements. U.S. extradition treaties with the Republic of Kosovo and the Republic of Serbia received the U.S. Senate’s advice and consent to ratification. U.S. maritime boundary treaties with Kiribati and Micronesia also received advice and consent to ratification in 2018. The U.S.-Mexico-Canada Agreement (“USMCA”) was concluded to replace the North American Free Trade Agreement (“NAFTA”). The United States, Mexico, and Canada also

concluded a trilateral agreement on environmental cooperation. The Department of State provided testimony to the Senate in support of the Marrakesh Treaty to Facilitate Access to Public Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. The United States terminated, withdrew from, suspended its obligations or participation under, or announced its withdrawal from: the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes; the U.S.-Iran Treaty of Amity, Economic Relations, and Consular Rights; the Universal Postal Union; the Intermediate-Range Nuclear Forces (“INF”) Treaty; the U.S.-Ecuador Bilateral Investment Treaty; and the Joint Comprehensive Plan of Action (“JCPOA”) with Iran. The United States entered into new arrangements in 2018, including new air transport agreements with the Netherlands with regard to Bonaire, St. Eustatius, and Saba; Grenada; Belize; the United Kingdom; and Haiti. The United States and Canada began a series of negotiations in 2018 to modernize the Columbia River Treaty regime. The United States extended two international agreements and entered into one new agreement pursuant to the 1970 UNESCO Cultural Property Convention. And the UN Convention on International Settlement Agreements Resulting from Mediation was concluded at the 68<sup>th</sup> session of UNCITRAL Working Group II in 2018 with U.S. support.

In the area of diplomatic relations, the United States reestablished a permanent diplomatic presence in Somalia in 2018. Representatives of the United States government actively and repeatedly called out the Maduro regime in Venezuela through statements and resolutions at the Organization of American States, the UN, and through U.S. sanctions. The Department of State declared the *chargé d’affaires* of the Venezuelan Embassy and the deputy consul general of the Venezuelan Consulate in Houston *persona non grata*. The ordered departure of U.S. Embassy Havana staff instituted in 2017 ended on March 4, 2018, when a new staffing plan went into effect. The State Department announced the expulsion of 48 Russian officials serving at Russia’s bilateral mission to the United States and twelve intelligence operatives as well as the required closure of the Russian Consulate General in Seattle in response to several destabilizing actions taken by the Russian government. As announced in 2017, the United States proceeded with the opening of the U.S. Embassy to Israel in Jerusalem and the merger of U.S. Embassy Jerusalem and U.S. Consulate General Jerusalem in 2018.

The U.S. government participated in litigation in U.S. courts in 2018 involving issues related to foreign policy and international law. In *Trump v. Hawaii*, the Supreme Court held that Proclamation 9645 was a lawful exercise of the broad discretion granted to the President to suspend the entry of aliens into the United States. The executive branch complied with a federal court’s preliminary injunction by extending Temporary Protected Status (“TPS”) for Sudan, Nicaragua, Haiti, and El Salvador. In *Animal Science Products v. Hebei Welcome Pharmaceutical Co.*, the United States filed an amicus brief in the Supreme Court and the Supreme Court determined the proper weight to give to a foreign government’s representation of its law. The Supreme Court held in *Jesner v. Arab Bank* that foreign corporations are not proper defendants in actions under the Alien Tort Statute. The Supreme Court issued its opinion in *Rubin v. Iran*, agreeing with the U.S. view that Section 1610(g) of the FSIA does not provide a freestanding basis for attaching and executing against the property of a foreign state. The United States filed briefs in several cases in which courts are considering whether they may dismiss, or decline to exercise jurisdiction over, claims based on the doctrines of international comity and *forum non conveniens*, even when the claims are brought under the expropriation exception in the FSIA. The United States filed a brief opposing a petition for certiorari in *Paracha v. Trump*, a

case brought by a detainee at Naval Station Guantanamo Bay, and the Supreme Court denied the petition for certiorari.

The United States government also participated in a variety of international court proceedings and arbitrations in 2018. The United States made non-disputing party submissions in dispute settlement proceedings in cases in 2018 under NAFTA, the Dominican Republic-Central America-United States-Free Trade Agreement (“CAFTA-DR”), and the United States-Panama Trade Promotion Agreement (“U.S.-Panama TPA”). The Iran-U.S. Claims Tribunal began a series of hearings in 2018 on Case B/1, pertaining to Iran’s former participation in the U.S. Foreign Military Sales program. The United States was very active at the International Court of Justice (“ICJ”) in 2018. The United States made oral submissions at The Hague in two cases brought by Iran against the United States: *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* and *Certain Iranian Assets*. Legal Adviser Jennifer Newstead urged the ICJ to dismiss a case brought against the United States by the Palestinians (*Relocation of the U.S. Embassy to Jerusalem*) because consent to the Court’s jurisdiction is lacking in the absence of treaty relations between the United States and the Palestinians. And the United States submitted two written statements and made an oral presentation in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, a case instituted upon a request for an advisory opinion, which was also discussed in *Digest 2017*.

The *Digest* also discusses U.S. participation in international organizations, institutions, and initiatives. At the 61<sup>st</sup> UN Commission on Narcotic Drugs, the United States advocated for a global response to the opioid crisis. Later in the year, the United States co-hosted a high-level event at the UN to announce the “Global Call to Action on the World Drug Problem.” The United States withdrew from the Human Rights Council. The United States continued its active participation in the Organization of American States’ Inter-American Commission on Human Rights through written submissions and participation in a number of hearings.

Many attorneys in the Office of the Legal Adviser collaborate in the annual effort to compile the *Digest*. For the 2018 volume, attorneys whose early and voluntary contributions to the *Digest* were particularly significant include Violanda Botet, Mike Coffee, Jeremy Freeman, Jennifer Gergen, Peter Guthrie, Meredith Johnston, Emily Kimball, Benjamin Levin, Oliver Lewis, Michael Mattler, Shana Rogers, Shubha Shastry, and Gene Smilansky. Sean Elliott at the Foreign Claims Settlement Commission also once again provided valuable input. I express very special thanks to Mae Bowen, Andrew Bulovsky, Jarrod Carman, Rebecca Childress, Emma DiNapoli, Mahad Ghani, and Rodolfo Martinez-Don for their review of the *Digest* chapters, and to Jerry Drake, Rickita Smith, and Nicholas Stampone for their technical assistance in transforming drafts into the final published version of the *Digest*. Finally, I thank CarrieLyn Guymon for her continuing, outstanding work as editor of the *Digest*.

*Marik String*  
*Acting Legal Adviser*  
*Department of State*

## Note from the Editor

The official version of the *Digest of United States Practice in International Law* for calendar year 2018 is published exclusively on-line on the State Department's website. I would like to thank my colleagues in the Office of the Legal Adviser and those in other offices and departments in the U.S. government who make this cooperative venture possible and aided in the release of this year's *Digest*.

The 2018 volume follows the general organization and approach of past volumes. We rely on the texts of relevant original source documents introduced by relatively brief explanatory commentary to provide context. Introductions (in Calibri font) prepared by the editor are distinguishable from excerpts (in Times Roman font), which come from the original sources. Some of the litigation-related entries do not include excerpts from the court opinions because most U.S. federal courts now post their opinions on their websites. In excerpted material, four asterisks are used to indicate deleted paragraphs, and ellipses are used to indicate deleted text within paragraphs. Bracketed insertions indicate editorial clarification or correction to the original text.

Entries in each annual *Digest* pertain to material from the relevant year, although some updates (through May 2019) are provided in footnotes. For example, we note the release of U.S. Supreme Court and other court decisions, as well as other noteworthy developments occurring during the first several months of 2019 where they relate to the discussion of developments in 2018.

Updates on most other 2019 developments are not provided, and as a general matter readers are advised to check for updates. This volume also continues the practice of providing cross-references to related entries within the volume and to prior volumes of the *Digest*.

As in previous volumes, our goal is to ensure that the full texts of documents excerpted in this volume are available to the reader to the extent possible. For many documents we have provided a specific internet citation in the text. We realize that internet citations are subject to change, but we have provided the best address available at the time of publication. Where documents are not readily accessible elsewhere, we have placed them on the State Department website, which was updated in 2019, at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>, where links to the documents are organized by the chapter in which they are referenced.

Other documents are available from multiple public sources, both in hard copy and from various online services. The United Nations Official Document System makes UN documents available to the public without charge at <https://www.un.org/en/sections/general/documents/index.html>. For UN-related information generally, the UN's home page at [www.un.org](http://www.un.org) also remains a valuable source. Legal texts of the World Trade Organization ("WTO") may be accessed through the WTO's website, at [https://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](https://www.wto.org/english/docs_e/legal_e/legal_e.htm).

The U.S. Government Printing Office ("GPO") provides electronic access to government publications, including the Federal Register and Code of Federal Regulations; the Congressional Record and other congressional documents and reports; the U.S. Code, Public and Private Laws, and Statutes at Large; Public Papers of the President; and the Daily Compilation of Presidential

Documents. The Federal Digital System, available at <https://www.govinfo.gov>, is GPO's online site for U.S. government materials.

On treaty issues, this site offers Senate Treaty Documents (for the President's transmittal of treaties to the Senate for advice and consent, with related materials), available at <https://www.govinfo.gov/app/collection/CDOC>, and Senate Executive Reports (for the reports on treaties prepared by the Senate Committee on Foreign Relations), available at <https://www.govinfo.gov/app/collection/CRPT>. In addition, the Office of the Legal Adviser provides a wide range of current treaty information at <https://www.state.gov/bureaus-offices/treaty-affairs/> and the Library of Congress provides extensive treaty and other legislative resources at <https://www.congress.gov>.

The U.S. government's official web portal is <https://www.usa.gov>, with links to government agencies and other sites. The State Department's home page (recently modernized in 2019) is <http://www.state.gov>. The website of the U.S. Mission to the UN (also recently modernized) is <https://usun.usmission.gov>.

While court opinions are most readily available through commercial online services and bound volumes, individual federal courts of appeals and many federal district courts now post opinions on their websites. The following list provides the website addresses where federal courts of appeals post opinions and unpublished dispositions or both:

U.S. Court of Appeals for the District of Columbia Circuit:

<https://www.cadc.uscourts.gov/bin/opinions/allopinions.asp>;

U.S. Court of Appeals for the First Circuit:

<http://media.ca1.uscourts.gov/opinions/>;

U.S. Court of Appeals for the Second Circuit:

<http://www.ca2.uscourts.gov/decisions.html>;

U.S. Court of Appeals for the Third Circuit:

<http://www.ca3.uscourts.gov/search-opinions>;

U.S. Court of Appeals for the Fourth Circuit:

<http://www.ca4.uscourts.gov/opinions/search-opinions>;

U.S. Court of Appeals for the Fifth Circuit:

<http://www.ca5.uscourts.gov/electronic-case-filing/case-information/current-opinions>;

U.S. Court of Appeals for the Sixth Circuit:

<https://www.ca6.uscourts.gov/opinions>;

U.S. Court of Appeals for the Seventh Circuit:

<http://media.ca7.uscourts.gov/opinion.html>;

U.S. Court of Appeals for the Eighth Circuit:

<https://www.ca8.uscourts.gov/all-opinions>;

U.S. Court of Appeals for the Ninth Circuit:

<https://www.ca9.uscourts.gov/opinions/>;

U.S. Court of Appeals for the Tenth Circuit:

<https://www.ca10.uscourts.gov/opinion/search>;

U.S. Court of Appeals for the Eleventh Circuit:

<http://www.ca11.uscourts.gov/published-opinions>;

U.S. Court of Appeals for the Federal Circuit:

<http://www.cafc.uscourts.gov/opinions-orders/0/all>.

The official U.S. Supreme Court website is maintained at [www.supremecourtus.gov](http://www.supremecourtus.gov). The Office of the Solicitor General in the Department of Justice makes its briefs filed in the Supreme Court available at <https://www.justice.gov/osg>. Many federal district courts also post their opinions on their websites, and users can access these opinions by subscribing to the Public Access to Electronic Records (“PACER”) service. Other links to individual federal court websites are available at <http://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links>.

Selections of material in this volume were made based on judgments as to the significance of the issues, their possible relevance for future situations, and their likely interest to government lawyers, especially our foreign counterparts; scholars and other academics; and private practitioners.

As always, we welcome suggestions from those who use the *Digest*.

*CarrieLyn D. Guymon*

# CHAPTER 1

## Nationality, Citizenship, and Immigration

### A. NATIONALITY, CITIZENSHIP, AND PASSPORTS

#### 1. *Hinojosa and Villafranca*

As discussed in *Digest 2017* at 4-7, the district court in two separate cases (*Hinojosa* and *Villafranca*) dismissed plaintiffs' Administrative Procedure Act ("APA") challenges to their passport denials, reasoning that an administrative remedy is provided in 8 U.S.C. § 1503(b)-(c). The U.S. Court of Appeals for the Fifth Circuit consolidated the cases for review and issued its decision on appeal on May 8, 2018. The Fifth Circuit affirmed. The majority opinion is excerpted below.\*

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\* \* \* \*

The Plaintiffs sought similar relief under the APA: *Hinojosa* challenged the denial of her application for a U.S. passport because she was a non-citizen. *Villafranca* challenged the revocation of her passport because its issuance was based on the misrepresentation that she was a U.S. citizen. The district court rejected *Villafranca*'s petition because it concluded she was not appealing a final agency action. By contrast, it rejected *Hinojosa*'s petition because it concluded there was an adequate alternative means of receiving judicial review under 8 U.S.C. § 1503. Both grounds provide independent bases to reject an APA claim. *See Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 287 (5th Cir. 1999) (finality requirement); *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (no other adequate remedy requirement).

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\* Editor's note: In February 2019, the United States filed a brief in opposition to the plaintiffs' petition for certiorari. The Supreme Court denied the petition on March 18, 2019. *Hinojosa v. Horn*, No. 18-461.

Section 1503 outlines the process by which individuals can receive judicial review of the denial of “a right or privilege as a national of the United States” by a government official, department or independent agency “upon the ground that he is not a national of the United States.” 8 U.S.C. §§ 1503(a), (b). On appeal, both Villafranca and Hinojosa challenge the dismissal of their APA claims by arguing that the procedures under 8 U.S.C. § 1503 are inadequate. We disagree. After reviewing the adequacy requirement under the APA and the procedures afforded under § 1503, we conclude that the district court’s denial on this basis was proper.

#### *A. The Adequate Alternative Remedy Requirement*

The APA provides judicial review for “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.” 5 U.S.C. § 702. Notwithstanding this broad definition, the APA limits the sort of “agency action[s]” to which it applies. Specifically, the statute requires that the challenged act be an “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.” *Id.* § 704. ...

At a minimum, the alternative remedy must provide the petitioner “specific procedures” by which the agency action can receive judicial review or some equivalent. *Id.* The adequacy of the relief available need not provide an identical review that the APA would provide, so long as the alternative remedy offers the “same genre” of relief. *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Justice*, 846 F.3d 1235, 1245 (D.C. Cir. 2017) ...

\* \* \* \*

#### *B. Section 1503 Procedures*

With these principles in mind, we now turn to the procedures set forth in the statute in question. 8 U.S.C. § 1503 outlines specific procedures to appeal the denial of “a right or privilege as a national of the United States” by a government official, department or independent agency “upon the ground that he is not a national of the United States.” 8 U.S.C. §§ 1503(a), (b). The statute provides two separate procedures for individuals to vindicate such claims, depending on whether they are within the United States. When the individuals are already within the United States, judicial review is immediately available: They are authorized to “institute an action under [the Declaratory Judgment Act] against the head of such department or independent agency for a judgment declaring him to be a national of the United States.” *Id.* § 1503(a).

When they are not already within the United States, however, the path to judicial review is longer because such individuals must first gain admission into the country by the procedures set forth in §§ 1503(b)–(c). These provisions first require an application to “a diplomatic or consular officer of the United States” for a certificate of identity, which allows petitioners to “travel[ ] to a port of entry in the United States and apply[ ] for admission.” *Id.* § 1503(b). To receive the certificate, petitioners must demonstrate good faith and a “substantial basis” for the claim that they are, in fact, American citizens. *Id.* If their applications are denied, petitioners are “entitled to an appeal to the Secretary of State, who, if he approves the denial, must provide a written statement of reasons.” *Id.* The statute does not itself provide a means of reviewing the Secretary of State’s decision if he confirms the denial.

If the certificate of identity is issued—either by the diplomatic or consular officer or by the Secretary of State—the individual may apply for admission to the United States at a port of entry, subject “to all the provisions ...relating to the conduct of proceedings involving aliens

seeking admission to the United States.” *Id.* § 1503(c). If admission is denied, petitioners are entitled to “[a] final determination by the Attorney General” that is “subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise.” *Id.* Conversely, if admission is granted, thereby permitting them to travel within the United States, they can file a declaratory judgment action under § 1503(a).

*C. The Plaintiffs’ Remedy Under § 1503 is an Adequate Alternative to APA Relief.*

We now apply this procedural framework to the present cases, looking specifically to the wrong the Plaintiffs assert as well as the procedures currently available to remedy that wrong. First, the wrong to be remedied is the deprivation of U.S. passports on the allegedly erroneous conclusion that they are not citizens. They have, in other words, been denied “a right or privilege . . . upon the ground that [they are] not . . . national[s] of the United States.” As noted, § 1503 is specifically designed to review such denials.

Second, we look to the procedures currently available to these Plaintiffs, who have not taken any of the procedural steps required by § 1503. As noted, the statute articulates two bases for reaching the courts to remedy their claims: They are permitted to file a habeas petition if denied admission at the port of entry, or, if granted admission, they are permitted to file a declaratory judgment action. Notably, both forums permit the Plaintiffs to prove their citizenship. If their petition is successful, the hearings will overturn the basis for the deprivation of their U.S. passports.

The only instance in which the Plaintiffs might not receive judicial review under the statute is if their petitions for certificates of identity are denied by the Secretary State. At that moment, they would be entitled to relief under the APA—a point which the Government concedes. But the mere chance that the Plaintiffs might be left without a remedy in court does not mean that the § 1503 is inadequate as a whole. In other words, the Plaintiffs are not entitled to relief under the APA on the basis that a certificate of identity *might* be denied. Otherwise, all persons living abroad claiming United States citizenship would be able to skip §§ 1503(b)–(c) procedures by initiating a suit under the APA. In light of the foregoing, we are satisfied that 8 U.S.C. § 1503 establishes an adequate alternative remedy in court for these Plaintiffs. As noted, the statute provides a direct and guaranteed path to judicial review. Moreover, the provision comprises “both agency obligations and a mechanism for judicial enforcement.” *Citizens for Responsibility*, 846 F.3d at 1245. In sum, § 1503 expresses a clear congressional intent to provide a specific procedure to review the Plaintiffs’ claims. Permitting a cause of action under the APA would provide a duplicative remedy, authorizing an end-run around that process. We therefore affirm the district court’s determination that it lacked jurisdiction.

\* \* \* \*

### III.

We next consider Plaintiffs’ claims that they should have been allowed to pursue their habeas petitions. “In an appeal from the denial of habeas relief, this court reviews a district court’s findings of fact for clear error and issues of law *de novo*.” *Jeffers v. Chandler*, 253 F.3d 827, 830 (5th Cir. 2001) (per curiam). A district court’s dismissal of a habeas corpus claim for failure to exhaust administrative remedies is reviewed for abuse of discretion. *Gallegos-Hernandez v. United States*, 688 F.3d 190, 194 (5th Cir. 2012).

A person seeking habeas relief must first exhaust available administrative remedies. *United States v. Cleto*, 956 F.2d 83, 84 (5th Cir. 1992) (per curiam). Exhaustion has long been a prerequisite for habeas relief, even where petitioners claim to be United States citizens. See *United States v. Low Hong*, 261 F. 73, 74 (5th Cir. 1919) (“A mere claim of citizenship, made in a petition for the writ of habeas corpus by one held under such process, cannot be given the effect of arresting the progress of the administrative proceeding provided for.”). “The exhaustion of administrative remedies doctrine requires not that only administrative remedies selected by the complainant be first exhausted, but instead that all those prescribed administrative remedies which might provide appropriate relief be pursued prior to seeking relief in the federal courts.” *Hessbrook v. Lennon*, 777 F.2d 999, 1003 (5th Cir. 1985), *abrogated on other grounds by McCarthy v. Madigan*, 503 U.S. 140 (1992), *superseded by statute on other grounds*, *Woodford v. Ngo*, 548 U.S. 81 (2006); see also *Lee v. Gonzales*, 410 F.3d 778, 786 (5th Cir. 2005) (“[A] petitioner must exhaust available avenues of relief and turn to habeas only when no other means of judicial review exists.”).

Conversely, “[e]xceptions to the exhaustion requirement are appropriate where the available administrative remedies either are unavailable or wholly inappropriate to the relief sought, or where the attempt to exhaust such remedies would itself be a patently futile course of action.” *Fuller v. Rich*, 11 F.3d 61, 62 (5th Cir. 1994) (per curiam) (quoting *Hessbrook*, 777 F.2d at 1003). The petitioner bears the burden to demonstrate an exception is warranted. *Id.* (citing *DCP Farms v. Yeutter*, 957 F.2d 1183, 1189 (5th Cir. 1992); *Gardner v. Sch. Bd. Caddo Par.*, 958 F.2d 108, 112 (5th Cir. 1992)).

This court has already applied these principles to §§ 1503(b)–(c), finding the procedures they outline must be exhausted before receiving habeas relief. Specifically, in *Samaniego v. Brownell*, 212 F.2d 891, 894 (5th Cir. 1954), this court noted that,

[w]here, as here, Congress has provided a method, administrative or judicial, by which appellant may challenge the legality of his detention, or exclusion, and such method or procedure is not tantamount to a suspension of the writ of habeas corpus, this remedy must be exhausted before resort may be had to the extraordinary writ.

Like the petitioner in *Samaniego*, Villafranca and Hinojosa have not pursued the remedies available to them under §1503(b)–(c). Nor have they demonstrated that such pursuit would be futile. They argue that they are not provided an effective remedy because the procedures do not specifically address the deprivation of their passports. But the denials were based on a finding that they were not citizens, which—as noted—is precisely the sort of claim that § 1503 is designed to address. In other words, these procedures provide a basis for the Plaintiffs to rectify the wrongful determination that they are not citizens, which, if they are successful, will afford the Plaintiffs an effective remedy to the wrong they suffered.

We also reject the Plaintiffs’ assertions that the position of a § 1503(b) petitioner who appears at a port of authority with a certificate of identity is the same as any other alien seeking admission to the United States. To the contrary, the very fact that the petitioner has that certificate puts her in a different position. Section 1503(b) calls on the U.S. diplomatic or consular officer of the United States to issue the certificate of identity “upon proof...that the application is made in good faith and has a substantial basis.” Thus, when individuals are issued a certificate of identity for purposes of applying for admission to the United States, a U.S. official has found some merit in their claims. Obtaining a certificate of identity signals to U.S.

officials charged with evaluating applications for admission to the United States at a port of entry that an individual's claim may be legitimate. Accordingly, persons who have gone through the process set forth in § 1503(b) assume a legal posture that is distinct from persons who merely proceed to the inspection station and request entry.

Thus, the Plaintiffs have not demonstrated that they are entitled to an exception to the exhaustion requirement.

\* \* \* \*

## 2. *Zzyym v. Pompeo: Indication of Sex on U.S. Passports*

Plaintiff Dana Zzyym (“Zzyym”) is an intersex individual who filed suit after the State Department denied Zzyym’s request for a passport with an “X” in the sex field, contrary to its policy of requiring either “M” or “F.” Zzyym’s complaint alleges violations of the APA and equal protection under the Fifth Amendment. On September 19, 2018, the U.S. District Court for the District of Colorado decided that the State Department’s policy and denial of the requested passport violate the APA and enjoined the Department from relying on the policy to deny the requested passport. The court did not reach the constitutional claims. The court had previously remanded the case to the Department for reconsideration of its policy after finding the Department failed to show its policy was rational. The 2018 decision was based on the Department reaffirming the policy and seeking dismissal based on the administrative record. Excerpts follow from the opinion of the district court. The opinion is available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

\* \* \* \*

The APA empowers the Court to “hold unlawful and set aside agency action, findings, and conclusions” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]” 5 U.S.C. § 706(2)(A). Agency action is arbitrary and capricious if it is not the product of reasoned decision making. This means, among other things, that an agency must provide an adequate evidentiary basis for its action and consider all important aspects of the problem before it.

\* \* \* \*

... In the Department’s memorandum, the Department first notes that it is aware that some countries and the International Civil Aviation Organization (the UN agency that sets forth passport specifications) provide for the issuance of travel documents bearing an “X” in addition to “M” or “F”. R. 82. The Department then provides five reasons for the gender policy:

- **Sex Data Point Ensures Accuracy and Verifiability of Passport Holder’s Identity:**  
The policy is necessary to ensure that the information contained in US passports is accurate and verifiable, thus ensuring the integrity of the US passport as proof of identity

and citizenship. Because the Department relies on third-party documentation issued by state, municipal, and/or foreign authorities who largely do not allow gender identifiers other than male or female to determine an applicant's identity, the Department would have a more difficult job verifying the identity of a passport holder if a gender aside from male or female was used.

- **Sex Data Point is Used to Determine Applicant's Eligibility to Receive Passport:** The policy is necessary because the sex of a passport applicant (male or female) is a vital data point in determining whether someone is entitled to a passport. In order to determine whether an applicant is eligible to receive a passport, the Department must data-match with other law enforcement systems. Because "all such agencies recognize only two sexes," the Department's continued use of a binary option for the sex data point is the most reliable means to determine eligibility.
- **Consistency of Sex Data Point Ensures Easy Verification of Passport Holder's Identity in Domestic Contexts:** The policy is necessary to ensure that a passport can be used as a reliable proof of identity within the United States. The introduction of a "new, third sex option in US passport applications and Passport data systems could introduce verification difficulties in name checks and complicate automated data sharing among these other agencies." The Department believes that this would "cause operational complications."
- **There is No Generally Accepted Medical Consensus on How to Define a Third Sex:** The policy is necessary because there is no generally accepted medical consensus as to how to define a third sex, making it unreliable as a component of identity verification. "Although the Department acknowledges that there are individuals whose gender identity is neither male nor female, the Department lacks a sound basis on which to make a reliable determination that such an individual has changed their sex to match that gender identity."
- **Altering Department System Would Be Expensive and Time-Consuming:** The policy is necessary because changing it would be inconvenient.

Looking at the proffered reasons and cited evidence provided by the Department, I find that the Department's decision is arbitrary and capricious. I will address each of the Department's proffered reasons and explain why in my judgment they do not show that the gender policy is the product of a rational decision-making process.

*i. Reasons One through Three Fail to Show Rational Decision Making* Reasons one through three essentially boil down to the same argument—the Department needs to maintain the binary gender classification system for passports because this will ensure accuracy and reliability in cross-checking gender data with other identity systems. R. 82–86. The Department notes that the binary system is important at two points: (1) when determining if an applicant is eligible to receive a passport, and (2) when a passport holder seeks to use their passport as proof of identity. *Id.* After reviewing the memorandum and administrative record, I find that the Department failed to add any substantive arguments or evidence that wasn't previously before the Court when I rejected this argument in my November 2016 Order.

In that order, I noted that the Department's argument that the binary gender policy helped to ensure the accurate identification of passport applicants/holders failed when one looked deeper at the evidence in the administrative record. For example, I noted that the Department undermined its purported rationale when it informed Dana that Dana could receive a male passport if Dana provided a physician's letter attesting to that gender, even though Dana's

Colorado driver's license listed Dana's gender as female. ECF No 55 at 10. The Department has established policies in place that passport specialists and consular officers must follow "when an applicant indicates a gender on the 'sex' line on the passport application with information different from some or all of the submitted citizenship and/or identity evidence[.]" R. 178; 7 FAM § 1310 App. M. By allowing this means of gender designation on the passport, the Department made it apparent that it did not actually rely on other jurisdictions' gender data to verify passport applicants' identities to the extent it argued.

Further, I noted that the administrative record included evidence that "not every law enforcement record from which data is input to this system designates an individual's sex," and "a field left blank in the system is assumed to reflect that the particular datum is unknown or unrecorded." ECF No. 55 at 10 (citing declaration of Bennet Fellows, Division Chief at the Department). Therefore—in addition to the Department's admission that gender is just one of many fields used to crosscheck a passport applicant/holder's identity with other systems (other fields include one's social security number, date of birth, name, etc.)—the Department also admitted that in some systems the gender field isn't even used or reliable. As such, I held the Department's insistence that a binary gender data option is necessary to ensure accuracy and reliability simply was not the case under the evidence provided and therefore was insufficient to show that the policy was the product of rational decision making.

Since that decision, the only "new" evidence in the record on this point cuts against the Department. Joining multiple countries and the International Civil Aviation Organization's recognition of a non-binary gender classification system, at least four U.S. states and territories now issue identification cards with a third gender option. The Department was on notice of this when it reconsidered its policy. As such, the Department's insistence that a binary gender system is necessary to accurately and reliably crosscheck a passport applicant/holder's identity ignores the reality that some American passport applicants will have gender verification documents that exclusively list a gender that is neither female nor male.

As support to its May 2017 letter, the Department offers a "History of the Designation of Sex in U.S. Passports," to explain the basis for its 1976 decision to add a requirement that applicant's designate either "male" or "female" in passport applications. R. 87–90. This brief history explained that the decision to add a sex marker to passport applications was made under the direction of the International Civil Aviation Organization (ICAO), which commissioned a panel of passport experts to address border security concerns resulting from the increase in international air travel. Apparently, the data field of "SEX (M-F)" was recommended because experts thought "[that with] the rise in the early 1970s of unisex attire and hairstyles, photographs had become a less reliable means for ascertaining a traveler's sex." R. 88. In a 1974 report "an ICAO panel confirmed that a holder's sex should be included on passports because names did not always provide a ready indication, and appearances from the passport photograph could be misleading." *Id.* Though this still doesn't answer the question of why a traveler's sex needed to be ascertained, the Department notes that at the time there was no consideration of a third sex marker as the passport book was based on the technical specifications of the ICAO, and the ICAO specified only male and female. *Id.*

But as noted already, the ICAO standards for machine-readable travel documents now specify that sex should be designated by "the capital F for female, M for male, or X for unspecified." ECF 1 ¶ 35; ICAO Document 9303, Machine Readable Travel Documents, at IV-14 (7th ed. 2015) at 14. The Department does not explain its departure from adherence to this standard.

Overall, in these three rationales, the Department argues that the purpose of the sex designation on the passport is to ensure the accuracy and integrity of the document. The Department has maintained that the male and female markers “help identify the bearer of the document, and ensure that the passport remains reliable proof of identification.” ECF 35 at 24. Dana submitted multiple medical certifications from licensed physicians attesting that she is neither male nor female, but intersex. Dana’s Complaint describes invasive and unnecessary medical procedures that doctors subjected Dana to as a child that attempted but failed to change Dana’s intersex nature. ECF 1 ¶ 15. I find that requiring an intersex person to misrepresent their sex on this identity document is a perplexing way to serve the Department’s goal of accuracy and integrity. In sum, taking the Department’s proffered rationales that I previously determined were inadequate with the new evidence in the administrative record regarding the growing body of jurisdictions that allow for a non-binary gender marker, I find that the Department failed to show that its decision-making process regarding the policy was rationale.

*ii. Reason Four Fails to Show Rational Decision Making*

The Department’s fourth asserted reason for maintaining the binary gender policy also fails. The Department argues that the policy is necessary because there is no generally accepted medical consensus as to how to define a third sex, making it unreliable as a component of identity. R. 85. However, by its own regulations, the Department relies upon a medical authority which plainly recognizes a third sex. *See* 7 FAM §1310(b). The Department defers to the medical “standards and recommendations for the World Professional Association for Transgender Health (WPATH), recognized as the authority in this field by the American Medical Association (AMA),” 7 FAM §1310(b) App. M. WPATH recognizes a third sex. R. 646–763. In addition, the administrative record includes the opinions of three former U.S. Surgeons General and the American Medical Association Board of Trustees that describe non-binary sex categories. ECF No. 65 at 13–14. The Department recognizes that it is medically established that an intersex person is born with mixed or ambiguous markers of sex that do not fit into the typical notions of either male or female bodies. 7 FAM §1360 App. M; R. 185, 605, 765. The Department’s uncertainty about how it would evaluate persons “transitioning” to a third sex misses the ball—intersex people are born as they are.

In the May 2017 letter, the Department highlights that it is unable to recognize a third gender “partly due to the lack of consensus of what it means, biologically, for an individual to have a sex other than male or female.” R 86. However, the information relied upon in the administrative record also reflect a lack of consensus as to how individuals born intersex could be classified as either “male” or “female,” R. 947–65. This has not prevented the Department from requiring intersex people to elect, perhaps at random, as it doesn’t seem to matter to the Department which one of those two categories Dana chooses. Even if the Court ignored the Department’s deference to the WPATH, the justification that there is a lack of medical consensus, whereby “there are a number of genetic, hormonal and physiological conditions in which an individual is not easily classified as male or female,” R. 86, still fails to account for why the binary sex designation is preferable.

Taking this evidence together, the Department's argument that the gender policy is necessary because there is no medically accepted consensus regarding a third sex is not rational and fails.

*iii. Reason Five is not Sufficient*

Finally, the Department arrives at what this Court suspects is the real reason that the Department has been so resistant to adding a third gender option to passports: money and time. The Department argues that switching the existing data systems—which are currently incapable of printing a passport that reflects a gender option other than “M” or “F”—would be considerably costly and timely. R. 86. However, the Department admits that it has not undertaken a level of effort (LOE) estimation on the time and cost that it would take to add the third sex designation option to the U.S. passport biodata page. *Id.* This does not ring of a rational decision. Without record evidence of or even an attempt at determining the time, cost, or coordination necessary, the Court cannot defer to the Department's claims of administrative convenience. *See, e.g., Plyer v. Doe*, 457 U.S. 202, 227–28 (1982) (“There is no evidence in the record suggesting...any significant burden on the State's economy.”). True, common sense would tell anyone that altering a system will necessary[ily] involve some effort and money. However, the Department's rational here is the product of guesswork rather than actual analysis, and it does not rise to the level of reliable evidence that is needed to show that the Department's policymaking was rational.

In sum, the Department added very little to the evidence and explanations that were before this Court in November 2016 when I determined that the Department's policymaking was not the product of rational decision making. Even with the new memorandum and proffered reasons, I again find that the gender policy is arbitrary and capricious and not the product of rational decision making.

**2. The Denial of Dana's Passport Application Exceeds the Authority Delegated to the Department by Congress, 5 U.S.C. § 706(2)(C).**

Dana challenges the policy under a second provision of the APA, section 706(2)(C), which empowers the Court to “hold unlawful and set aside agency action, findings, and conclusions” that are “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C). Dana argues that the Department is acting beyond its authority in denying the option for a non-binary gender option on the passport application. ...

The Department has the power to issue passports under the Passport Act of 1926 “under such rules as the President shall designate and prescribe for and on behalf of the United States.” 22 U.S.C. § 211a; *see* Exec. Order 11295. While this grant of authority does not expressly authorize the denial of passport applications nor specify particular reasons that passports may be denied, the Supreme Court has construed this power broadly. Defendant and plaintiff refer to the Supreme Court cases of *Kent v. Dulles* and *Haig v. Agee* to resolve the question of whether the Department is acting outside of its authority in withholding a passport from Dana.

*Haig* held that the Secretary has the power to deny passports for reasons not specified in the Passport Act. *Haig v. Agee*, 453 U.S. 280, 290 (1981). ... There, the Supreme Court examined historical practices to conclude that the Executive did have “authority to withhold passports on the basis of substantial reasons of national security and foreign policy,” and that legislative history confirmed congressional recognition and of this power. *Id.* at 293. In *Kent v. Dulles*, the Supreme Court examined whether the Secretary of State had the authority to deny a passport based on suspicions that the passport applicant was a communist. Though the

Court concluded that the Secretary of State did not have authority to promulgate regulations denying passports to persons suspected of being communist, it also emphasized that the Department had a long history of exercising the power to deny passport applications based on grounds related to “citizenship or allegiance on the one hand or to criminal or unlawful conduct on the other.” *Id.* at 127–28. Here, we don’t have a case where the passport applicant is being denied on grounds related to national security, foreign policy, citizenship, allegiance, or criminal or unlawful conduct. Indeed, 22 C.F.R § 51.60 identifies a number of discretionary and mandatory reasons that a passport can be denied, and these provisions relate to such grounds. None of the provisions setting forth reasons for mandatory and discretionary restrictions of passports in 22 C.F.R. § 51.60 apply to Dana. ECF No. 61 at 23. “It is beyond dispute that the Secretary has the power to deny a passport for reasons not specified in the statutes,” *Haig* at 281; however a reason must be given, and *Kent* and *Haig* both hold that it must also be a good one.

The authority to issue passports and prescribe rules for the issuance of passports under 22 U.S.C. § 211a does not include the authority to deny an applicant on grounds pertinent to basic identity, unrelated to any good cause as described in *Kent* and *Haig*. The Department contends that it was acting within its authority in requiring every applicant to fully complete the passport, *see* 2 C.F.R. §51.20(a). ECF No. 41 at 5. I agree, but Dana does not take issue with the regulation that requires fully completing a passport application. Dana’s issue is that there is not an option on the passport application that does not require Dana to untruthfully claim to be either male or female. ECF No. 61 ¶ 26. I have already held that the Department has acted arbitrarily and capriciously in maintaining a gender policy that requires Dana to inaccurately select M or F, when the administrative record does not provide a rational basis for this requirement. Because neither the Passport Act nor any other law authorizes the denial of a passport application without good reason, and adherence to a series of internal policies that do not contemplate the existence of intersex people is not good reason, the Department has acted in excess of its statutory jurisdiction.

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On December 3, 2018, the Department filed a motion for a stay, pending appeal, of the district court’s injunction prohibiting the Department from relying on its policy to deny the passport as requested with the “X” gender marker. Excerpts follow from the U.S. brief in support of the motion. The brief and the Declaration of Assistant Secretary of State Carl C. Risch in support of the motion are available at

<https://www.state.gov/digest-of-united-states-practice-in-international-law/>.\*\*

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\*\* Editor’s note: On February 4, 2019, the Department filed a reply brief in support of the motion for stay pending appeal. On February 21, 2019, the district court denied the motion for stay. On February 28, 2019, the Department filed a motion for stay in the U.S. Court of Appeals for the Tenth Circuit. The reply brief in support of the motion was filed on March 18, 2019. The Court of Appeals denied the motion for stay on April 3, 2019, reasoning that the Department was not required to do anything under the district court’s order if there was no pending renewed application for a passport from Zzyym. The case will be discussed further in *Digest 2019*.

In sum, at present, DOS’s information technology systems are incapable of producing a passport bearing an “X” sex designation while also properly recording that information in DOS’s databases. In order to ensure that even a single passport issued to Plaintiff with an “X” sex designation functions properly like a passport with an “M” or “F” designation, a host of modifications would be required to the entire system for issuing passports and recording their information. The Department estimates these modifications would take approximately 24 months and cost roughly \$11 million. And although it is possible to create a passport bearing an “X” designation outside of the Department’s normal processes, such a passport would not function properly. In particular, the sex field information would not be reflected in all of the pertinent databases of DOS or other federal agencies, including U.S. Customs and Border Protection. As a result, use of the passport would likely lead to significant delays and inconvenience when entering the U.S. and create difficulties for the bearer if the passport were to be lost or stolen overseas. Nor would such a passport comply with DOS’s published policies, likely leading to delay, inconvenience, or denial of entry at foreign borders. More generally, the production of any passport out of compliance with DOS’s published policies would undermine the Government’s efforts to fight fraud, detect illegal entry, and prevent terrorism, and would undermine the credibility of all U.S. passports, causing harm to U.S. travelers.

In contrast to the harms to the Government and public described above, a stay pending appeal will not substantially injure Plaintiff. During the pendency of the appeal, Plaintiff may still receive an interim passport with an “M” or “F” marker. Such a passport would permit Plaintiff to travel abroad without impediment, alleviating any irreparable harm Plaintiff could otherwise incur.

Finally, Defendants have made a strong showing that they are likely to succeed on the merits. In this regard, for the reasons set forth below, this Court need not find that its decision was in error in order to stay its injunction, given the balance of harms at stake and the serious questions of law at issue. In any event, Defendants respectfully submit that the Court misapplied the ... arbitrary and capricious standard, which requires the agency to do nothing more than examine the relevant data and articulate a rational connection between the facts found and the decision made. ... DOS did just that: it identified five reasons in support of its decision to retain the sex-designation policy. A.R. 83–86. Although the Court identified what it saw as shortcomings in these reasons, the key inquiry is whether a rational decision maker could arrive at the challenged policy based on those reasons.

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Under the Constitution, “the President ha[s] primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation’s foreign relations.” *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2097 (2015). In furtherance of its sovereign interests, the federal government has dedicated significant effort and resources to establishing the U.S. Passport as the “gold standard” international travel document. Risch Decl. ¶ 6. This status is grounded both in the quality of the document itself and in the document’s credibility—that it reflects information that is accurate and is backed up by a robust set of publicized DOS regulations and policies. *Id.* ¶¶ 6, 9. For these reasons, whenever DOS implements a change to its passport standards (even a minor one), it undertakes “substantial effort to notify all countries about the impending change and send exemplars of the document so that foreign authorities can

recognize the valid document.” *Id.* ¶ 6. This helps ensure that U.S. passports are recognized as a valid travel document wherever they are presented...

The production of even a single standard or emergency passport with an “X” sex marker, in contravention of DOS’s published policies, would likely undermine the U.S. Passport’s status as the gold standard identity and travel document, for several reasons. *Id.* ¶ 7. First, the use of such a passport could “undermine the confidence that other countries rightfully have in our process for ensuring the validity of our passports, and thus give rise to doubts about the credibility of all U.S. passports.” *Id.* ¶ 10. In turn, this may cause foreign officials to give increased scrutiny to U.S. passports and U.S. travelers generally. *Id.* This would prove to the detriment of the Government and the public, as travelers would experience increased disruption, inconvenience, and delay. *Id.* ¶ 10.

Similarly, a foreign government’s willingness to accept such a passport could undermine the United States’ interest in promoting a reliable and secure system of international travel. As Assistant Secretary Risch explains, foreign governments “could be more inclined to accept, or less able to refuse, similarly nonconforming passports issued by other countries in the future.” *Id.* ¶ 12. This complication raises security concerns for the United States and other countries, as bad actors could exploit this vulnerability to cross borders. *See id.*

Finally, the U.S. Government relies on the information and exemplars provided by other countries in order to police the use of fraudulent or altered passports at our own borders. *Id.* ¶ 11. The more reliable those foreign standards and exemplars are, the better the U.S. Government can defend against fraud, illegal entry, and terrorism. *Id.* By issuing a passport not in compliance with DOS’s *own* standards, the Government undermines its ability to insist that other countries abide by their own standards. *Id.* To protect all of these interests, the United States simply does not issue “one-off” passports. *Id.* ¶ 7.

In sum, DOS is unable at this time to produce by its standard processes a fully functioning U.S. passport bearing an “X” in the sex field. A “one-off” passport with an “X” sex marker would not function properly without systematic changes, and the changes necessary to achieve that capability would cost roughly \$11 million and take approximately 24 months. Specifically, a “one off” passport with an “X” designation would likely lead to delays, inconvenience, and denials of entry for the bearer. The Government, in turn, could face harms to its abilities to detect unlawful conduct, as well as to its sovereign interests in the U.S. passport system generally.

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### **3. U.S. Passports Invalid for Travel to North Korea**

As discussed in *Digest 2017* at 7, U.S. passports were declared invalid for travel to the Democratic People’s Republic of Korea (“DPRK”), pursuant to 22 CFR 51.63(a)(3), for a period of one year beginning September 1, 2017. Effective September 1, 2018, the Department of State extended the restriction until August 31, 2019. 83 Fed. Reg. 44,688 (Aug. 31, 2018). The State Department “determined that there continues to be serious risk to United States nationals of arrest and long-term detention representing imminent danger to the physical safety of United States nationals traveling to and within the DPRK.” *Id.*

## B. IMMIGRATION AND VISAS

### 1. Consular Nonreviewability

#### a. *Allen v. Milas*

As discussed in *Digest 2017* at 13-16, the United States brief on appeal in *Allen v. Milas* argued that the decision to deny plaintiff's wife's application for a visa was not reviewable. The U.S. Court of Appeals for the Ninth Circuit issued its decision in the case on July 24, 2018. While the Court of Appeals rejected the assertion that the doctrine of consular nonreviewability was jurisdictional and found that the district court had jurisdiction to review the denial, it held that the scope of that review is limited by the doctrine and the consular officer in the case had cited facially legitimate and bona fide reasons for refusing the visa application. The Court also affirmed that the doctrine of consular nonreviewability precludes APA review of a consular officer's adjudication of a visa application. The decision is excerpted below. 896 F.3d. 1094 (9<sup>th</sup> Cir. 2018). See *Digest 2015* at 15-20 for discussion of the Supreme Court's decision in *Kerry v. Din*, which is discussed in the decision.

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Section 1201(g)(3) of Title 8 provides that no visa shall be issued if “the consular officer knows or has reason to believe that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law.” In accord with this provision, the consular officer here advised Mrs. Allen of the two grounds on which he believed she was not eligible for a visa under § 1182. First, because she had been convicted of a theft offense, the consular officer determined that she was ineligible for a visa because theft is a crime involving moral turpitude. 8 U.S.C. § 1182(a) (2)(A)(i)(I). Second, the officer determined that because Mrs. Allen had been convicted of “illicit acquisition of narcotics” under German law, she was ineligible for a visa because she had been convicted of “a violation of ... any law or regulation of ... a foreign country relating to a controlled substance.” *Id.* § 1182(a)(2)(A)(i)(II).

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We conclude that the district court had subject matter jurisdiction in this case under 28 U.S.C. § 1331 and the doctrine of consular nonreviewability did not strip the district court of that jurisdiction. Subject matter jurisdiction over this class of claims, otherwise amply provided here by the federal question statute, is constrained only if we identify and apply some “prescripti[ve] delineati[on]” on our “adjudicatory authority.” *Id.* at 160–61, 130 S.Ct. 1237 (quoting *Kontrick*, 540 U.S. at 455, 124 S.Ct. 906); see *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153, 133 S.Ct. 817, 184 L.Ed.2d 627 (2013) (requiring a “clear statement” from Congress that “the rule is jurisdictional”). We know of no such “prescriptive delineation,” and the government has not pointed to any. The rule at issue here, that is, the rule of consular nonreviewability, supplies a rule of decision, not a constraint on the subject matter jurisdiction of the federal courts. See *Fiallo v. Bell*, 430 U.S. 787, 795–96 n.6, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977) (denying that “the

Government's power in this area [of immigration] is never subject to judicial review,” but “only to limited judicial review”); *Mathews v. Diaz*, 426 U.S. 67, 81–82, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976) (“The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.”); *Matushkina v. Nielsen*, 877 F.3d 289, 294 n.2 (7th Cir. 2017) (“We treat the doctrine of consular nonreviewability as a matter of a case’s merits rather than the federal courts’ subject matter jurisdiction.”). We discuss consular nonreviewability and *Mandel* in greater detail below, but it suffices at present to observe that the Court’s “facially legitimate and bona fide” standard is not the language of subject matter jurisdiction, but the language of the discretion courts afford consular officers. It is a scope of review, the contours of which we turn to now. The district court was correct to treat the government's Rule 12(b)(1) motion as a motion under Rule 12(b)(6).

### B

The core of Allen’s petition is that he was entitled to judicial review of the non-issuance of his wife’s visa under the “scope of review” provisions of the APA found in § 706. More particularly, Allen contends that the consular officer failed to apply the appropriate legal standards to Mrs. Allen’s German convictions, and that this legal error renders the consular officer’s decision “arbitrary, capricious, and otherwise not in accordance with law.”

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We recognize that the APA’s judicial review provisions supply a “strong presumption that Congress intends judicial review of administrative action.” *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986). Sections 701–06 of the APA supply a “default rule ... that agency actions are reviewable under federal question jurisdiction ... even if no statute specifically authorizes judicial review.” *ANA Int’l, Inc. v. Way*, 393 F.3d 886, 890 (9th Cir. 2004). ...

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Nevertheless, the APA itself anticipates that, on occasion, Congress might itself abrogate the presumption of judicial review. First, the APA recognizes that a statute may preclude judicial review. 5 U.S.C. § 701(a)(1). Second, the APA provides that its judicial review provisions do not apply where “agency action is committed to agency discretion by law,” *id.* § 701(a)(2), a “rare instance[ ] where statutes are drawn in such broad terms that in a given case there is no law to apply.” *Webster v. Doe*, 486 U.S. 592, 599, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971) ); *see also, e.g., Ekimian v. INS*, 303 F.3d 1153, 1157–58 (9th Cir. 2002) (finding no judicially reviewable standard to examine BIA decision's not to reopen a case). The government does not contend that either of these exceptions to judicial review applies.

The APA recognizes two other instances in which at least some provisions of §§ 701–06 might not apply. Section 702 confers the broad right to judicial review and sets out the cause of action, but then concludes in limiting fashion:

Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

This narrows our focus: Is the doctrine of consular nonreviewability either (1) a “limitation[ ] on judicial review” or (2) based on statutes that “impliedly forbid[ ] the relief which is sought”? In other words, is Allen entitled to APA review of the consular official's decision not to issue his wife a visa, or is the standard set forth in *Mandel* his only avenue for judicial relief? The D.C. Circuit has addressed this precise question, and it concluded that *Mandel* supplies the only standard by which the federal courts can review a consular officer's decision on the merits. *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162–63 (D.C. Cir. 1999). We start with *Mandel* and the rule of consular nonreviewability, and we then turn to *Saavedra Bruno*.

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In *Mandel*, the Court reaffirmed that where Congress entrusts discretionary visa-processing and ineligibility-waiver authority in a consular officer or the Attorney General, the courts cannot substitute their judgments for those of the Executive. 408 U.S. at 769–70, 92 S.Ct. 2576. But the Court also recognized a narrow exception for review of constitutional claims. Belgian Marxist Ernest Mandel was denied a visa to visit the United States for academic activities. *Id.* at 756–57. ...[T]he Supreme Court began with the proposition that Mandel had no right of entry and thus no personal right to judicial review. 408 U.S. at 762, 92 S.Ct. 2576. The Court assumed the professor plaintiffs had First Amendment rights to hear Mandel speak, and sought a means to balance their rights against Congress's grant of discretionary waiver authority to the Attorney General. It did so against the presumption of consular nonreviewability that had embedded itself as a rule of decision, the provenance of which the Court was “not inclined in the present context to reconsider.” *Id.* at 767, 92 S.Ct. 2576. Rejecting Mandel's request for an “arbitrary and capricious” standard of review, *id.* at 760, 92 S.Ct. 2576, the Court recognized an exception to the rule of consular nonreviewability for review of constitutional claims. The exception itself is quite narrow, requiring deference to the consular officer's decision so long as “that reason was facially legitimate and bona fide.” *Id.* at 769, 92 S.Ct. 2576. The Court concluded:

We hold that when the Executive exercises this power [of exclusion] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, not test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.

*Id.* at 770, 92 S.Ct. 2576.

The Court returned to *Mandel* in *Fiallo v. Bell*, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977). There, three sets of fathers and sons challenged immigration laws giving preference to natural mothers of “illegitimate” children, thereby alleging constitutional injury through “‘double- barreled’ discrimination based on sex and illegitimacy.” *Id.* at 788, 794, 97 S.Ct. 1473. The government argued that these claims were not subject to judicial review at all, a claim the Court rejected. But the Court also rejected any review beyond that set out in *Mandel*: “We can

see no reason to review the broad congressional policy choice at issue here under a more exacting standard than was applied in *Kleindienst v. Mandel*.” *Id.* at 795, 97 S.Ct. 1473.

The *Mandel* rule was again upheld in *Din*. 135 S.Ct. at 2141. *Din*, a U.S. citizen, challenged a consular officer’s decision to deny an entry visa to her husband, and sought a writ of mandamus and a declaratory judgment to remedy her alleged constitutional injury arising out of the visa denial. *Id.* at 2131–32 (plurality opinion of Scalia, J.). Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, found in a plurality opinion that *Din* had no such constitutional right and so received the process due. *Id.* at 2138–40. But Justice Kennedy, joined by Justice Alito, concurred in the judgment alone, in the narrowest and thus controlling opinion in that case. See *Cardenas v. United States*, 826 F.3d 1164, 1171 (9th Cir. 2016). Justice Kennedy found it unnecessary to answer whether *Din* had a protected constitutional interest, because even assuming she did “[t]he reasoning and the holding in *Mandel* control here.” *Din*, 135 S.Ct. at 2139, 2140 (Kennedy, J., concurring in the judgment). Moreover, *Mandel* “extends to determinations of how much information the Government is obliged to disclose about a consular officer’s denial of a visa to an alien abroad.” *Id.* at 2141. In *Din*, the consular officer offered no explanation other than a citation to 8 U.S.C. § 1182(a)(3)(B), prohibiting visas to persons engaged in or otherwise related to statutorily defined “terrorist activity.” See 8 U.S.C. § 1182(a)(3)(B)(iii). For Justice Kennedy, “the Government satisfied any obligation it might have had to provide *Din* with a facially legitimate and bona fide reason for its action.” *Din*, 135 S.Ct. at 2141 (Kennedy, J., concurring in the judgment).

*Mandel*, *Fiallo*, and *Din* all involved constitutional claims. We have applied the *Mandel* rule in a variety of circumstances involving visa denials and claimed violations of constitutional rights. *E.g.*, *Cardenas*, 826 F.3d at 1171; *Bustamante*, 531 F.3d at 1061 (describing *Mandel* as “a limited exception to the doctrine [of consular nonreviewability] where the denial of a visa implicates the constitutional rights of American citizens”). Most recently, in *Trump v. Hawaii*, the Court observed that its “opinions have reaffirmed and applied [*Mandel*’s] deferential standard of review across different contexts and constitutional claims.” — U.S. —, —, 138 S.Ct. 2392, — L.Ed.2d — (2018). Allen concedes *Mandel*’s limited scope of review as to *constitutional* challenges to visa denials. He argues nonetheless that he is entitled to APA review of his claims, which he characterizes as a nonconstitutional *statutory* challenge to the consular Officer’s allegedly nondiscretionary duty.

The D.C. Circuit rejected this argument in *Saavedra Bruno*. When a consular officer in Bolivia refused to issue a visa to Saavedra Bruno, he brought suit under the APA, arguing that he was entitled to review for the purpose of challenging factual errors on which the official ostensibly made his decision. 197 F.3d at 1155–56. After a careful review of the historical origins of the consular nonreviewability rule, the court wrote:

[W]e may infer that the immigration laws preclude judicial review of consular visa decisions. There was no reason for Congress to say as much expressly. Given the historical background against which it has legislated over the years, ... Congress could safely assume that aliens residing abroad were barred from challenging consular visa decisions in federal court unless legislation specifically permitted such actions. The presumption, in other words, is the opposite of what the APA normally supposes.

*Id.* at 1162. From this the court deduced that “[i]n terms of APA § 702(1), the doctrine of consular nonreviewability—the origin of which predates passage of the APA,” constitutes precisely such a “limitation[ ] on judicial review” unaffected by § 702’s otherwise glad-handing statutory cause of action and right of review to those suffering “‘legal wrong’ from agency action.” *Id.* at 1160 (quoting 5 U.S.C. § 702). In sum, “the immigration laws preclude judicial review of consular visa decisions.” *Id.* at 1162; *see also Morfin v. Tillerson*, 851 F.3d 710, 714 (7th Cir. 2017) (rejecting a claim brought under the APA that a consular decision was arbitrary and capricious and not supported by substantial evidence, and concluding that “the denial of a visa application is not a question open to review by the judiciary”).

We agree with the D.C. Circuit’s analysis and conclusion in *Saavedra Bruno*. If Allen were correct, then constitutional claims would be reviewable under the limited *Mandel* standard, and nonconstitutional claims would be reviewable under the APA; in other words, all claims would be reviewable under some standard. Allen’s theory converts consular nonreviewability into consular reviewability. The conclusion flies in the face of more than a century of decisions limiting our review of consular visa decisions. Allen attempts to narrow our focus to *legal* error, which he argues is within the province of the judiciary. We reject his argument for several reasons. First, the burden the INA places on consular officers—who may or may not have any formal legal training—is not to make *legal* determinations in a way that an administrative agency (such as the BIA) or a court might do. Rather the officer is charged with adjudicating visas under rules prescribed by law, and the officer is instructed not to issue a visa if the officer “knows or has reason to believe that such alien is ineligible to receive a visa” under any provision of law. 8 U.S.C. § 1201(g)(3).

Second, the distinction Allen presses for would eclipse the *Mandel* exception itself. The claims in *Mandel*, *Fiallo*, and *Din* were all legal claims. To be sure, they were legal claims based on the law of the Constitution, as opposed to statutory law, but we fail to see why legal claims based on statute should receive greater protection than legal claims based on the Constitution. Indeed, we think the Court has already rejected such an argument in *Webster*, 486 U.S. at 594, 108 S.Ct. 2047. There the Court addressed whether a statute giving the Director of the CIA blanket authority to terminate any officer or employee when deemed “necessary or advisable in the interests of the United States,” rendered the Director’s decisions unreviewable under § 701(a)(2). *Id.* at 594, 601, 108 S.Ct. 2047 (quoting 50 U.S.C. § 403(c) ). Although the Court found that Doe’s claims could not be reviewed under the APA, it did find that Doe could nonetheless otherwise raise constitutional claims arising out of his termination, namely that his termination deprived him of liberty and property interests, denied him equal protection under the law, and impaired his right to privacy. *Webster*, 486 U.S. at 601–05, 108 S.Ct. 2047. After *Webster*, we have assumed that the courts will be open to review of constitutional claims, even if they are closed to other claims. *See, e.g., Am. Fed’n of Gov’t Employees Local 1 v. Stone*, 502 F.3d 1027, 1034–39 (9th Cir. 2007). Allen’s argument would flip *Webster* on its head: Statutory arguments would be subject to full APA review even if constitutional arguments, per *Mandel*, are not. We find no support for Allen’s position.

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We join the D.C. Circuit in holding that the APA provides no avenue for review of a consular officer’s adjudication of a visa on the merits. Whether considered under § 702(1) or (2), the doctrine of consular nonreviewability is a limitation on the scope of our judicial review and thus precludes our review under § 706. Allen raises no claim to review under *Mandel*, and regardless, we agree with the district court that the consular officer’s citations to the INA and identification of Mrs. Allen’s criminal history constituted facially legitimate and bona fide reasons for rejecting her visa application.

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**b. Zeng**

On October 18, 2018, the U.S. Court of Appeals for the Second Circuit issued its decision in *Zeng v. Pompeo*, No. 17-2902 (2018). The Second Circuit affirmed the decision of the district court dismissing the case. Excerpts follow from the decision.

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Zeng contends that the District Court erred in denying his motion to amend his complaint to bring a due process claim challenging the Consulate’s denial of his wife’s visa. ...

We conclude that the District Court did not err in denying Zeng’s motion to amend, although we reach this conclusion on slightly different grounds than the District Court. Zeng sought to amend his complaint to state a due process claim based on the U.S. Consulate’s decision to deny his wife a visa due to a finding that she had misrepresented her employment history in a prior visa application.

The doctrine of consular nonreviewability generally bars courts from reviewing a consular officer’s denial of a visa. *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 123 (2d Cir. 2009). But we have concluded that there is a narrow exception where a plaintiff alleges that the denial of a visa to a visa applicant violated the plaintiff’s First Amendment right to have the applicant present his views in this Country. *Id.* at 125 (relying on *Kleindienst v. Mandel*, 408 U.S. 753 (1972)). Under such circumstances, a court will review the consular officer’s denial of a visa to determine whether the officer acted “on the basis of a facially legitimate and bona fide reason.” *Id.* (quoting *Mandel*, 408 U.S. at 769–70). This standard will be satisfied where a consular officer relies on a statutory ground of inadmissibility, unless the plaintiff affirmatively proffers “a well supported allegation of bad faith.” *Id.* at 137.

Zeng urges that the District Court erred in failing to apply this limited review and in failing to conclude that the consular officer denied the visa without any bona fide reason to do so. We have not decided whether this narrow exception to the consular nonreviewability doctrine applies to constitutional challenges other than First Amendment challenges, such as due process challenges. *Cf. Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring) (construing *Mandel* to apply where a plaintiff alleges that the visa denial “burdens a citizen’s own constitutional rights” and applying *Mandel* to a due process claim). Nor have we ever decided whether a citizen has a due process right to live in this country with their spouse. *See id.* at 2133–36 (Scalia, J., plurality opinion) (holding that wife had no protectible liberty interest in living in

the United States with her husband and could not bring a due process claim based on denial of his visa application). But even if we were to conclude that the limited “bona fide reason” review does apply to due process claims and that Zeng has a due process right to live in the United States with his wife, we would affirm the ruling of the District Court.

Here, the Consulate provided a bona fide and facially legitimate reason for denying Zeng’s wife a visa—namely, that she had made a material misrepresentation about her employment when applying for a visa. Such a misrepresentation rendered her inadmissible. *See* 8 U.S.C. § 1201(g) (“No visa...shall be issued to an alien if ...it appears to the consular officer ... that such alien is ineligible to receive a visa... under section 1182 of this title”); *id.* § 1182(a)(6)(C)(i) (“Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible.”). Moreover, Zeng’s allegation that the Consulate relied on sixteen-year-old information does not constitute a well-supported allegation of bad faith. Neither 8 U.S.C. § 1201(g) nor § 1182(a)(6)(C)(i) contain a limitation on considering such information. Accordingly, the Consulate has satisfied its minimal burden of providing a bona fide reason for denying the visa, and we will not “look behind the exercise of [the consulate’s] discretion.” *Am. Acad. of Religion*, 573 F.3d at 125 (quoting *Mandel*, 408 U.S. at 769–70). As such, Zeng’s proposed amendment was futile, and the District Court did not err by denying Zeng’s motion to amend.

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## **2. Visa Regulations and Restrictions**

### ***a. Visa sanctions***

On November 27, 2018, the State Department issued the determination, dated October 15, 2018, that visa sanctions should be imposed pursuant to section 604 of the Foreign Relations Authorization Act, Fiscal Year 2003 (Pub. L. 107–228) (the “Act”). 83 Fed. Reg. 60,937 (Nov. 27, 2018). Specifically, the determination was that the sanction set out in section 604(a)(1), “Denial of Visas to PLO and Palestinian Authority Officials,” should be imposed for a period of 180 days due to the extent of noncompliance by the Palestine Liberation Organization (“PLO”) or the Palestinian Authority with certain commitments. *Id.* The State Department also determined at the same time that the sanction should be waived pursuant to section 604(c) of the Act for a period of 180 days. *Id.*

### ***b. Visas for same-sex partners of foreign government personnel***

On October 2, 2018, senior State Department officials provided a briefing on the eligibility for diplomatic visas for same-sex domestic partners of foreign government officials and international organization personnel traveling to and/or serving in foreign missions or at international organizations in the United States. Excerpts follow from the briefing transcript, which is available at <https://www.state.gov/senior-administration-officials-on-visas-for-same-sex-domestic-partners-of-g-4-and-diplomatic-visa-holders/>.

\* \* \* \*

...[T]he purpose of the policy is to promote the equal treatment of all family members and couples, and this decision is in light of the 2015 Supreme Court decision legalizing same-sex marriage. So since 2015, the department announced that it would change its policies to accommodate that Supreme Court decision, and this is part of that policy.

...[R]oughly there are 105 families that would be impacted total in the U.S., and of those only about 55 are with international organizations. ... [W]e understand that a lot of other countries don't necessarily view that the same way, so we are proud of the fact that we're forward-leaning in this policy and are glad that we can implement a policy in furtherance of that. And the department has also been working with foreign governments where same-sex marriage isn't legal to – and like, for example, Israel, where our foreign diplomats – our diplomats serving abroad in Israel are treated the same as opposite-sex spouses. So in the U.S., we would then do the same for those spouses.

And then with respect to IOs, ...international organizations, we expect that there will be lots of questions from that since our policy is slightly different, and we are happy to review any such cases specifically and certainly look forward to doing that and working with them to find a solution.

\* \* \* \*

...Just wanted to tell you a little bit about the timeline of our communications with the UN and the foreign missions up here in New York. We've had a dialogue since July on this change to our policy. From the beginning, we've stressed that we'd work closely with the UN and the foreign missions to help people meet these new requirements. I also communicated that if the requirements couldn't be met, that we'd work with individuals on a case-by-case basis to help them to try to legally adjust their status to remain in the United States after the deadline. I'd be happy to answer questions about the process of informing the UN and the foreign missions.

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U.S. diplomats as of yesterday have to be legally married in order to get ...derivative diplomatic status when they go overseas, so these changes are to mirror what U.S. policy now is.

... if same-sex marriage is legal in that host country, then they would have to be married to get the diplomatic visa derivative status for their partner. If they're from a country that does not recognize same-sex marriage, then we will put processes in place to create a process so that ... the partner could still get derivative status in the United States. So the policy recognizes that not all countries have the same policy as we do, that they don't all recognize same-sex marriage legal as we do, as long as those countries act in a reciprocal fashion towards us and our diplomats.

\* \* \* \*

**c. *Executive Actions on Foreign Terrorist Entry into the United States***

As discussed in *Digest 2017* at 17-28, the President issued several orders in 2017 on protecting the United States from foreign terrorist entry. These actions were the subject of litigation in multiple courts. On January 19, 2018, the U.S. Supreme Court granted a petition for certiorari in a case challenging Proclamation No. 9645 of September 24, 2017. *Trump v. Hawaii*, No. 17-965.

On April 10, 2018, the President lifted travel restrictions for Chadian nationals imposed under Proclamation 9654. See State Department press statement, available at <https://www.state.gov/presidential-proclamation-lifts-travel-restrictions-for-chad/>. The press statement explains that the Government of Chad had improved its identity-management and information sharing practices. The statement explains further that:

Chad is a critical and vital partner to the U.S. counterterrorism mission. Chad has made significant strides and now meets the baseline criteria established in the Presidential Proclamation. For this reason, the travel restrictions placed on Chad are terminated effective April 13. Its citizens will again be able to receive visas for travel to the United States.

In *Trump v. Hawaii*, the Supreme Court issued its decision on June 26, 2018, holding that the President's issuance of Proclamation 9645 was a lawful exercise of the broad discretion granted to him to suspend the entry of aliens into the United States. Excerpts follow from the majority opinion (with footnotes omitted). The two concurring opinions and two dissenting opinions are not excerpted herein.

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Under the Immigration and Nationality Act, foreign nationals seeking entry into the United States undergo a vetting process to ensure that they satisfy the numerous requirements for admission. The Act also vests the President with authority to restrict the entry of aliens whenever he finds that their entry “would be detrimental to the interests of the United States.” 8 U. S. C. §1182(f). Relying on that delegation, the President concluded that it was necessary to impose entry restrictions on nationals of countries that do not share adequate information for an informed entry determination, or that otherwise present national security risks. Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017) (Proclamation). The plaintiffs in this litigation, respondents here, challenged the application of those entry restrictions to certain aliens abroad. We now decide whether the President had authority under the Act to issue the Proclamation, and whether the entry policy violates the Establishment Clause of the First Amendment.

## I A

Shortly after taking office, President Trump signed Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States. 82 Fed. Reg. 8977 (2017) (EO–1). EO–1 directed the Secretary of Homeland Security to conduct a review to examine the adequacy of information provided by foreign governments about their nationals seeking to enter the United States. §3(a). Pending that review, the order suspended for 90 days the entry of foreign nationals from seven countries— Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen— that had been previously identified by Congress or prior administrations as posing heightened terrorism risks. §3(c). The District Court for the Western District of Washington entered a temporary restraining order blocking the entry restrictions, and the Court of Appeals for the Ninth Circuit denied the Government’s request to stay that order. *Washington v. Trump*, 847 F. 3d 1151 (2017) (*per curiam*).

In response, the President revoked EO–1, replacing it with Executive Order No. 13780, which again directed a worldwide review. 82 Fed. Reg. 13209 (2017) (EO–2). Citing investigative burdens on agencies and the need to diminish the risk that dangerous individuals would enter without adequate vetting, EO–2 also temporarily restricted the entry (with case-by-case waivers) of foreign nationals from six of the countries covered by EO–1: Iran, Libya, Somalia, Sudan, Syria, and Yemen. §§2(c), 3(a). The order explained that those countries had been selected because each “is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones.” §1(d). The entry restriction was to stay in effect for 90 days, pending completion of the worldwide review.

These interim measures were immediately challenged in court. The District Courts for the Districts of Maryland and Hawaii entered nationwide preliminary injunctions barring enforcement of the entry suspension, and the respective Courts of Appeals upheld those injunctions, albeit on different grounds. *International Refugee Assistance Project (IRAP) v. Trump*, 857 F. 3d 554 (CA4 2017); *Hawaii v. Trump*, 859 F. 3d 741 (CA9 2017) (*per curiam*). This Court granted certiorari and stayed the injunctions— allowing the entry suspension to go into effect—with respect to foreign nationals who lacked a “credible claim of a bona fide relationship” with a person or entity in the United States. *Trump v. IRAP*, 582 U. S. \_\_\_, \_\_\_ (2017) (*per curiam*) (slip op., at 12). The temporary restrictions in EO–2 expired before this Court took any action, and we vacated the lower court decisions as moot. *Trump v. IRAP*, 583 U. S. \_\_\_ (2017); *Trump v. Hawaii*, 583 U. S. \_\_\_ (2017).

On September 24, 2017, after completion of the worldwide review, the President issued the Proclamation before us—Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats. 82 Fed. Reg. 45161. The Proclamation (as its title indicates) sought to improve vetting procedures by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present “public safety threats.” §1(a). To further that purpose, the Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate.

The Proclamation described how foreign states were selected for inclusion based on the review undertaken pursuant to EO–2. As part of that review, the Department of Homeland Security (DHS), in consultation with the State Department and several intelligence agencies, developed a “baseline” for the information required from foreign governments to confirm the identity of individuals seeking entry into the United States, and to determine whether those

individuals pose a security threat. §1(c). The baseline included three components. The first, “identity-management information,” focused on whether a foreign government ensures the integrity of travel documents by issuing electronic passports, reporting lost or stolen passports, and making available additional identity-related information. Second, the agencies considered the extent to which the country discloses information on criminal history and suspected terrorist links, provides travel document exemplars, and facilitates the U. S. Government’s receipt of information about airline passengers and crews traveling to the United States. Finally, the agencies weighed various indicators of national security risk, including whether the foreign state is a known or potential terrorist safe haven and whether it regularly declines to receive returning nationals following final orders of removal from the United States. *Ibid.*

DHS collected and evaluated data regarding all foreign governments. §1(d). It identified 16 countries as having deficient information-sharing practices and presenting national security concerns, and another 31 countries as “at risk” of similarly failing to meet the baseline. §1(e). The State Department then undertook diplomatic efforts over a 50-day period to encourage all foreign governments to improve their practices. §1(f). As a result of that effort, numerous countries provided DHS with travel document exemplars and agreed to share information on known or suspected terrorists. *Ibid.*

Following the 50-day period, the Acting Secretary of Homeland Security concluded that eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—remained deficient in terms of their risk profile and willingness to provide requested information. The Acting Secretary recommended that the President impose entry restrictions on certain nationals from all of those countries except Iraq. §§1(g), (h). She also concluded that although Somalia generally satisfied the information-sharing component of the baseline standards, its “identity-management deficiencies” and “significant terrorist presence” presented special circumstances justifying additional limitations. She therefore recommended entry limitations for certain nationals of that country. §1(i). As for Iraq, the Acting Secretary found that entry limitations on its nationals were not warranted given the close cooperative relationship between the U.S. and Iraqi Governments and Iraq’s commitment to combating ISIS. §1(g).

After consulting with multiple Cabinet members and other officials, the President adopted the Acting Secretary’s recommendations and issued the Proclamation. Invoking his authority under 8 U. S. C. §§1182(f) and 1185(a), the President determined that certain entry restrictions were necessary to “prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information”; “elicit improved identity-management and information-sharing protocols and practices from foreign governments”; and otherwise “advance [the] foreign policy, national security, and counter-terrorism objectives” of the United States. Proclamation §1(h). The President explained that these restrictions would be the “most likely to encourage cooperation” while “protect[ing] the United States until such time as improvements occur.” *Ibid.*

The Proclamation imposed a range of restrictions that vary based on the “distinct circumstances” in each of the eight countries. *Ibid.* For countries that do not cooperate with the United States in identifying security risks (Iran, North Korea, and Syria), the Proclamation suspends entry of all nationals, except for Iranians seeking nonimmigrant student and exchange-visitor visas. §§2(b)(ii), (d)(ii), (e)(ii). For countries that have information-sharing deficiencies but are nonetheless “valuable counterterrorism partner[s]” (Chad, Libya, and Yemen), it restricts entry of nationals seeking immigrant visas and nonimmigrant business or tourist visas. §§2(a)(i), (c)(i), (g)(i). Because Somalia generally satisfies the baseline standards but was found to present

special risk factors, the Proclamation suspends entry of nationals seeking immigrant visas and requires additional scrutiny of nationals seeking nonimmigrant visas. §2(h)(ii). And for Venezuela, which refuses to cooperate in information sharing but for which alternative means are available to identify its nationals, the Proclamation limits entry only of certain government officials and their family members on nonimmigrant business or tourist visas. §2(f)(ii).

The Proclamation exempts lawful permanent residents and foreign nationals who have been granted asylum. §3(b). It also provides for case-by-case waivers when a foreign national demonstrates undue hardship, and that his entry is in the national interest and would not pose a threat to public safety. §3(c)(i); see also §3(c)(iv) (listing examples of when a waiver might be appropriate, such as if the foreign national seeks to reside with a close family member, obtain urgent medical care, or pursue significant business obligations). The Proclamation further directs DHS to assess on a continuing basis whether entry restrictions should be modified or continued, and to report to the President every 180 days. §4. Upon completion of the first such review period, the President, on the recommendation of the Secretary of Homeland Security, determined that Chad had sufficiently improved its practices, and he accordingly lifted restrictions on its nationals. Presidential Proclamation No. 9723, 83 Fed. Reg. 15937 (2018).

#### B

Plaintiffs in this case are the State of Hawaii, three individuals (Dr. Ismail Elshikh, John Doe #1, and John Doe #2), and the Muslim Association of Hawaii. The State operates the University of Hawaii system, which recruits students and faculty from the designated countries. The three individual plaintiffs are U.S. citizens or lawful permanent residents who have relatives from Iran, Syria, and Yemen applying for immigrant or nonimmigrant visas. The Association is a nonprofit organization that operates a mosque in Hawaii.

Plaintiffs challenged the Proclamation—except as applied to North Korea and Venezuela—on several grounds. As relevant here, they argued that the Proclamation contravenes provisions in the Immigration and Nationality Act (INA), 66 Stat. 187, as amended. Plaintiffs further claimed that the Proclamation violates the Establishment Clause of the First Amendment, because it was motivated not by concerns pertaining to national security but by animus toward Islam.

The District Court granted a nationwide preliminary injunction barring enforcement of the entry restrictions. The court concluded that the Proclamation violated two provisions of the INA: §1182(f), because the President did not make sufficient findings that the entry of the covered foreign nationals would be detrimental to the national interest, and §1152(a)(1)(A), because the policy discriminates against immigrant visa applicants on the basis of nationality. 265 F.Supp. 3d 1140, 1155–1159 (Haw. 2017). The Government requested expedited briefing and sought a stay pending appeal. The Court of Appeals for the Ninth Circuit granted a partial stay, permitting enforcement of the Proclamation with respect to foreign nationals who lack a bona fide relationship with the United States. This Court then stayed the injunction in full pending disposition of the Government’s appeal. 583 U. S. \_\_\_ (2017).

The Court of Appeals affirmed. The court first held that the Proclamation exceeds the President’s authority under §1182(f). In its view, that provision authorizes only a “temporary” suspension of entry in response to “exigencies” that “Congress would be ill-equipped to address.” 878 F. 3d 662, 684, 688 (2017). The court further reasoned that the Proclamation “conflicts with the INA’s finely reticulated regulatory scheme” by addressing “matters of immigration already passed upon by Congress.” *Id.*, at 685, 690. The Ninth Circuit then turned to §1152(a)(1)(A) and determined that the entry restrictions also contravene the prohibition on

nationality-based discrimination in the issuance of immigrant visas. The court did not reach plaintiffs' Establishment Clause claim.

We granted certiorari. 583 U. S. \_\_\_\_ (2018).

## II

Before addressing the merits of plaintiffs' statutory claims, we consider whether we have authority to do so. The Government argues that plaintiffs' challenge to the Proclamation under the INA is not justiciable. Relying on the doctrine of consular nonreviewability, the Government contends that because aliens have no "claim of right" to enter the United States, and because exclusion of aliens is "a fundamental act of sovereignty" by the political branches, review of an exclusion decision "is not within the province of any court, unless expressly authorized by law." *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537, 542–543 (1950). According to the Government, that principle barring review is reflected in the INA, which sets forth a comprehensive framework for review of orders of removal, but authorizes judicial review only for aliens physically present in the United States. See Brief for Petitioners 19–20 (citing 8 U.S.C. §1252).

The justiciability of plaintiffs' challenge under the INA presents a difficult question. The Government made similar arguments that no judicial review was available in *Sale v. Haitian Centers Council, Inc.*, 509 U. S. 155 (1993). The Court in that case, however, went on to consider on the merits a statutory claim like the one before us without addressing the issue of reviewability. The Government does not argue that the doctrine of consular nonreviewability goes to the Court's jurisdiction, see Tr. of Oral Arg. 13, nor does it point to any provision of the INA that expressly strips the Court of jurisdiction over plaintiffs' claims, see *Sebelius v. Auburn Regional Medical Center*, 568 U. S. 145, 153 (2013) (requiring Congress to "clearly state[]" that a statutory provision is jurisdictional). As a result, we may assume without deciding that plaintiffs' statutory claims are reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue, and we proceed on that basis.

## III

The INA establishes numerous grounds on which an alien abroad may be inadmissible to the United States and ineligible for a visa. See, e.g., 8 U. S. C. §§1182(a)(1) (health-related grounds), (a)(2) (criminal history), (a)(3)(B) (terrorist activities), (a)(3)(C) (foreign policy grounds). Congress has also delegated to the President authority to suspend or restrict the entry of aliens in certain circumstances. The principal source of that authority, §1182(f), enables the President to "suspend the entry of all aliens or any class of aliens" whenever he "finds" that their entry "would be detrimental to the interests of the United States."

Plaintiffs argue that the Proclamation is not a valid exercise of the President's authority under the INA. In their view, §1182(f) confers only a residual power to temporarily halt the entry of a discrete group of aliens engaged in harmful conduct. They also assert that the Proclamation violates another provision of the INA—8 U. S. C. §1152(a)(1)(A)—because it discriminates on the basis of nationality in the issuance of immigrant visas.

By its plain language, §1182(f) grants the President broad discretion to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest. And plaintiffs' attempts to identify a conflict with other provisions in the INA, and their appeal to the statute's purposes and legislative history, fail to overcome the clear statutory language.

A The text of §1182(f) states:

“Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.”

By its terms, §1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry (“[w]henver [he] finds that the entry” of aliens “would be detrimental” to the national interest); whose entry to suspend (“all aliens or any class of aliens”); for how long (“for such period as he shall deem necessary”); and on what conditions (“any restrictions he may deem to be appropriate”). It is therefore unsurprising that we have previously observed that §1182(f) vests the President with “ample power” to impose entry restrictions in addition to those elsewhere enumerated in the INA. *Sale*, 509 U. S., at 187 (finding it “perfectly clear” that the President could “establish a naval blockade” to prevent illegal migrants from entering the United States); see also *Abourezk v. Reagan*, 785 F. 2d 1043, 1049, n. 2 (CA DC 1986) (describing the “sweeping proclamation power” in §1182(f) as enabling the President to supplement the other grounds of inadmissibility in the INA).

The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in §1182(f) is that the President “find[]” that the entry of the covered aliens “would be detrimental to the interests of the United States.” The President has undoubtedly fulfilled that requirement here. He first ordered DHS and other agencies to conduct a comprehensive evaluation of every single country’s compliance with the information and risk assessment baseline. The President then issued a Proclamation setting forth extensive findings describing how deficiencies in the practices of select foreign governments—several of which are state sponsors of terrorism—deprive the Government of “sufficient information to assess the risks [those countries’ nationals] pose to the United States.” Proclamation §1(h)(i). Based on that review, the President found that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information—both to protect national security and public safety, and to induce improvement by their home countries. The Proclamation therefore “craft[ed]...country-specific restrictions that would be most likely to encourage cooperation given each country’s distinct circumstances,” while securing the Nation “until such time as improvements occur.” *Ibid.*

Plaintiffs believe that these findings are insufficient. They argue, as an initial matter, that the Proclamation fails to provide a persuasive rationale for why nationality alone renders the covered foreign nationals a security risk. And they further discount the President’s stated concern about deficient vetting because the Proclamation allows many aliens from the designated countries to enter on nonimmigrant visas.

Such arguments are grounded on the premise that §1182(f) not only requires the President to *make* a finding that entry “would be detrimental to the interests of the United States,” but also to explain that finding with sufficient detail to enable judicial review. That premise is questionable. See *Webster v. Doe*, 486 U. S. 592, 600 (1988) (concluding that a statute authorizing the CIA Director to terminate an employee when the Director “shall deem such termination necessary or advisable in the interests of the United States” forecloses “any meaningful judicial standard of review”). But even assuming that some form of review is appropriate, plaintiffs’ attacks on the sufficiency of the President’s findings cannot be sustained.

The 12-page Proclamation—which thoroughly describes the process, agency evaluations, and recommendations underlying the President’s chosen restrictions—is more detailed than any prior order a President has issued under §1182(f). Contrast Presidential Proclamation No. 6958, 3 CFR 133 (1996) (President Clinton) (explaining in one sentence why suspending entry of members of the Sudanese government and armed forces “is in the foreign policy interests of the United States”); Presidential Proclamation No. 4865, 3 CFR 50–51 (1981) (President Reagan) (explaining in five sentences why measures to curtail “the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States” are “necessary”).

Moreover, plaintiffs’ request for a searching inquiry into the persuasiveness of the President’s justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere. “Whether the President’s chosen method” of addressing perceived risks is justified from a policy perspective is “irrelevant to the scope of his [§1182(f)] authority.” *Sale*, 509 U. S., at 187–188. And when the President adopts “a preventive measure . . . in the context of international affairs and national security,” he is “not required to conclusively link all of the pieces in the puzzle before [courts] grant weight to [his] empirical conclusions.” *Holder v. Humanitarian Law Project*, 561 U. S. 1, 35 (2010).

The Proclamation also comports with the remaining textual limits in §1182(f). We agree with plaintiffs that the word “suspend” often connotes a “defer[ral] till later,” Webster’s Third New International Dictionary 2303 (1966). But that does not mean that the President is required to prescribe in advance a fixed end date for the entry restrictions. Section 1182(f) authorizes the President to suspend entry “for such period as he shall deem necessary.” It follows that when a President suspends entry in response to a diplomatic dispute or policy concern, he may link the duration of those restrictions, implicitly or explicitly, to the resolution of the triggering condition. See, e.g., Presidential Proclamation No. 5829, 3 CFR 88 (1988) (President Reagan) (suspending the entry of certain Panamanian nationals “until such time as . . . democracy has been restored in Panama”); Presidential Proclamation No. 8693, 3 CFR 86–87 (2011) (President Obama) (suspending the entry of individuals subject to a travel restriction under United Nations Security Council resolutions “until such time as the Secretary of State determines that [the suspension] is no longer necessary”). In fact, not one of the 43 suspension orders issued prior to this litigation has specified a precise end date.

Like its predecessors, the Proclamation makes clear that its “conditional restrictions” will remain in force only so long as necessary to “address” the identified “inadequacies and risks” within the covered nations. Proclamation Preamble, and §1(h); see *ibid.* (explaining that the aim is to “relax[] or remove[]” the entry restrictions “as soon as possible”). To that end, the Proclamation establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be modified or terminated. §§4(a), (b). Indeed, after the initial review period, the President determined that Chad had made sufficient improvements to its identity-management protocols, and he accordingly lifted the entry suspension on its nationals. See Proclamation No. 9723, 83 Fed. Reg. 15937.

Finally, the Proclamation properly identifies a “class of aliens”—nationals of select countries—whose entry is suspended. Plaintiffs argue that “class” must refer to a well-defined group of individuals who share a common “characteristic” apart from nationality. Brief for Respondents 42. But the text of §1182(f), of course, does not say that, and the word “class” comfortably encompasses a group of people linked by nationality. Plaintiffs also contend that the class cannot be “overbroad.” Brief for Respondents 42. But that simply amounts to an unspoken

tailoring requirement found nowhere in Congress’s grant of authority to suspend entry of not only “any class of aliens” but “all aliens.”

In short, the language of §1182(f) is clear, and the Proclamation does not exceed any textual limit on the President’s authority.

## B

Confronted with this “facially broad grant of power,” 878 F. 3d, at 688, plaintiffs focus their attention on statutory structure and legislative purpose. They seek support in, first, the immigration scheme reflected in the INA as a whole, and, second, the legislative history of §1182(f) and historical practice. Neither argument justifies departing from the clear text of the statute.

### 1

Plaintiffs’ structural argument starts with the premise that §1182(f) does not give the President authority to countermand Congress’s considered policy judgments. The President, they say, may supplement the INA, but he cannot supplant it. And in their view, the Proclamation falls in the latter category because Congress has already specified a two-part solution to the problem of aliens seeking entry from countries that do not share sufficient information with the United States. First, Congress designed an individualized vetting system that places the burden on the alien to prove his admissibility. See §1361. Second, instead of banning the entry of nationals from particular countries, Congress sought to encourage information sharing through a Visa Waiver Program offering fast-track admission for countries that cooperate with the United States. See §1187.

We may assume that §1182(f) does not allow the President to expressly override particular provisions of the INA. But plaintiffs have not identified any conflict between the statute and the Proclamation that would implicitly bar the President from addressing deficiencies in the Nation’s vetting system.

To the contrary, the Proclamation supports Congress’s individualized approach for determining admissibility. The INA sets forth various inadmissibility grounds based on connections to terrorism and criminal history, but those provisions can only work when the consular officer has sufficient (and sufficiently reliable) information to make that determination. The Proclamation promotes the effectiveness of the vetting process by helping to ensure the availability of such information.

Plaintiffs suggest that the entry restrictions are unnecessary because consular officers can simply deny visas in individual cases when an alien fails to carry his burden of proving admissibility—for example, by failing to produce certified records regarding his criminal history. Brief for Respondents 48. But that misses the point: A critical finding of the Proclamation is that the failure of certain countries to provide reliable information prevents the Government from accurately determining whether an alien is inadmissible or poses a threat. Proclamation §1(h). Unless consular officers are expected to apply categorical rules and deny entry from those countries across the board, fraudulent or unreliable documentation may thwart their review in individual cases. And at any rate, the INA certainly does not *require* that systemic problems such as the lack of reliable information be addressed only in a progression of case-by-case admissibility determinations. One of the key objectives of the Proclamation is to encourage foreign governments to improve their practices, thus facilitating the Government’s vetting process overall. *Ibid.*

Nor is there a conflict between the Proclamation and the Visa Waiver Program. The Program allows travel without a visa for short-term visitors from 38 countries that have entered into a “rigorous security partnership” with the United States. DHS, U. S. Visa Waiver Program (Apr. 6, 2016), <http://www.dhs.gov/visa-waiver-program> (as last visited June 25, 2018). Eligibility for that partnership involves “broad and consequential assessments of [the country’s] foreign security standards and operations.” *Ibid.* A foreign government must (among other things) undergo a comprehensive evaluation of its “counterterrorism, law enforcement, immigration enforcement, passport security, and border management capabilities,” often including “operational site inspections of airports, seaports, land borders, and passport production and issuance facilities.” *Ibid.*

Congress’s decision to authorize a benefit for “many of America’s closest allies,” *ibid.*, did not implicitly foreclose the Executive from imposing tighter restrictions on nationals of certain high-risk countries. The Visa Waiver Program creates a special exemption for citizens of countries that maintain exemplary security standards and offer “reciprocal [travel] privileges” to United States citizens. 8 U. S. C. §1187(a)(2)(A). But in establishing a select partnership covering less than 20% of the countries in the world, Congress did not address what requirements should govern the entry of nationals from the vast majority of countries that fall short of that gold standard—particularly those nations presenting heightened terrorism concerns. Nor did Congress attempt to determine—as the multi-agency review process did—whether those high-risk countries provide a minimum baseline of information to adequately vet their nationals. Once again, this is not a situation where “Congress has stepped into the space and solved the exact problem.” Tr. of Oral Arg. 53.

Although plaintiffs claim that their reading preserves for the President a flexible power to “supplement” the INA, their understanding of the President’s authority is remarkably cramped: He may suspend entry by classes of aliens “similar in nature” to the existing categories of inadmissibility—but not too similar—or only in response to “some exigent circumstance” that Congress did not already touch on in the INA. Brief for Respondents 31, 36, 50; see also Tr. of Oral Arg. 57 (“Presidents have wide berth in this area . . . if there’s any sort of emergency.”). In any event, no Congress that wanted to confer on the President only a residual authority to address emergency situations would ever use language of the sort in §1182(f). Fairly read, the provision vests authority in the President to impose additional limitations on entry beyond the grounds for exclusion set forth in the INA—including in response to circumstances that might affect the vetting system or other “interests of the United States.”

Because plaintiffs do not point to any contradiction with another provision of the INA, the President has not exceeded his authority under §1182(f).

Plaintiffs seek to locate additional limitations on the scope of §1182(f) in the statutory background and legislative history. Given the clarity of the text, we need not consider such extra-textual evidence. See *State Farm Fire & Casualty Co. v. United States ex rel. Rigsby*, 580 U. S. \_\_\_, \_\_\_ (2016) (slip op., at 9). At any rate, plaintiffs’ evidence supports the plain meaning of the provision.

Drawing on legislative debates over §1182(f), plaintiffs suggest that the President’s suspension power should be limited to exigencies where it would be difficult for Congress to react promptly. Precursor provisions enacted during the First and Second World Wars confined the President’s exclusion authority to times of “war” and “national emergency.” See Act of May 22, 1918, §1(a), 40 Stat. 559; Act of June 21, 1941, ch. 210, §1, 55 Stat. 252. When Congress enacted §1182(f) in 1952, plaintiffs note, it borrowed “nearly verbatim” from those predecessor

statutes, and one of the bill’s sponsors affirmed that the provision would apply only during a time of crisis. According to plaintiffs, it therefore follows that Congress sought to delegate only a similarly tailored suspension power in §1182(f). Brief for Respondents 39–40.

If anything, the drafting history suggests the opposite. In borrowing “nearly verbatim” from the pre-existing statute, Congress made one critical alteration—it removed the national emergency standard that plaintiffs now seek to reintroduce in another form. Weighing Congress’s conscious departure from its wartime statutes against an isolated floor statement, the departure is far more probative. See *NLRB v. SW General, Inc.*, 580 U. S. \_\_\_, \_\_\_ (2017) (slip op., at 16) (“[F]loor statements by individual legislators rank among the least illuminating forms of legislative history.”). When Congress wishes to condition an exercise of executive authority on the President’s finding of an exigency or crisis, it knows how to say just that. See, e.g., 16 U.S.C. §824o–1(b); 42 U. S. C. §5192; 50 U. S. C. §§1701, 1702. Here, Congress instead chose to condition the President’s exercise of the suspension authority on a different finding: that the entry of an alien or class of aliens would be “detrimental to the interests of the United States.”

Plaintiffs also strive to infer limitations from executive practice. By their count, every previous suspension order under §1182(f) can be slotted into one of two categories. The vast majority targeted discrete groups of foreign nationals engaging in conduct “deemed harmful by the immigration laws.” And the remaining entry restrictions that focused on entire nationalities—namely, President Carter’s response to the Iran hostage crisis and President Reagan’s suspension of immigration from Cuba—were, in their view, designed as a response to diplomatic emergencies “that the immigration laws do not address.” Brief for Respondents 40–41.

Even if we were willing to confine expansive language in light of its past applications, the historical evidence is more equivocal than plaintiffs acknowledge. Presidents have repeatedly suspended entry not because the covered nationals themselves engaged in harmful acts but instead to retaliate for conduct by their governments that conflicted with U. S. foreign policy interests. See, e.g., Exec. Order No. 13662, 3 CFR 233 (2014) (President Obama) (suspending entry of Russian nationals working in the financial services, energy, mining, engineering, or defense sectors, in light of the Russian Federation’s “annexation of Crimea and its use of force in Ukraine”); Presidential Proclamation No. 6958, 3 CFR 133 (1997) (President Clinton) (suspending entry of Sudanese governmental and military personnel, citing “foreign policy interests of the United States” based on Sudan’s refusal to comply with United Nations resolution). And while some of these reprisals were directed at subsets of aliens from the countries at issue, others broadly suspended entry on the basis of nationality due to ongoing diplomatic disputes. For example, President Reagan invoked §1182(f) to suspend entry “as immigrants” by almost all Cuban nationals, to apply pressure on the Cuban Government. Presidential Proclamation No. 5517, 3 CFR 102 (1986). Plaintiffs try to fit this latter order within their carve-out for emergency action, but the proclamation was based in part on Cuba’s decision to breach an immigration agreement some 15 months earlier.

More significantly, plaintiffs’ argument about historical practice is a double-edged sword. The more ad hoc their account of executive action—to fit the history into their theory—the harder it becomes to see such a refined delegation in a statute that grants the President sweeping authority to decide whether to suspend entry, whose entry to suspend, and for how long.

\* \* \* \*

## IV

## A

We now turn to plaintiffs' claim that the Proclamation was issued for the unconstitutional purpose of excluding Muslims. Because we have an obligation to assure ourselves of jurisdiction under Article III, we begin by addressing the question whether plaintiffs have standing to bring their constitutional challenge.

\* \* \* \*

... We agree that a person's interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact. This Court has previously considered the merits of claims asserted by United States citizens regarding violations of their personal rights allegedly caused by the Government's exclusion of particular foreign nationals. See *Kerry v. Din*, 576 U. S. \_\_\_, \_\_\_ (2015) (plurality opinion) (slip op., at 15); *id.*, at \_\_\_ (KENNEDY, J., concurring in judgment) (slip op., at 1); *Kleindienst v. Mandel*, 408 U. S. 753, 762 (1972). Likewise, one of our prior stay orders in this litigation recognized that an American individual who has "a bona fide relationship with a particular person seeking to enter the country ... can legitimately claim concrete hardship if that person is excluded." *Trump v. IRAP*, 582 U. S., at \_\_\_ (slip op., at 13).

The Government responds that plaintiffs' Establishment Clause claims are not justiciable because the Clause does not give them a legally protected interest in the admission of particular foreign nationals. But that argument—which depends upon the scope of plaintiffs' Establishment Clause rights—concerns the merits rather than the justiciability of plaintiffs' claims. We therefore conclude that the individual plaintiffs have Article III standing to challenge the exclusion of their relatives under the Establishment Clause.

## B

The First Amendment provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Our cases recognize that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U. S. 228, 244 (1982). Plaintiffs believe that the Proclamation violates this prohibition by singling out Muslims for disfavored treatment. The entry suspension, they contend, operates as a "religious gerrymander," in part because most of the countries covered by the Proclamation have Muslim-majority populations. And in their view, deviations from the information-sharing baseline criteria suggest that the results of the multi-agency review were "foreordained." Relying on Establishment Clause precedents concerning laws and policies applied domestically, plaintiffs allege that the primary purpose of the Proclamation was religious animus and that the President's stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims. Brief for Respondents 69–73.

At the heart of plaintiffs' case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. For example, while a candidate on the campaign trail, the President published a "Statement on Preventing Muslim Immigration" that called for a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." App. 158. That statement remained on his campaign website until May 2017. *Id.*, at 130–131. Then-candidate Trump also stated that "Islam hates us" and asserted that the United States was "having problems with Muslims coming into the country." *Id.*, at 120–121, 159. Shortly after being elected, when asked whether violence

in Europe had affected his plans to “ban Muslim immigration,” the President replied, “You know my plans. All along, I’ve been proven to be right.” *Id.*, at 123.

One week after his inauguration, the President issued EO–1. In a television interview, one of the President’s campaign advisers explained that when the President “first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’” *Id.*, at 125. The adviser said he assembled a group of Members of Congress and lawyers that “focused on, instead of religion, danger.... [The order] is based on places where there [is] substantial evidence that people are sending terrorists into our country.” *Id.*, at 229.

Plaintiffs also note that after issuing EO–2 to replace EO–1, the President expressed regret that his prior order had been “watered down” and called for a “much tougher version” of his “Travel Ban.” Shortly before the release of the Proclamation, he stated that the “travel ban ... should be far larger, tougher, and more specific,” but “stupidly that would not be politically correct.” *Id.*, at 132–133. More recently, on November 29, 2017, the President re-tweeted links to three anti-Muslim propaganda videos. In response to questions about those videos, the President’s deputy press secretary denied that the President thinks Muslims are a threat to the United States, explaining that “the President has been talking about these security issues for years now, from the campaign trail to the White House” and “has addressed these issues with the travel order that he issued earlier this year and the companion proclamation.” *IRAP v. Trump*, 883 F. 3d 233, 267 (CA4 2018).

The President of the United States possesses an extraordinary power to speak to his fellow citizens and on their behalf. Our Presidents have frequently used that power to espouse the principles of religious freedom and tolerance on which this Nation was founded. In 1790 George Washington reassured the Hebrew Congregation of Newport, Rhode Island that “happily the Government of the United States ... gives to bigotry no sanction, to persecution no assistance [and] requires only that they who live under its protection should demean themselves as good citizens.” 6 Papers of George Washington 285 (D. Twohig ed. 1996). President Eisenhower, at the opening of the Islamic Center of Washington, similarly pledged to a Muslim audience that “America would fight with her whole strength for your right to have here your own church,” declaring that “[t]his concept is indeed a part of America.” Public Papers of the Presidents, Dwight D. Eisenhower, June 28, 1957, p. 509 (1957). And just days after the attacks of September 11, 2001, President George W. Bush returned to the same Islamic Center to implore his fellow Americans—Muslims and non-Muslims alike—to remember during their time of grief that “[t]he face of terror is not the true faith of Islam,” and that America is “a great country because we share the same values of respect and dignity and human worth.” Public Papers of the Presidents, George W. Bush, Vol. 2, Sept. 17, 2001, p. 1121 (2001). Yet it cannot be denied that the Federal Government and the Presidents who have carried its laws into effect have—from the Nation’s earliest days—performed unevenly in living up to those inspiring words.

Plaintiffs argue that this President’s words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.

The case before us differs in numerous respects from the conventional Establishment Clause claim. Unlike the typical suit involving religious displays or school prayer, plaintiffs seek to invalidate a national security directive regulating the entry of aliens abroad. Their claim accordingly raises a number of delicate issues regarding the scope of the constitutional right and the manner of proof. The Proclamation, moreover, is facially neutral toward religion. Plaintiffs therefore ask the Court to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements—many of which were made before the President took the oath of office. These various aspects of plaintiffs’ challenge inform our standard of review.

### C

For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a “fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” *Fiallo v. Bell*, 430 U. S. 787, 792 (1977); see *Harisiades v. Shaughnessy*, 342 U. S. 580, 588–589 (1952) (“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power.”). Because decisions in these matters may implicate “relations with foreign powers,” or involve “classifications defined in the light of changing political and economic circumstances,” such judgments “are frequently of a character more appropriate to either the Legislature or the Executive.” *Mathews v. Diaz*, 426 U. S. 67, 81 (1976).

Nonetheless, although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen. In *Kleindienst v. Mandel*, the Attorney General denied admission to a Belgian journalist and self-described “revolutionary Marxist,” Ernest Mandel, who had been invited to speak at a conference at Stanford University. 408 U. S., at 756–757. The professors who wished to hear Mandel speak challenged that decision under the First Amendment, and we acknowledged that their constitutional “right to receive information” was implicated. *Id.*, at 764–765. But we limited our review to whether the Executive gave a “facially legitimate and bona fide” reason for its action. *Id.*, at 769. Given the authority of the political branches over admission, we held that “when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification” against the asserted constitutional interests of U. S. citizens. *Id.*, at 770.

The principal dissent suggests that *Mandel* has no bearing on this case, *post*, at 14, and n. 5 (opinion of SOTOMAYOR, J.) (hereinafter the dissent), but our opinions have reaffirmed and applied its deferential standard of review across different contexts and constitutional claims. In *Din*, JUSTICE KENNEDY reiterated that “respect for the political branches’ broad power over the creation and administration of the immigration system” meant that the Government need provide only a statutory citation to explain a visa denial. 576 U. S., at \_\_\_ (opinion concurring in judgment) (slip op., at 6). Likewise in *Fiallo*, we applied *Mandel* to a “broad congressional policy” giving immigration preferences to mothers of illegitimate children. 430 U. S., at 795. Even though the statute created a “categorical” entry classification that discriminated on the basis of sex and legitimacy, *post*, at 14, n. 5, the Court concluded that “it is not the judicial role in cases of this sort to probe and test the justifications” of immigration policies. 430 U. S., at 799 (citing *Mandel*, 408 U. S., at 770). Lower courts have similarly applied *Mandel* to broad executive action. See *Rajah v. Mukasey*, 544 F. 3d 427, 433, 438–439 (CA2 2008) (upholding National Security Entry-Exit Registration System instituted after September 11, 2001).

*Mandel*'s narrow standard of review "has particular force" in admission and immigration cases that overlap with "the area of national security." *Din*, 576 U. S., at \_\_\_ (KENNEDY, J., concurring in judgment) (slip op., at 3). For one, "[j]udicial inquiry into the national-security realm raises concerns for the separation of powers" by intruding on the President's constitutional responsibilities in the area of foreign affairs. *Ziglar v. Abbasi*, 582 U. S. \_\_\_, \_\_\_ (2017) (slip op., at 19) (internal quotation marks omitted). For another, "when it comes to collecting evidence and drawing inferences" on questions of national security, "the lack of competence on the part of the courts is marked." *Humanitarian Law Project*, 561 U. S., at 34.

The upshot of our cases in this context is clear: "Any rule of constitutional law that would inhibit the flexibility" of the President "to respond to changing world conditions should be adopted only with the greatest caution," and our inquiry into matters of entry and national security is highly constrained. *Mathews*, 426 U. S., at 81–82. We need not define the precise contours of that inquiry in this case. A conventional application of *Mandel*, asking only whether the policy is facially legitimate and bona fide, would put an end to our review. But the Government has suggested that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order. See Tr. of Oral Arg. 16–17, 25–27 (describing *Mandel* as "the starting point" of the analysis). For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes. See *Railroad Retirement Bd. v. Fritz*, 449 U. S. 166, 179 (1980). As a result, we may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.

#### D

Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where we have done so, a common thread has been that the laws at issue lack any purpose other than a "bare...desire to harm a politically unpopular group." *Department of Agriculture v. Moreno*, 413 U. S. 528, 534 (1973). In one case, we invalidated a local zoning ordinance that required a special permit for group homes for the intellectually disabled, but not for other facilities such as fraternity houses or hospitals. We did so on the ground that the city's stated concerns about (among other things) "legal responsibility" and "crowded conditions" rested on "an irrational prejudice" against the intellectually disabled. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448–450 (1985) (internal quotation marks omitted). And in another case, this Court overturned a state constitutional amendment that denied gays and lesbians access to the protection of antidiscrimination laws. The amendment, we held, was "divorced from any factual context from which we could discern a relationship to legitimate state interests," and "its sheer breadth [was] so discontinuous with the reasons offered for it" that the initiative seemed "inexplicable by anything but animus." *Romer v. Evans*, 517 U. S. 620, 632, 635 (1996).

The Proclamation does not fit this pattern. It cannot be said that it is impossible to "discern a relationship to legitimate state interests" or that the policy is "inexplicable by anything but animus." Indeed, the dissent can only attempt to argue otherwise by refusing to apply anything resembling rational basis review. But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.

The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks. See 8 U.S.C. §1187(a)(12)(A) (identifying Syria and state sponsors of terrorism such as Iran as “countr[ies] or area[s] of concern” for purposes of administering the Visa Waiver Program); Dept. of Homeland Security, DHS Announces Further Travel Restrictions for the Visa Waiver Program (Feb. 18, 2016) (designating Libya, Somalia, and Yemen as additional countries of concern); see also *Rajah*, 544 F. 3d, at 433, n. 3 (describing how nonimmigrant aliens from Iran, Libya, Somalia, Syria, and Yemen were covered by the National Security Entry-Exit Registration System).

The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review, pointing to deviations from the review's baseline criteria resulting in the inclusion of Somalia and omission of Iraq. But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country. Although Somalia generally satisfies the information-sharing component of the baseline criteria, it “stands apart . . . in the degree to which [it] lacks command and control of its territory.” Proclamation §2(h)(i). As for Iraq, the Secretary of Homeland Security determined that entry restrictions were not warranted in light of the close cooperative relationship between the U.S. and Iraqi Governments and the country's key role in combating terrorism in the region. §1(g). It is, in any event, difficult to see how exempting one of the largest predominantly Muslim countries in the region from coverage under the Proclamation can be cited as evidence of animus toward Muslims.

The dissent likewise doubts the thoroughness of the multi-agency review because a recent Freedom of Information Act request shows that the final DHS report “was a mere 17 pages.” *Post*, at 19. Yet a simple page count offers little insight into the actual substance of the final report, much less predecisional materials underlying it. See 5 U. S. C. §552(b)(5) (exempting deliberative materials from FOIA disclosure).

More fundamentally, plaintiffs and the dissent challenge the entry suspension based on their perception of its effectiveness and wisdom. They suggest that the policy is overbroad and does little to serve national security interests. But we cannot substitute our own assessment for the Executive's predictive judgments on such matters, all of which “are delicate, complex, and involve large elements of prophecy.” *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948); see also *Regan v. Wald*, 468 U. S. 222, 242–243 (1984) (declining invitation to conduct an “independent foreign policy analysis”). While we of course “do not defer to the Government's reading of the First Amendment,” the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving “sensitive and weighty interests of national security and foreign affairs.” *Humanitarian Law Project*, 561 U. S., at 33–34.

Three additional features of the entry policy support the Government's claim of a legitimate national security interest. First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries—Iraq, Sudan, and Chad—have been removed from the list of covered countries. The Proclamation emphasizes that its “conditional restrictions” will remain in force only so long as necessary to “address” the identified

“inadequacies and risks,” Proclamation Preamble, and §1(h), and establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be terminated, §§4(a), (b). In fact, in announcing the termination of restrictions on nationals of Chad, the President also described Libya’s ongoing engagement with the State Department and the steps Libya is taking “to improve its practices.” Proclamation No. 9723, 83 Fed. Reg. 15939.

Second, for those countries that remain subject to entry restrictions, the Proclamation includes significant exceptions for various categories of foreign nationals. The policy permits nationals from nearly every covered country to travel to the United States on a variety of nonimmigrant visas. See, e.g., §§2(b)–(c), (g), (h) (permitting student and exchange visitors from Iran, while restricting only business and tourist nonimmigrant entry for nationals of Libya and Yemen, and imposing no restrictions on nonimmigrant entry for Somali nationals). These carve-outs for nonimmigrant visas are substantial: Over the last three fiscal years—before the Proclamation was in effect—the majority of visas issued to nationals from the covered countries were nonimmigrant visas. Brief for Petitioners 57. The Proclamation also exempts permanent residents and individuals who have been granted asylum. §§3(b)(i), (vi).

Third, the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants. According to the Proclamation, consular officers are to consider in each admissibility determination whether the alien demonstrates that (1) denying entry would cause undue hardship; (2) entry would not pose a threat to public safety; and (3) entry would be in the interest of the United States. §3(c)(i); see also §3(c)(iv) (listing examples of when a waiver might be appropriate, such as if the foreign national seeks to reside with a close family member, obtain urgent medical care, or pursue significant business obligations). On its face, this program is similar to the humanitarian exceptions set forth in President Carter’s order during the Iran hostage crisis. See Exec. Order No. 12206, 3 CFR 249; Public Papers of the Presidents, Jimmy Carter, Sanctions Against Iran, at 611–612 (1980) (outlining exceptions). The Proclamation also directs DHS and the State Department to issue guidance elaborating upon the circumstances that would justify a waiver.

Finally, the dissent invokes *Korematsu v. United States*, 323 U. S. 214 (1944). Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case. The forcible relocation of U. S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. See *post*, at 26–28. The entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.

The dissent’s reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—“has no place in law under the Constitution.” 323 U. S., at 248 (Jackson, J., dissenting).

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Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review. We express no view on the soundness of the policy. We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim.

## V

Because plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion. *Winter v. Natural Resources Defense Council, Inc.*, 555 U. S. 7, 32 (2008). The case now returns to the lower courts for such further proceedings as may be appropriate.

Our disposition of the case makes it unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

\* \* \* \*

**d. *Visa restrictions relating to Nicaragua***

On June 7, 2018, the State Department spokesperson issued a press statement announcing the imposition of visa restrictions on individuals involved in human rights abuses or undermining democracy in Nicaragua. See press statement, available at <https://www.state.gov/visa-restrictions-against-individuals-involved-in-human-rights-abuses-or-undermining-democracy-in-nicaragua/>. The press statement follows.

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The political violence by police and pro-government thugs against the people of Nicaragua, particularly university students, shows a blatant disregard for human rights and is unacceptable. Secretary Mike Pompeo today decided to impose U.S. visa restrictions on individuals responsible for human rights abuses or undermining democracy in Nicaragua.

Affected individuals include National Police officials, municipal government officials, and a Ministry of Health officials—specifically those directing or overseeing violence against others exercising their rights of peaceful assembly and freedom of expression, thereby undermining Nicaragua’s democracy. These officials have operated with impunity across the country, including in Managua, León, Estelí, and Matagalpa. In certain circumstances, family members of those individuals will also be subject to visa restrictions.

We will not publicly identify these individuals due to U.S. visa confidentiality laws, but we are sending a clear message that human rights abusers and those who undermine democracy are not welcome in the United States.

We emphasize the action we are announcing today is specific to certain officials and not directed at the Nicaraguan people. We will continue to monitor the situation and take additional steps as necessary. The United States continues to call for an end to violence and supports peaceful negotiations to end this crisis.

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#### 4. Removals and Repatriations

The Department of State works closely with the Department of Homeland Security in effecting the removal of aliens subject to final orders of removal. It is the belief of the United States that every country has an international legal obligation to accept the return of its nationals whom another state seeks to expel, remove, or deport.

On August 21, 2018, the State Department spokesperson issued a press statement regarding Germany's acceptance of a former Nazi slave-labor camp guard who was removed from the United States. See August 21, 2018 press statement, available at <https://www.state.gov/germany-accepts-former-nazi-slave-labor-camp-guard-jakiw-palij/>. The statement includes the following:

The United States expresses its deep appreciation to the Federal Republic of Germany for re-admitting former Nazi slave-labor camp guard Jakiw Palij, who was removed from the United States on August 20.

During World War II, Palij served as an armed guard at the Trawniki slave-labor camp for Jews in Nazi-occupied Poland. He concealed his Nazi service when he immigrated to the United States from Germany in 1949. A federal court stripped Palij of his citizenship in 2003 and a U.S. immigration judge ordered him removed from the United States in 2004 based on his wartime activities and postwar immigration fraud.

#### 5. Agreements for the Sharing of Visa Information

On April 18, 2018, the United States and Argentina signed an agreement for the exchange of visa information. The agreement is available at <https://www.state.gov/argentina-19-314>.\*\*\*

### C. ASYLUM, REFUGEE, AND MIGRANT PROTECTION ISSUES

#### 1. Temporary Protected Status

Section 244 of the Immigration and Nationality Act ("INA" or "Act"), as amended, 8 U.S.C. § 1254a, authorizes the Secretary of Homeland Security, after consultation with appropriate agencies, to designate a state (or any part of a state) for temporary protected status ("TPS") after finding that (1) there is an ongoing armed conflict within the state (or part thereof) that would pose a serious threat to the safety of nationals returned there; (2) the state has requested designation after an environmental disaster resulting in a substantial, but temporary, disruption of living conditions that renders the state temporarily unable to handle the return of its nationals; or (3) there are other extraordinary and temporary conditions in the state that prevent nationals from

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\*\*\* Editor's note: The agreement entered into force on March 14, 2019.

returning in safety, unless permitting the aliens to remain temporarily would be contrary to the national interests of the United States. The TPS designation means that eligible nationals of the state (or stateless persons who last habitually resided in the state) can remain in the United States and obtain work authorization documents. For background on previous designations of states for TPS, see *Digest 1989–1990* at 39–40; *Cumulative Digest 1991–1999* at 240-47; *Digest 2004* at 31-33; *Digest 2010* at 10-11; *Digest 2011* at 6-9; *Digest 2012* at 8-14; *Digest 2013* at 23-24; *Digest 2014* at 54-57; *Digest 2015* at 21-24; *Digest 2016* at 36-40; and *Digest 2017* at 33-37. In 2018, the United States extended TPS designations for Syria, Yemen, and Somalia, and announced the termination of TPS for El Salvador, Nepal, and Honduras, as discussed below.

**a. *El Salvador***

On January 18, 2018, the Department of Homeland Security provided notice of the termination of the designation of El Salvador for TPS. 83 Fed. Reg. 2654 (Jan. 18, 2018). The Secretary of Homeland Security determined that conditions in El Salvador no longer support its designation for TPS. *Id.* Termination is effective September 9, 2019. *Id.* The termination is based on the determination that recovery efforts relating to the 2001 earthquakes, which were the basis for the original designation, have largely been completed. *Id.* at 2655-56.

**b. *Syria***

On March 5, 2018, the Department of Homeland Security (“DHS”) announced the extension of the designation of Syria for TPS for 18 months, from April 1, 2018 through September 30, 2019. 83 Fed. Reg. 9329 (Mar. 5, 2018). The extension is based on the determination that the conditions in Syria that prompted the 2016 TPS redesignation continue to exist, specifically, the ongoing armed conflict and extraordinary and temporary conditions that have persisted and pose a serious threat to the personal safety of Syrian nationals if they were required to return to their country. *Id.* at 9331-32.

**c. *Nepal***

On May 22, 2018, the Department of Homeland Security announced its determination, after reviewing country conditions and consulting with the appropriate U.S. Government agencies, that conditions in Nepal no longer support its designation for TPS. 83 Fed. Reg. 23,705 (May 22, 2018). Termination is effective June 24, 2019, in order to allow for an orderly transition. DHS designated Nepal in 2015 after a severe earthquake and extended the designation through 2018 in 2016 due to civil unrest and obstruction of the border with India. See *Digest 2016* at 40. DHS determined in 2018 that the conditions supporting Nepal’s 2015 designation for TPS on the basis of environmental disaster are no longer met; that Nepal has made considerable progress in

post-earthquake recovery and reconstruction; and that conditions in Nepal have significantly improved since the TPS extension in 2016. 83 Fed. Reg. 23,706.

**d. Honduras**

On June 5, 2018, DHS announced the termination of the designation of Honduras for TPS, effective January 5, 2020, in order to provide time for an orderly transition. 83 Fed. Reg. 26,074 (June 5, 2018). Termination is based on the determination that the conditions supporting Honduras's 1999 designation for TPS on the basis of environmental disaster due to the damage caused by Hurricane Mitch in October 1998 are no longer met. *Id.* at 26,076. The notice states that recovery and reconstruction efforts after Hurricane Mitch "have largely been completed." *Id.*

**e. Yemen**

On August 14, 2018, DHS announced the extension of the designation of Yemen for TPS for 18 months, from September 4, 2018, through March 3, 2020. 83 Fed. Reg. 40,307 (Aug. 14, 2018). The extension was based on the determination that the ongoing armed conflict and extraordinary and temporary conditions that prompted Yemen's 2017 extension and new designation for TPS persist. *Id.* at 40,308.

**f. Somalia**

On August 27, 2018, DHS announced the extension of the designation of Somalia for TPS for 18 months, from September 18, 2018 through March 17, 2020. 83 Fed. Reg. 43,695 (Aug. 27, 2018). The extension was based on the determination that conditions in Somalia supporting the TPS designation continue to be met, namely, ongoing armed conflict and extraordinary and temporary conditions that prevent Somali nationals from returning in safety. *Id.* As discussed in *Digest 2017* at 34, DHS last extended Somalia's TPS designation in 2017.

**g. Ramos v. Nielsen and other litigation**

On October 3, 2018, the U.S. District Court for the Northern District of California in *Ramos v. Nielsen*, No. 18–01554 (N.D. Cal.), issued a preliminary injunction, enjoining enforcement of the termination of TPS for Sudan, Nicaragua, Haiti, and El Salvador. On October 31, 2018 DHS announced through a notice in the Federal Register that it would comply with the preliminary injunction by extending TPS for Sudan, Nicaragua, Haiti, and El Salvador so long as the preliminary injunction remains in effect. 83 Fed. Reg. 54,764 (Oct. 31, 2018). The notice also announced automatic extensions of the validity

of TPS-related documentation for TPS beneficiaries from Sudan and Nicaragua. *Id.*\*\*\*\* The preliminary injunction followed the denial by the court of the U.S. Government’s motion to dismiss the case. Excerpts follow (with footnotes omitted) from the court’s decision issuing the preliminary injunction in *Ramos*. The decision is available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>. *Trump v. Hawaii* is discussed in section B.2.c, *supra*.

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The federal government seeks to terminate the Temporary Protected Status (“TPS”) designations for four countries: Haiti, Sudan, Nicaragua, and El Salvador. Under three prior administrations, the TPS designations of these countries have been repeatedly extended based on adverse and dangerous conditions in these countries. Under the designations, approximately 300,000 TPS beneficiaries have been allowed to stay and work in the United States because of dangerous or unsafe conditions in their home countries. Without TPS designations, these beneficiaries will be subject to removal from the United States.

Plaintiffs in this case are TPS beneficiaries (who have resided in the United States for years) along with their U.S.-citizen children. In this suit, Plaintiffs challenge the Trump administration’s decision to terminate TPS status for the affected countries. Currently pending before the Court is Plaintiffs’ motion for a preliminary injunction. Plaintiffs seek to enjoin the government from implementing or enforcing the decisions of the Secretary of the Department of Homeland Security to terminate TPS designations of these countries pending a final resolution of the case on the merits.

As described below, absent injunctive relief, TPS beneficiaries and their children indisputably will suffer irreparable harm and great hardship. TPS beneficiaries who have lived, worked, and raised families in the United States (many for more than a decade), will be subject to removal. Many have U.S.-born children; those may be faced with the Hobson’s choice of bringing their children with them (and tearing them away from the only country and community they have known) or splitting their families apart. In contrast, the government has failed to establish any real harm were the status quo (which has been in existence for as long as two decades) is maintained during the pendency of this litigation. Indeed, if anything, Plaintiffs and amici have established without dispute that local and national economies will be hurt if hundreds of thousands of TPS beneficiaries are uprooted and removed.

The balance of hardships thus tips sharply in favor of TPS beneficiaries and their families. And Plaintiffs have made substantial showing on the merits of their claims, both on the facts and the law. They have presented a substantial record supporting their claim that the Acting Secretary or Secretary of DHS, in deciding to terminate the TPS status of Haiti, El Salvador, Nicaragua and Sudan, changed the criteria applied by the prior administrations, and did so without any explanation or justification in violation of the Administrative Procedure Act. There

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\*\*\*\* Editor’s note: To comply with the court’s injunction, on March 1, 2019, DHS published a second notice in the Federal Register extending through January 2, 2020, the validity of TPS-related documentation for eligible, affected beneficiaries of TPS for Sudan, Nicaragua, Haiti, and El Salvador.

is also evidence that this may have been done in order to implement and justify a pre-ordained result desired by the White House. Plaintiffs have also raised serious questions whether the actions taken by the Acting Secretary or Secretary was influenced by the White House and based on animus against non-white, non-European immigrants in violation of Equal Protection guaranteed by the Constitution. The issues are at least serious enough to preserve the status quo.

Having considered the parties' briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **GRANTS** Plaintiffs' motion. ...

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... The Court previously held that a deferential standard was applied in *Trump v. Hawaii* because the case involved “the entry of aliens from outside the United States, express national security concerns[,] and active involvement of foreign policy.” Docket No. 55 (Order at 50). The instant case was distinguishable from *Trump v. Hawaii* because (1) there was no indication that national security or foreign policy was a reason to terminate TPS designations; (2) unlike the aliens in *Trump v. Hawaii*, the aliens here (*i.e.*, the TPS beneficiaries) are already in the United States and “aliens within the United States have greater constitutional protections than those outside who are seeking admission for the first time”; and (3) “the executive order in *Trump [v. Hawaii]* was issued pursuant to a very broad grant of statutory discretion” whereas “Congress has not given the Secretary *carte blanche* to terminate TPS for any reason whatsoever.” Docket No. 55 (Order at 52-53); *see also* Docket No. 55 (Order at 53) (stating that *Trump v. Hawaii* “did not address the standard of review to be applied under the equal protection doctrine when steps are taken to *withdraw* an immigration status or benefit from aliens lawfully present and admitted into the United States for reasons unrelated to national security or foreign affairs”) (emphasis in original). In another TPS case pending in the District of Massachusetts, the district court made a similar analysis of *Trump v. Hawaii*. *See Centro Presente*, 2018 U.S. Dist. LEXIS 122509, at \*44 (stating that the Supreme Court’s “decision to apply rational basis review [in *Trump v. Hawaii*] was based on two considerations not at issue here: first, the limited due process rights afforded to foreign nationals seeking entry into the United States and the particular deference accorded to the executive in making national security determinations”). Applying *Arlington Heights*, the Massachusetts court found that there were sufficient allegations in the complaint to withstand the government’s motion to dismiss. *See id.* at \*56 (“find[ing] that the combination of a disparate impact on particular racial groups, statements of animus by people plausibly alleged to be involved in the decision-making process, and an allegedly unreasoned shift in policy sufficient to allege plausibly that a discriminatory purpose was a motivating factor in a decision”).

The government argues that the Court’s analysis above is inconsistent with cases cited in *Trump v. Hawaii*, *see* Opp’n at 19-20 (arguing that *Trump v. Hawaii* “is not limited to executive actions rooted in national security concerns or to actions restricting entry of foreign nationals”). The Court does not agree.

*Kleindienst v. Mandel*, 408 U.S. 753 (1972), is a case that involved *admission* of an alien into the United States, and thus is distinguishable from the instant case where the TPS beneficiaries are already lawfully present and admitted into the country. In fact, the alien in *Mandel* was actually ineligible for a visa under the Immigration and Nationality Act (because of his advocacy of Communist doctrines) and could only enter the United States if he first obtained a waiver from the Attorney General. *See id.* at 756-59.

Similarly, *Fiallo v. Bell*, 430 U.S. 787 (1977), is an admission case and is therefore distinguishable. *See id.* at 790 n.3 .... The Court acknowledges that, in *Fiallo*, the appellants “characterize[d] [the Supreme Court’s] prior immigration cases as involving foreign policy matters and congressional choices to exclude or expel groups of aliens that were specifically and clearly perceived to pose a grave threat to the national security . . . or to the general welfare of this country” and that the Supreme Court noted there was no indication in our prior cases that the scope of judicial review is a function of the nature of the policy choice at issue. To the contrary, [s]ince decisions in these matters may implicate our foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary, and [t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization. *Id.* at 796 (internal quotation marks omitted). *Fiallo* also contains other broad language that could be read unfavorably to Plaintiffs (*i.e.*, suggesting limited judicial review). *See Fiallo*, 430 U.S. at 792 (“Our cases ‘have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’”). However, this language of “expel” and “exclude” appears to be a dated or historical phrase, *see Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) (indicating that “[t]he control of the people within its limits, and the right to expel from its territory persons who and dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested”), and does not detract from evolved and well-established authority that aliens lawfully within the United States have rights from those seeking admission in the first instance into the United States. *See Zadvydas*, 533 U.S. at 693 (noting that “certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders”); *cf. Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (stating that “it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States”).

In any event, this Court does not hold that *Trump v. Hawaii* [is] inapplicable to the instant case solely because the decisions to terminate did not rest on national security—or foreign policy—concerns. Rather, the Court’s holding is predicated on an amalgam of factors: the fact that the TPS beneficiaries are living and have lived in the United States for lengthy periods with established ties to the community, no foreign policy or national security interest has been relied upon [by] the DHS to support its decision to terminate TPS status for the affected countries, and the TPS statute does not confer[] unfettered authority upon the Secretary. The justification for a kind of super deference advocated by the government in this case is not warranted.

Finally, *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008), is distinguishable from the instant case as well. Although *Rajah*, like the instant case, is *not* an admission case, it is still distinguishable because the aliens in *Rajah* were, undisputedly, deportable from the country, and the only issue was whether the aliens might be able to get a reprieve from deportation because the “deportation proceedings were so tainted by the [post-9/11] Program [that required nonimmigrant alien males over the age of 16 from designated countries to appear for registration and fingerprinting] and associated events.” *Id.* at 434. ...Moreover, *Rajah* is distinguishable

because, while the case (like the instant case) involved an Equal Protection claim, the claim was really one for selective prosecution/enforcement, an area in which the courts have applied substantial deference to the exercise of prosecutorial discretion. *See, e.g., Reno v. Am.- Arab Anti-Discrim. Comm.*, 525 U.S. 471, 489-90 (1999) (noting that, “[e]ven in the criminal-law field, a selective prosecution claim is a *rara avis*” because “such claims invade a special province of the Executive” and therefore a “criminal defendant [must] introduce ‘clear evidence’ displacing the presumption that a prosecutor has acted lawfully”; adding that “[t]hese concerns are greatly magnified in the deportation context” but also stating that “we need not rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome”).

At the very least, the above analysis indicates that there are serious questions going to the merits as to whether *Trump v. Hawaii* governs in the instant case. Even if *Trump v. Hawaii* did provide the governing legal standard for the Equal Protection claim here, the Court nevertheless finds that there are serious questions going to the merits that warrant a preliminary injunction. In *Trump v. Hawaii*, the Supreme Court stated that the “standard of review considers whether the [challenged decision] is plausibly related to the Government’s stated objective.” *Trump v. Hawaii*, 138 S. Ct. at 2420. The Supreme Court also indicated that, in spite of this deferential standard of review, it assumed a court could “look behind the face of the [challenged decision] to the extent of applying rational basis review.” *Id.* In other words, a court could “consider [a plaintiff’s] extrinsic evidence,” including statements by the President, and should “uphold [the challenged decision] so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.” *Id.* Judicial review, though more deferential than traditional strict scrutiny, remains fact based. Here, considering the substantial extrinsic evidence submitted by Plaintiffs, there are serious questions as to whether the terminations of TPS designations could “reasonably be understood to result from a justification independent of unconstitutional grounds.” *Id.*; *see also Centro Presente*, 2018 U.S. Dist. LEXIS 122509, at \*58-59 (in similar TPS case, stating that, “even if rational basis review were to apply, Plaintiffs’ claims, at this early stage of litigation, would still survive”; noting that “there is no justification, explicit or otherwise, for Defendants’ switch to focusing on whether the conditions that caused the initial designation had abated rather than a fuller evaluation of whether the country would be able to safely accept returnees”).

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In addition to *Ramos* and *Centro Presente*, No. 18-10340 (D. Mass.), referenced by the *Ramos* court, *supra*, other cases in which district courts have denied motions to dismiss claims challenging TPS terminations include: *Saget*, No. 18-1599 (E.D. NY) (Haiti); and *Casa de Maryland*, No. 18-845 (D. Md.) (El Salvador).

## **2. Executive Actions on Refugees and Migration**

### **a. Refugee Admissions**

On October 4, 2018, the President determined that the admission of 30,000 refugees to the United States during Fiscal Year 2019 is justified by humanitarian concerns or otherwise in the national interest and authorized the admission of that number. 83 Fed.

Reg. 55,091 (Nov. 1, 2018). The President made the determination in accordance with section 207 of the Immigration and Nationality Act (the “Act”) (8 U.S.C. 1157), after appropriate consultations with the Congress, and consistent with the Report on Proposed Refugee Admissions for Fiscal Year 2019 submitted to the Congress on September 17, 2018. *Id.*

**b. *Presidential Proclamation on Migration through the Southern Border***

On November 9, 2018, the President issued a proclamation regarding mass migration through the southern border of the United States. 83 Fed. Reg. 57,661 (Nov. 15, 2018) The proclamation responds to the large groups of migrants, primarily from Central America, approaching the U.S. border. The President suspended and limited the entry of aliens across the border with Mexico pursuant to authority in sections 212(f) and 215(a) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(f) and 1185(a), respectively). Excerpts follow from the proclamation.

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**Section 1. *Suspension and Limitation on Entry.*** The entry of any alien into the United States across the international boundary between the United States and Mexico is hereby suspended and limited, subject to section 2 of this proclamation. That suspension and limitation shall expire 90 days after the date of this proclamation or the date on which an agreement permits the United States to remove aliens to Mexico in compliance with the terms of section 208(a)(2)(A) of the INA (8 U.S.C. 1158(a)(2)(A)), whichever is earlier.

**Sec. 2. *Scope and Implementation of Suspension and Limitation on Entry.*** (a) The suspension and limitation on entry pursuant to section 1 of this proclamation shall apply only to aliens who enter the United States after the date of this proclamation.

(b) The suspension and limitation on entry pursuant to section 1 of this proclamation shall not apply to any alien who enters the United States at a port of entry and properly presents for inspection, or to any lawful permanent resident of the United States.

(c) Nothing in this proclamation shall limit an alien entering the United States from being considered for withholding of removal under section 241(b)(3) of the INA (8 U.S.C. 1231(b)(3)) or protection pursuant to the regulations promulgated under the authority of the implementing legislation regarding the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or limit the statutory processes afforded to unaccompanied alien children upon entering the United States under section 279 of title 6, United States Code, and section 1232 of title 8, United States Code.

(d) No later than 90 days after the date of this proclamation, the Secretary of State, the Attorney General, and the Secretary of Homeland Security shall jointly submit to the President, through the Assistant to the President for National Security Affairs, a recommendation on whether an extension or renewal of the suspension or limitation on entry in section 1 of this proclamation is in the interests of the United States.

**Sec. 3. Interdiction.** The Secretary of State and the Secretary of Homeland Security shall consult with the Government of Mexico regarding appropriate steps—consistent with applicable law and the foreign policy, national security, and public-safety interests of the United States—to address the approach of large groups of aliens traveling through Mexico with the intent of entering the United States unlawfully, including efforts to deter, dissuade, and return such aliens before they physically enter United States territory through the southern border.

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Also on November 9, 2018, the U.S. Departments of Justice and Homeland Security published an interim final rule (“Rule”), effective immediately, that an alien entering “along the southern border with Mexico” may not be granted asylum if the alien is “subject to a presidential proclamation ... suspending or limiting the entry of aliens” on this border. 83 Fed. Reg. 55,934 (Nov. 9, 2018). The new rule, in concert with the Proclamation, discussed *supra*, bars aliens from eligibility for asylum if they have entered the United States anywhere but through lawful ports of entry. *Id.*

The Rule was challenged in federal district court by organizations representing asylum applicants. On November 19, 2018, the district court issued a temporary restraining order, finding the Rule to be inconsistent with the INA, which allows aliens to apply for asylum whether or not they arrived at a designated port of entry. *East Bay Sanctuary Covenant v. Trump*, No. 18-16810 (N.D. Cal.), available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

On December 7, 2018, the Court of Appeals for the Ninth Circuit denied the U.S. Government’s motion for a stay of the district court’s temporary restraining order pending appeal, also finding that the Rule is likely inconsistent with existing United States law. *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219 (9th Cir. 2018).

**c. Migration Protection Protocols (“MPP”)**

On December 20, 2018, the Department of Homeland Security announced that, effective immediately, in accordance with Section 235(b)(2)(C) of the INA and new Migration Protection Protocols (“MPP”), “individuals arriving in or entering the United States from Mexico—illegally or without proper documentation—may be returned to Mexico for the duration of their immigration proceedings.” DHS press release, available at <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration>. Secretary of Homeland Security Kirstjen M. Nielsen, provided a statement on the action, *id.*, which is excerpted below:

Today we are announcing historic measures to bring the illegal immigration crisis under control... We will confront this crisis head on, uphold the rule of law, and strengthen our humanitarian commitments. Aliens trying to game the system to get into our country illegally will no longer be able to disappear into the United States, where many skip their court dates. Instead, they will wait for an immigration court decision while they are in Mexico. ‘Catch and release’ will be

replaced with ‘catch and return.’ In doing so, we will reduce illegal migration by removing one of the key incentives that encourages people from taking the dangerous journey to the United States in the first place. This will also allow us to focus more attention on those who are actually fleeing persecution.

Let me be clear: we will undertake these steps consistent with all domestic and international legal obligations, including our humanitarian commitments. We have notified the Mexican government of our intended actions. In response, Mexico has made an independent determination that they will commit to implement essential measures on their side of the border. We expect affected migrants will receive humanitarian visas to stay on Mexican soil, the ability to apply for work, and other protections while they await a U.S. legal determination.

Secretary of State Michael R. Pompeo issued a press statement regarding the actions to counter illegal immigration. His statement follows and is available at <https://www.state.gov/united-states-action-to-confront-illegal-immigration/>.

Today the United States Government announced historic action to confront the illegal immigration crisis facing the United States. We notified the Government of Mexico that the United States is invoking Section 235(b)(2)(c) of the Immigration and Nationality Act. We will begin implementation immediately. Individuals arriving in the United States from Mexico—illegally or without proper documentation—will be returned to Mexico for the duration of their immigration proceedings. In response, the Mexican government has informed us that it will support the human rights of migrants by affording affected migrants humanitarian visas to stay on Mexican soil, the ability to apply for work, and other protections while they await U.S. proceedings.

### **3. Rohingya Refugees**

On June 7, 2018, the United States expressed its support for a Memorandum of Understanding (“MOU”) signed by UNHCR, UNDP, and the Burmese government regarding the voluntary return of Rohingya refugees to Burma. See Department of State Press Statement, available at <https://www.state.gov/u-s-support-of-memorandum-of-understanding-between-unhcr-undp-and-the-government-of-burma-to-create-the-conditions-for-the-voluntary-return-of-rohingya-refugees-from-bangladesh/>. The June 7 press statement includes the following:

This is a positive step. We see this MOU as a confidence-building measure that, if effectively implemented, could allow much-needed humanitarian assistance to reach all affected communities and assist Burma in creating the necessary conditions for voluntary return and to support recovery and resilience-based development for the benefit of all communities living in Rakhine State.

We encourage the Burmese government to fulfill its commitment to work

with UNHCR and UNDP to implement the recommendations of the Kofi Annan-led Advisory Commission on Rakhine State.

**Cross References**

*Nicaragua*, **Ch. 7.D.1.b**

*Migration*, **Ch. 7.D.1.c**

*IACHR petition regarding David Johnson (Jamaican national seeking U.S. citizenship)*, **Ch. 7.D.2.d**

*IACHR submission regarding migration policy*, **Ch. 7.D.2.d**

*IACHR hearing on Temporary Protected Status (“TPS”) and Deferred Action for Childhood Arrivals (“DACA”)*, **Ch. 7.D.2.f**

*Migration talks with Cuba*, **Ch. 9.A.4**

*Visa restrictions relating to human rights and corruption*, **Ch. 16.A.10.b**

*Nicaragua sanctions*, **Ch. 16.A.11.a**

*Burma sanctions*, **Ch. 16.A.11.b**

*Nicaragua*, **Ch. 17.B.6**

*South Sudan*, **Ch. 17.B.8**

*Burma*, **Ch. 17.C.1**

## CHAPTER 2

### Consular and Judicial Assistance and Related Issues

#### A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

##### 1. UNGA Resolution on Consular Notification

On December 20, 2018, U.S. Representative to the UN for Economic and Social Affairs Kelley Currie delivered the U.S. explanation of vote on a UN General Assembly resolution put forward by Mexico regarding the International Court of Justice's decision in *Avena*. See *Digest 2004* at 37-43 for discussion of the ruling in *Avena*; see *Digest 2008* at 175-93 for discussion of the U.S. Supreme Court decision in *Medellín*. Ambassador Currie's remarks are excerpted below and available at <https://usun.usmission.gov/explanation-of-vote-before-the-vote-on-mexicos-unga-resolution-on-the-international-criminal-court-of-justice-avena-decision/>.

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The United States believes that it is inappropriate that Mexico has brought this bilateral matter to the UN General Assembly. We are also disappointed that Mexico failed to consult with the United States prior to circulating the draft resolution. We will vote “no” on this resolution.

Our vote should not be interpreted as a repudiation of our international obligations regarding consular notification and access. On the contrary, the United States continues to take very seriously our international obligations with respect to consular notification and access.

We will vote “no” to affirm that the UN General Assembly is not the appropriate venue for this issue. The United States continues to take steps with respect to the *Avena* judgment, and we have engaged in close and extensive consultations with Mexico.

The United States notes that the United States Supreme Court has held, in *Medellin v. Texas*, that the ICJ's *Avena* decision does not constitute directly enforceable federal law and that U.S. obligations could be discharged through the adoption of federal legislation.

This resolution will not alter the force of the Supreme Court's decision as binding upon the United States government. Accordingly, legislation that would facilitate actions consistent with the *Avena* judgment in the United States was included in the President's Fiscal Year 2019 budget request.

The State Department has engaged directly with relevant state authorities in the United States, urging them to take the necessary steps to give effect to the *Avena* decision.

The United States has closely consulted with Mexico on its efforts to implement the *Avena* judgment, and has kept Mexico informed of its efforts. Mexico's decision to introduce this resolution was unfortunate. We call on all delegations to vote "no" on this resolution.

\* \* \* \*

## 2. Engagement with states regarding *Avena*

On November 14, 2018, U.S. Department of State Legal Adviser Jennifer G. Newstead sent a letter to Governor Greg Abbott of Texas regarding Roberto Moreno Ramos, a Mexican national whose case was addressed by the ICJ in *Avena*. The text of the body of the letter appears below.

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As the Legal Adviser of the U.S. Department of State, I am writing with regard to the case of Roberto Moreno Ramos, a Mexican national scheduled to be executed in Texas on November 14, 2018, and the cases of five other Mexican nationals convicted of capital crimes in Texas and still awaiting execution dates.

The United States and Mexico are both parties to the Vienna Convention on Consular Relations (Vienna Convention), which requires, among other things, that states inform foreign nationals upon their arrest of the option to have their consulate notified of the arrest, and provide such notification upon request and without delay. In 2004, the International Court of Justice (ICJ) found that the United States breached these obligations in the case of Mr. Ramos and 51 other Mexican nationals in the *Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.) 2004 I.C.J. 12 (March 31),<sup>11</sup> and directed the United States to provide effective judicial review and reconsideration of any claims of actual prejudice to the affected Mexican nationals.

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<sup>11</sup> The ICJ found that the United States had breached its obligations under Article 36 of the Vienna Convention with respect to Mr. Ramos, specifically Article 36(1)(b), by failing to inform Mr. Ramos of his option to have the Mexican consulate notified of his arrest and failing to provide such notification; Article 36(1)(a) by failing to enable Mexican consular officers to communicate with and have access to him; and Article 36(1)(c) regarding the right of consular officers to visit him and arrange for his legal representation. The ICJ also noted that Mr. Ramos's case was one of only three where the United States was in breach of its obligations under Article 36(2) because his criminal proceedings had already reached a stage "at which there is no further possibility of judicial reexamination" because his conviction and sentence had already become final by the time of the *Avena* judgment.

Shortly after the ICJ's judgment, the United States withdrew from the Vienna Convention Optional Protocol under which the ICJ had asserted jurisdiction to hear the dispute. However, this withdrawal did not directly alter the status of the ICJ's *Avena* decision.

In *Medellin v. Texas*, 552 U.S. 491 (2008), the United States Supreme Court held that the ICJ's *Avena* decision does not constitute directly enforceable federal law and that a Presidential Memorandum alone could not render it so. Under the federal legal framework currently applicable to this matter, the actions of the State of Texas will determine whether the United States carries out the actions called for by the *Avena* decision. I respectfully request that Texas take the steps necessary to give effect to the *Avena* decision with respect to Mr. Ramos' case and those of the other Mexican nationals referenced in the *Avena* decision who, to the best of the Department of State's knowledge, remain in Texas custody.<sup>12</sup>

Your assistance in this matter is important to the interests of the United States and its citizens, including Texans detained abroad. The United States relies on foreign governments' reciprocal enforcement of the consular notification and access provisions of the Vienna Convention and other applicable consular agreements to obtain access to U.S. citizens detained abroad, many of whom are from Texas, and a perception of unaddressed U.S. noncompliance could put those citizens at risk. The United States has other important foreign policy interests in complying with the consular notification and access provisions of the Vienna Convention, including maintaining strong relations with Mexico.

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## **B. CHILDREN**

### **1. Adoption**

In April 2018, the State Department released its Annual Report to Congress on Intercountry Adoptions. The Fiscal Year 2017 Annual Report, as well as past annual reports, can be found at <https://travel.state.gov/content/adoptionsabroad/en/about-us/publications.html>. The report includes several tables showing numbers of intercountry adoptions by country during fiscal year 2017, average times to complete adoptions, and median fees charged by adoption service providers.

Suzanne Lawrence, Special Advisor for Children's Issues at the U.S. Department of State, provided a special briefing on March 23, 2018 on the release of the Fiscal Year 2017 Annual Report on Intercountry Adoption. That briefing is excerpted below and available at <https://www.state.gov/suzanne-lawrence-special-advisor-for-childrens-issues-on-the-release-of-the-fiscal-year-2017-annual-report-on-intercountry-adoption/>.

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<sup>12</sup> Cesar Roberto Fierro Reyna (El Paso County), Ignacio Gomez (El Paso County), Felix Rocha Diaz (Harris County), Juan Carlos Alvarez Banda (Harris County), and Ramiro Rubi Ibarra (McLennan County).

In addition to the Intercountry Adoption Act of 2000, the United States became a party to the Hague Convention on Intercountry Adoption in 2008. And those are two pieces of legislation that guide us each and every day—that, and the really important goal of ensuring that every child deserves the security and love of a permanent family. It's ... inspiring, but we are also inspired by the adoptions that we help complete every day. And that inspiration further fuels our dedication as we work with the foreign countries, with the adoption service providers, with families, and with the broader adoption community.

We know that we owe it to all of those people—especially to the adoptive families and to the children who are being adopted, as well as the birth parents—that intercountry adoptions are ethical and transparent. And what that means, really, in a practical sense, is that we're out there each and every day, here in Washington and around the world through our embassies and consulates, advocating for children and putting in place safeguards so that we can protect against any abuses of the intercountry adoption system.

I know you've received a copy of the report, and maybe you've had some time to look at it. I thought it would be helpful to provide a little bit of context and also to focus on three areas that I thought would be of most interest.

So let's start with the numbers. You've seen that the report has a lot of numbers in it. The overall number of adoptions to the United States in Fiscal Year 2017 was 4,714. And that does represent a decline of 658 from the previous year. And again, to provide some context for this year's numbers, I think the most important thing to note is that this is a decrease in intercountry adoptions, which is a global trend over the last decade. Other receiving countries report similar reductions in the number of children adopted internationally.

I think another thing that is ... helpful in looking at the numbers is that even with those lower overall numbers due to the global decline, U.S. families consistently provide homes to 50 percent of the adopted children who are placed internationally. I think that speaks a lot to Americans and the families that are continuing to open their hearts and their homes to children in special situations. The United States actually receives the most special needs children, the most sibling groups, and the most children over age nine, and that's worldwide.

The other thing I would say about the numbers is that when you look at that decline in 2017, it was primarily driven by internal changes in just two countries. The first is China, and the reason for that is something that I'm sure many of you are aware of, that there has been a growing, a rising middle class in China. And so we've seen an increase in domestic adoptions, and so that would explain China's role in that decline. And the other country that represents the primary drive behind the reduction in last year's report is that... in the Democratic Republic of Congo, and that's really an internal decision that was made there where the country actually no longer issues exit permits to adopted Congolese children who are seeking to depart the country with their adoptive parents. So I hope that's been helpful in understanding all those numbers and drawing out what we think are some of the more significant facts.

The other thing that I would point out are the barriers. What are the barriers to intercountry adoption? And when we look at what those barriers are, we find the most common one is that, unfortunately, we do continue to hear from families who are harmed by illicit and illegal practices in intercountry adoption. Sadly, even one case of corruption or fraud reduces confidence in the system. And you know these are families that just want to give a child a loving home, but unfortunately, they would lose that chance because of corrupt or unethical practices. We work together with these families to identify and address the vulnerabilities, and then in the work that we carry out every day, we look to provide appropriate monitoring and oversight of

adoption service providers, and that's really to protect these families' children, both birth and adoptive, and again, to preserve the future of intercountry adoption.

The last thing that I wanted to draw out from the report is really what can we do? What does the Department do? What is our response to these barriers? Because I think this is an area where the Department of State can and does make a difference. We take very seriously our legal mandate to ensure appropriate monitoring and oversight of these adoption agencies and service providers so that we can preserve the future of intercountry adoption. And we work very closely with Congress to ensure that we fulfill our obligations under the law.

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... The report does give some information about children who are adopted from the United States, so you may have seen that statistic in Fiscal Year 2017. It's a small number, 83 children, that were adopted from the United States and they went to seven different countries—the vast majority to Canada, the next group to the Netherlands, and then the third ranking there would be Ireland.

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...[W]e want to ensure that the practice of intercountry adoption is ethical and sustainable. And so these are really the cornerstones of what we're working towards. ...[L]egally we have the obligation to provide oversight for the accrediting entity that works with adoption service providers to monitor their activities. All of that is part of a long-term plan to ensure the viability of intercountry adoptions, again by ensuring the system is ethical and transparent. That benefits adoption service providers, it benefits the adoption community, it benefits children and families here in the United States and internationally.

As I mentioned earlier, the ability to work with foreign governments who are sending countries is determined by their confidence in what we do. And that's why we need to build that confidence through our monitoring and oversight. If we don't do that, they can consider suspending placement of children with U.S. families or even closing intercountry adoptions altogether. Because ... there were concerns about the move to a new accrediting entity, we have had numerous calls with stakeholders, with adoption service providers, with adoption advocacy groups, with members of Congress, with their staffers. So we have done a lot of information. They have had the opportunity to talk to the leadership of the new accrediting entity. And you might be interested in a message from our assistant secretary that went onto our website where he actually goes into some great detail about the designation of the accrediting entity and what they do, which is supervision of the adoption service providers. But there is a fairly lengthy letter there from him that I think would go to some of the concerns that you have pointed out.

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## **2. Abduction**

### **a. Annual Reports**

As described in *Digest 2014* at 71, the International Child Abduction Prevention and Return Act (“ICAPRA”), signed into law on August 8, 2014, increased the State Department’s annual Congressional reporting requirements pertaining to countries’ efforts to resolve international parental child abduction cases. In accordance with ICAPRA, the Department submits an Annual Report on International Parental Child Abduction to Congress each year and a report to Congress ninety days thereafter on the actions taken toward those countries cited in the Annual Report for demonstrating a pattern of noncompliance. See International Parental Child Abduction page of the State Department Bureau of Consular Affairs, <https://travel.state.gov/content/childabduction/en/legal/compliance.html>.

Annual reports on international child abduction are available at <https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/providers/legal-reports-and-data/reported-cases.html>.

### **b. Hague Abduction Convention**

On March 1, 2018, the 1980 Hague Convention on the Civil Aspects of International Child Abduction entered into force between the United States and Armenia. See March 7, 2018 State Department media note, available at <https://www.state.gov/united-states-armenia-hague-convention-on-international-child-abduction/>. The United States had 77 partners under the Convention as of March 2018. As explained in the March 7, 2018 media note:

The Convention provides a civil law mechanism for parents seeking the return of children who have been wrongfully removed from or retained outside their country of habitual residence in violation of custodial rights. Parents seeking access to children residing in treaty partner countries may also invoke the Convention. The Convention is important because it establishes an internationally recognized legal framework to resolve international parental child abduction cases. The Convention does not address who should have custody of the child; rather it addresses where issues of child custody should be decided.

**Cross References**

*Children*, **Chapter 6.C**

*Enhanced consular immunities*, **Chapter 10.D.3**

## CHAPTER 3

### International Criminal Law

#### A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

##### 1. Extradition Treaties

On July 26, 2018, the U.S. extradition treaties with the Republic of Kosovo and the Republic of Serbia received the U.S. Senate's advice and consent to ratification. In each case, the resolution of ratification includes a declaration to the effect that the treaty is self-executing. Treaty Doc. 115-1, 115-2. The treaty with Kosovo is available at <https://www.state.gov/kosovo-19-613>. The treaty with Serbia is available at <https://www.state.gov/serbia-19-423>.\*

##### 2. Extradition of Former President Martinelli

On June 11, 2018, the State Department announced in a media note, available at <https://www.state.gov/extradition-to-panama-of-former-president-martinelli/>, that the United States had extradited to Panama the former president of Panama, Ricardo Martinelli. The extradition was completed in accordance with the extradition treaty between the United States of America and the Republic of Panama. The former president was arrested in Miami on June 12, 2017, based on an extradition request from the Panamanian government, to face criminal prosecution.

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\* Editor's note: The treaty with Serbia entered into force on April 23, 2019 after the parties exchanged instruments of ratification at Belgrade. The treaty with Kosovo entered into force June 13, 2019 after exchange of instruments of ratification at Pristina.

### 3. Extradition of Russian Arms Dealers from Hungary

On November 27, 2018, the State Department issued a press statement on the U.S. request to Hungary for the extradition of two suspected Russian arms dealers. The statement, available at <https://www.state.gov/hungary-lyubishin-extradition/>, follows.

The United States requested the extradition of two suspected Russian arms dealers, Vladimir Lyubishin Sr. and Vladimir Lyubishin Jr., pursuant to the U.S.-Hungary Extradition Treaty. Hungary denied the U.S. request and instead extradited the suspects to Russia, where it is unclear whether they will face trial.

The United States is disappointed in the Hungarian government's decision to extradite the Lyubishins to Russia. The United States had a strong case, built in cooperation with members of Hungarian law enforcement. Hungary is a partner and friend of the United States, but this decision raises questions about Hungary's commitment to law enforcement cooperation. This decision is not consistent with our law enforcement partnership, undercuts the work that our agencies had done together to build this case, and will make citizens in the United States, Hungary, and the world less safe.

### 4. Extradition of Meng Wanzhou

On December 21, 2018, the State Department issued a press statement on the arrest in Canada of a Chinese national in response to a U.S. request under the U.S.-Canada extradition treaty. The statement follows and is available at <https://www.state.gov/canadas-legitimate-arrest-of-huawei-cfo-meng-wanzhou/>.

Canada, a country governed by the rule of law, is conducting a fair, unbiased, and transparent legal proceeding with respect to Ms. Meng Wanzhou, the Chief Financial Officer of Huawei. Canada respects its international legal commitments by honoring its extradition treaty with the United States. We share Canada's commitment to the rule of law as fundamental to all free societies, and we will defend and uphold this principle. We also express our deep concern for the Chinese Government's detention of two Canadians earlier this month and call for their immediate release.

### 5. Universal Jurisdiction

Julian Simcock, Deputy Legal Adviser for the U.S. Mission to the United Nations, delivered remarks on October 9, 2018 at a meeting of the Sixth Committee on the scope and application of the principle of universal jurisdiction. His remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-87-scope-and-application-of-the-principle-of-universal-jurisdiction/>.

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We greatly appreciate the Sixth Committee's continued interest in this important item. We thank the Secretary-General for his reports, which have usefully summarized the submissions made by states on this topic.

Despite the importance of this issue and its long history as part of international law relating to piracy, the United States' view is that basic questions remain about how jurisdiction should be exercised in relation to universal crimes and States' views and practices related to the topic.

We have engaged in lengthy, thoughtful discussions on a variety of important topics regarding universal jurisdiction, including its definition, the scope of the principle, as well as its application, in the years since the Committee took up this issue. The submissions made by states to date, the work of the Working Group in this Committee, and the Secretary-General's reports have been extremely useful in helping us to identify differences of opinion among states as well as points of consensus on this issue. We remain interested in further exploring issues related to the practical application of universal jurisdiction.

The United States continues to analyze the contributions of other states and organizations. We welcome this Committee's continued consideration of this issue and the input of more states about their own practice. We look forward to exploring these issues in as practical a manner as possible.

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## **B. INTERNATIONAL CRIMES**

### **1. Terrorism**

#### ***a. Determination of Countries Not Fully Cooperating with U.S. Antiterrorism Efforts***

On May 5, 2018, Secretary Pompeo issued his determination and certification, pursuant to, *inter alia*, section 40A of the Arms Export Control Act (22 U.S.C. § 2781), that certain countries "are not cooperating fully with United States antiterrorism efforts." 83 Fed. Reg. 23,988 (May 23, 2018). The countries are: Eritrea, Iran, Democratic People's Republic of Korea, Syria, and Venezuela.

#### ***b. Country Reports on Terrorism***

On September 19, 2018, the Department of State released the 2017 Country Reports on Terrorism. The annual report is submitted to Congress pursuant to 22 U.S.C. § 2656f, which requires the Department to provide Congress a full and complete annual report on terrorism for those countries and groups meeting the criteria set forth in the legislation. The report covers the 2017 calendar year and provides policy-related

assessments; country-by-country breakdowns of foreign government counterterrorism cooperation; and information on state sponsors of terrorism, terrorist safe havens, foreign terrorist organizations, and the global challenge of chemical, biological, radiological, and nuclear terrorism. The report is available at <https://www.state.gov/reports/country-reports-on-terrorism-2017/>. On September 19, 2018, Ambassador-at-Large and Coordinator for Counterterrorism Nathan A. Sales provided a briefing on key aspects of the report, which is available at <https://www.state.gov/coordinator-for-counterterrorism-nathan-a-sales-on-the-release-of-the-country-reports-on-terrorism-2017/>, and excerpted below.

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... Country Reports on Terrorism is an important document laying out the United States Government's assessment of recent counterterrorism trends and highlighting some of the efforts that we and our partners have taken to combat groups like ISIS, al-Qaida, Iran-backed threats, and other terrorist groups of global reach.

Let me start with some numbers. The report includes a statistical annex that was prepared by the National Consortium for the Study of Terrorism and Responses to Terrorism just down the street at the University of Maryland. The annex notes that the total number of terrorist attacks worldwide in 2017 decreased by 23 percent. Similarly, the total deaths due to terrorist attacks decreased by 27 percent. Both of those are compared to the numbers for 2016.

While numerous countries saw a decline in terrorist violence between 2016 and 2017, this overall trend was largely due to dramatically fewer attacks and deaths in Iraq. Although terrorist attacks took place in 100 countries in 2017, they were concentrated geographically. Fifty-nine percent of all attacks took place in five countries. Those are Afghanistan, India, Iraq, Pakistan, and the Philippines. Similarly, 70 percent of all deaths due to terrorist attacks took place in five countries, and those are Afghanistan, Iraq, Nigeria, Somalia, and Syria.

The report notes a number of major strides that the United States and our international partners made to defeat and degrade terrorist organizations in 2017. We worked with allies and partners around the world to expand information sharing, improve aviation security, enhance law enforcement and rule of law capacities, and to counter terrorist radicalization with a focus on preventing recruitment and recidivism.

In December 2017, the U.S. drafted UN Security Council Resolution 2396, was adopted unanimously with 66 co-sponsors. UNSCR 2396 requires member-states to collect and use biometrics and traveler data, including passenger name record data, to identify and disrupt terrorist travel and to develop watch lists or databases of known and suspected terrorists. We continue to engage foreign partners to conclude bilateral arrangements for the exchange of identity information on known and suspected terrorists. This is pursuant to Homeland Security Presidential Directive 6, or HSPD-6.

Since 2007, the CT Bureau and the FBI's Terrorist Screening Center have signed 71 of these arrangements with foreign partners, and they're helping to identify, track, and deter the travel of known and suspected terrorists.

2017 saw the United States and a global coalition accomplish major efforts against ISIS. Ninety-nine percent of the territory ISIS once held in Iraq and Syria has now been liberated. Approximately 50 percent of those gains were achieved since January of 2017. Similarly, more than 7.7 million people have been liberated from ISIS' brutal rule—approximately 4.5 million in Iraq and 3.2 million in Syria. Of those 7.7 million people, an estimated 5 million have been liberated since 2017.

We increased pressure on al-Qaida to prevent its resurgence. We're working closely with our allies to counter al-Qaida's ability to recruit, raise money, travel, and plot. In May of this year, the State Department expanded the terrorist designation of an al-Qaida affiliate in Syria. We also designated al-Qaida's Mali branch earlier this month, on September 5th, and we have led efforts at the UN Security Council to designate numerous organizations and individuals affiliated with al-Qaida.

Despite these many successes, the terrorist landscape grew more complex in 2017. ISIS, al-Qaida, and their affiliates have proven to be resilient, determined, and adaptable. They have adjusted to heightened counterterrorism pressure in Iraq, Syria, Somalia, and elsewhere. Foreign terrorist fighters are heading home from the war zone in Iraq and Syria or traveling to third countries to join ISIS branches there. We also are experiencing an increase in attacks by homegrown terrorists—that is, people who have been inspired by ISIS but have never set foot in Syria or Iraq. We've seen ISIS-directed or ISIS-inspired attacks outside the war zone on soft targets and in public spaces like hotels, tourist resorts, and cultural sites. We've seen this trend in places as far afield as Bamako, Barcelona, Berlin, London, Marawi, New York City, Ouagadougou, and many others.

Iran remains the world's leading state sponsor of terrorism and is responsible for intensifying multiple conflicts and undermining U.S. interests in Syria, in Yemen, in Iraq, in Bahrain, in Afghanistan, and in Lebanon, using a number of proxies and other instruments such as Lebanese Hizballah and the Islamic Revolutionary Guard Corp's Quds Force. The threats posed by Iran's support for terrorism are not confined to the Middle East; they are truly global. Since 2012 alone, Hizballah has conducted a successful attack in Bulgaria that killed six, it has undertaken two separate plots in Cyprus, and it has developed large caches of military equipment and explosives in Kuwait, Nigeria, and Bolivia while sending terrorist operatives to Peru and Thailand.

On June 30th of this year, German authorities arrested an Iranian official for his role in a terrorist plot to bomb a political rally in Paris. Authorities in Belgium and France also made arrests in connection with this Iranian-supported terrorist plot.

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**c. United Nations**

On October 3, 2018, Emily Pierce, Counselor to the U.S. Mission to the United Nations delivered remarks at a meeting of the Sixth Committee on "Agenda Item 109: Measures to Eliminate International Terrorism." Her remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-109-measures-to-eliminate-international-terrorism/>.

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The United States reiterates both its firm condemnation of terrorism in all its forms and manifestations as well as our commitment to the common fight to end terrorism. All acts of terrorism—by whomever committed—are criminal, inhumane and unjustifiable, regardless of motivation. The United States is committed to using all of our tools to end terrorism, including through our efforts with the Global Coalition to Defeat ISIS. Given the often transnational nature of modern terrorist groups, it is clear that an unwavering and united effort by the international community is required if we are to succeed in fully preventing and countering terrorism. In this respect, we recognize the United Nations’ critical role in mobilizing the international community, building capacity, and facilitating technical assistance to Member States in implementation of the United Nations Global Counter-Terrorism Strategy and relevant resolutions, as well as the UN Plan of Action to Prevent Violent Extremism.

We note the 6th biannual review of the UN Global Counter-Terrorism Strategy last June. The Strategy’s four pillars—including on addressing the conditions conducive to the spread of terrorism and upholding human rights and the rule of law—remain as valid and relevant today as when the Strategy was adopted 12 years ago. The GCTS, and the General Assembly’s biennial review resolutions, notwithstanding several serious flaws that the United States hopes will be rectified in future resolutions, have given the Secretariat the guidance it needs to help Member States implement the Strategy. This includes preventing violent extremism, PVE, and supporting the Secretary-General’s High Level Action Group to mainstream PVE across the UN system, implementation of the recommendations laid out in the UN’s PVE Plan of Action, as well as other efforts to help Member States adopt a whole-of-society approach to countering terrorism and violent extremism.

A major success and addition to the global counterterrorism framework was the Security Council’s unanimous adoption of Resolution 2396 in December 2017, which updated Resolution 2178 and provided greater focus on measures to address returning and relocating foreign terrorist fighters, FTFs, and transnational terrorist groups. Resolution 2396 built on 2178 by creating new international obligations and highlighting other actions to strengthen border security and information sharing, strengthen judicial measures and international cooperation, ensure appropriate prosecution, rehabilitation, and reintegration of FTFs and their accompanying family members, and strengthen Member States’ cooperation, including with the private sector, to protect public spaces and soft targets. The resolution rightly reiterates the ongoing terrorist threat against soft targets and, in doing so, complements ongoing efforts to better protect critical infrastructure under UN Security Council resolution 2341. Of key importance are 2396’s new obligations concerning Passenger Name Record, PNR, data, Advanced Passenger Information, API, biometrics, and watchlists—all vital counterterrorism tools. As part of our efforts to address ISIS operations outside of Iraq and Syria, we must also pursue the goal of UN Security Council resolution 2309 to elevate aviation security standards globally to ensure countries are less susceptible to the threat of terrorism. These efforts must include countering insider threat and deploying next-generation screening technologies.

One important aspect of the Security Council’s work in recent years is that Member States are increasingly adopting the ‘whole-of-government’ approach to countering terrorism. Recent resolutions underscore the importance of having all elements of government, including

ministries of finance, justice, interior and security, and information and communications, work together to prevent and counter terrorism and violent extremism.

We are seeing results. Combined with intense military pressure from the United States alongside the Defeat-ISIS coalition, Member States' implementation of Security Council resolution 2178—aimed at stemming the flow of FTFs—made a tremendous impact on the ground in Syria and Iraq, where 99 percent of the territory ISIS once held, and 7.7 million people once under ISIS' brutal rule, have now been liberated. The United States now has information sharing arrangements with over 70 international partners to help identify, track, and deter known and suspected terrorists. We can all stand to learn from each other on these gains, but there is much more work that can be done to fully implement Resolution 2178 and Resolution 2396 as FTFs seek to return to their home countries and relocate elsewhere.

From international legal cooperation, to critical infrastructure security and resilience, to countering terrorist narratives, the UN can play a meaningful role in addressing new challenges that arise in the fight against terrorism. We express our firm support for these UN efforts, as well as those of the Global Counterterrorism Forum, GCTF, and other multilateral bodies, civil society, the private sector and non-governmental organizations, and regional and subregional organizations that work to develop practical tools to further the implementation of the UN counterterrorism framework. We call for continued coordination among UN entities and with external partners, including the GCTF and its related initiatives and platforms such as the International Institute for Justice and the Rule of Law and Hedayah, which advance practical implementation of the UN Global Counter-Terrorism Strategy through training, capacity building, and grant-making for community-based preventing and countering violent extremism projects. In this regard, we welcome the close cooperation and partnership between the UN and the GCTF and the Joint UN-GCTF Ministerial Statement endorsed on September 26th at the GCTF Ministerial.

We also welcome the General Assembly's decision to bring greater coherence to the UN's role in countering terrorism and violent extremism by approving the creation of the UN Office of Counterterrorism. The United States was among the strongest advocates for this overdue reform, and we look forward to UNOCT's leadership in making the UN CT work efficient.

We encourage continued close coordination between the UN Office of Counter-Terrorism and CTED, and welcome their joint report in response to UN Security Council resolution 2395 to improve coordination between the two entities, so that country assessments can serve as the basis for technical assistance and capacity-building. Furthermore, efforts to counter terrorism that come at the expense of human rights and the rule of law are counterproductive and often feed the bankrupt narrative of terrorists. For these reasons, CTED and the UNOCT must pursue a balanced approach to implementing the UN Global Counter-Terrorism Strategy and the recommendations of the Secretary-General's Plan of Action to Prevent Violent Extremism that recognizes the importance of preventing violent extremism, respecting human rights and the rule of law. UN counterterrorism efforts benefit from engagement with a wide range of actors, including youth; families; women; religious, cultural, and educational leaders; and other elements of civil society—in addition to governments and the private sector.

Domestically, we continue to engage and raise community awareness of violent extremism or radicalization to terrorism and recruitment dynamics, as well as provide community leaders tools and resources to work on prevention efforts. One continuing area of work is state and local intervention services for individuals headed down a path toward violent

extremism or radicalization to terrorism before a crime is committed. We look forward to continued exchanges on these issues with our international partners.

We continue to emphasize the importance of countering the use of the Internet for terrorist purposes, while respecting human rights such as freedom of expression and recognizing that the Internet is but one tool used by terrorists. While taking appropriate law enforcement action against criminal activities online, we have also worked to strengthen and expand our ongoing voluntary collaboration and partnerships with private technology companies, who counter terrorist content online by enforcing their terms of service. We applaud the efforts being made by the industry-led Global Internet Forum to Counter Terrorism and UN-affiliated Tech Against Terrorism in this regard. As Member States continue to work together to implement the UN Global Counter Terrorism Strategy and resolutions such as UNSCR 2354 on countering terrorist narratives, we must seek to build long-term resilience to terrorist messages through partnerships with youth to cultivate critical thinking skills and online public safety awareness through education. Yet the problem cannot be solved by governments and private companies alone, and we are seeking ways to involve civil society, academia, and community leaders in developing a long-term comprehensive solution.

To help achieve this long-term and comprehensive vision, we need all Member States to better assist and sufficiently resource UN system actors and other relevant implementers in order to deliver needed technical assistance and generate more effective solutions. To do our part, we are pleased to note that we continue to make voluntary contributions to the UNODC Terrorism Prevention Branch, UNDP, INTERPOL, and UNICRI for development of research, capacity-building assistance, and training. We encourage other interested Member States to help share the burden of helping the UN implement the Global Counter-Terrorism Strategy, both by helping it improve its own work and its efforts to assist Member States. These include preventing and countering violent extremism, and implementing relevant UN Security Council resolutions, including resolution 2396.

Beyond the UN, we should also continue to partner with local communities and key civil society organizations. They will often be among the most effective in countering terrorist lies.

Focusing now on treaty developments, we recognize the great success of the United Nations, thanks in large part to the work of this Committee, in developing 18 universal instruments that establish a thorough legal framework for countering terrorism. The achievements on this front are noteworthy. We have witnessed a dramatic increase in the number of states that have become party to these important counterterrorism conventions. For example, there are 188 parties to the Terrorist Financing Convention.

The United States recognizes that while the accomplishments of the international community in developing a robust legal counterterrorism regime are significant, there remains much work to be done to make this regime fully serve its purpose. The 18 universal counterterrorism instruments are only effective if they are widely ratified and implemented. In this regard, we fully support efforts to promote ratification and implementation of these instruments. We draw particular attention to the six instruments concluded since 2005—the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, Nuclear Terrorism Convention; the 2005 Amendment to the Convention on the Physical Protection of Nuclear Material, CPPNM Amendment; the 2005 Protocols to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, SUA Protocols; the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation; and the 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft.

While the work of the international community began with the negotiation and conclusion of those instruments, that work will only be completed when those instruments are widely ratified and fully implemented.

And as we move forward with our collective efforts to ratify and implement these instruments, the United States remains willing to work with other states to build upon and enhance the counterterrorism framework. Concerning the Comprehensive Convention on International Terrorism, we will listen carefully to the statements of other delegates at this session. We would highlight in this regard that it is critical that the United Nations send united, unambiguous signals when it comes to terrorism, otherwise we risk some of the progress that we have made.

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**d. *Global Coalition to Defeat ISIS***

On February 13, 2018, the United States concluded a joint statement with other members of the Global Coalition to Defeat ISIS. The Joint Statement was released as a State Department media note, available in full at <https://www.state.gov/joint-statement-of-guiding-principles-from-the-global-coalition-to-defeat-isis/>. The February 13, 2018 Joint Statement of the Global Coalition is excerpted below.

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We, the Foreign Ministers and principals of the Global Coalition, have come together in Kuwait City united in our determination to defeat ISIS/Da'esh through a focused, sustained, multifaceted effort. We know our enemy: ISIS/Da'esh is intrinsically malevolent, celebrates cruelty, systematically violates international law and regularly commits gross abuses of human rights. Yet three and a half years into this effort, ISIS/Da'esh stands undeniably degraded—it has lost its territorial hold in Iraq and only a few pockets of land remain under its control in Syria. Its leadership, on-line presence and global networks are under pressure. But our work is not done. ISIS/Da'esh remains a serious threat to the stability of the region and to our common security. Enduring defeat will come when ISIS/Da'esh no longer has safe havens from which to operate; when it no longer poses a threat to our homelands; and when it can no longer convey its ideology of hate globally. Recognizing that we are at an inflection point, where we must sustain attention to Iraq and Syria to secure our significant gains, while simultaneously adapting our footing to curb ISIS/Daesh's global ambitions, we offer these Guiding Principles as our vision for the future of this Coalition.

Ultimately to achieve a full and enduring defeat of ISIS/Da'esh, the Coalition will fully eliminate ISIS/Da'esh as a territorial threat in Iraq and Syria and stabilize liberated communities in an inclusive manner. We will mobilize Coalition members and external partners, using a whole-of-government approach, to disrupt ISIS/Da'esh networks and its branches and affiliates, including possible new manifestations and variants, and deny its freedom of movement, safe havens, and access to resources in accordance with and in support of UNSCR 2396. We will

combat ISIS/Da'esh's ideology to prevent its reemergence, recruitment, and expansion. We will support local voices that offer an alternative vision to ISIS/Da'esh's propaganda, and we will redouble our efforts to deny ISIS/Da'esh space to exploit social media and the Internet. We will work to consolidate our gains to date and prevent a re-emergence of ISIS/Da'esh by supporting Iraqi-led political and security sector reforms, and, through UNSCR 2254, committing to reach a political solution in Syria, thus helping to address root causes for the appearance of ISIS/Da'esh.

Our approach rests on a number of key pillars. First, we see this Coalition as a mobilizing and coordinating mechanism nested in a much larger diplomatic, military and counterterrorism ecosystem, in accordance with the principles of international law, including the Charter of the United Nations, and relevant Security Council Resolutions. Second, we recognize nations bear primary responsibility for defending their homelands against ISIS/Da'esh; our Coalition must work by, with, and through our partners. Third, membership in this Coalition is voluntary, as are the contributions each of us makes to this effort. Fourth and finally, we agree there is no single approach to the defeat of ISIS/Da'esh—each one is tailored to address the unique nature of the threat in a given country or region—importantly, most approaches to ISIS/Da'esh globally will not mirror our efforts in Iraq and Syria, where Coalition-led military action has been central. That said, we agree there is great utility in sustaining collaboration and unity of purpose across the Coalition against ISIS/Da'esh and ISIS-related threats on a global scale.

At the heart of our collaboration are the Coalition's Working Groups, and each one has a unique path forward.

The Counter-Finance Working Group (CIFG) focuses on identifying and disrupting ISIS/Da'esh's ability to generate revenue and access the regional and international financial systems. ...

The Foreign Terrorist Fighter Working Group (FTF WG) focuses on supporting and encouraging preventive, counter-terrorism-related information sharing through appropriate bilateral and collective law enforcement channels (such as Interpol), rehabilitation/reintegration, law enforcement and legal/criminal justice actions to mitigate the FTF threat (including FTF and their families returning, relocating and resurfacing). ...

The Communications Working Group seeks to contest the information space in which ISIS/Da'esh operates and to ensure that the contraction of the group's territory is followed by its ideological defeat. ...

The Working Group on Stabilization plays a central role coordinating and promoting international stabilization efforts in Iraq and, where possible, in Syria. Successful IDP return is essential to consolidate the military defeat of ISIS/Da'esh. ... [T]he Police Training Sub Group will strengthen its focus on "blue training" and support the Iraqi government's efforts to restructure the Federal police and create a civilian police force that represents and is trusted by all citizens in Iraq. In Syria, the Working Group on Stabilization will coordinate and promote stabilization efforts with the aim of strengthening credible, inclusive and non-sectarian governance, in accordance with and in support of UNSCR 2254.

The defense aspects of the Coalition also will continue to evolve as the nature of the threat changes and the Coalition increasingly focuses on ISIS/Da'esh networks and branches. As with the Coalition's Foreign Ministers, Defense Ministries also will continue to coordinate regularly on how best to address the threat. The Coalition will pursue its military commitment in Iraq and Syria, and the existing Coalition Force Command in Tampa will continue to support the efforts in the region, in order to secure and stabilize the liberated areas to help retain our significant successes against ISIS/Da'esh to date.

Across lines of effort, we will work to ensure women and women's organizations are fully and actively engaged and included in peacebuilding and stabilization efforts, in accordance with UNSCR 2242, and will seek to ensure our policies and practices are gender-informed and guided by international legal frameworks.

The Global Coalition to Defeat ISIS/Da'esh was founded in September 2014 based on the worldwide concern over ISIS/Da'esh and the threat it poses to international peace and security. The Coalition has made enormous progress since then, but our work is not done. Looking ahead, we recognize the need to remain alert to the inevitable evolution of the ISIS/Da'esh threat, and to flexibly adapt our response, including through existing multilateral and regional counterterrorism and CVE institutions. We will revisit these Guiding Principles as appropriate. We recognize that the Coalition and its Working Groups serve to focus the international community's attention on countering the global/transnational threat of ISIS/Da'esh. With that in mind, the Coalition should look to share its expertise into international counterterrorism efforts wherever possible, with an eye to a time in the future when the international community is confident it has the tools to address and neutralize ISIS/Da'esh and ISIS-related threats.

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**e. U.S. actions against terrorist groups**

**(1) Overview**

On February 27, 2018, the State Department issued a fact sheet providing answers to frequently asked questions about terrorism designations. The fact sheet is excerpted below and available at <https://www.state.gov/terrorism-designations-faqs/>.

Designations as Foreign Terrorist Organizations ("FTOs") are discussed *infra*. See Chapter 16.A.8.b. for further discussion of designations under E.O. 13224.

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**1. What are the different types of terrorism designations for groups and individuals?**

There are two main authorities for terrorism designations of groups and individuals. Groups can be designated as *Foreign Terrorist Organizations* under the Immigration and Nationality Act. Under Executive Order (E.O.) 13224, a wider range of entities, including terrorist groups, individuals acting as part of a terrorist organization, and other entities such as financiers and front companies, can be designated as *Specially Designated Global Terrorists* (SDGTs).

**2. What is the difference between an FTO and E.O. 13224 designation?**

There are several differences between these two designation authorities. For example, while both FTO and E.O. 13224 designations trigger an asset freeze, the FTO designation imposes immigration restrictions on members of the organization simply by virtue of their membership, whereas E.O. 13224 restricts travel for persons who meet the criteria contained within the order. In addition, the FTO designation triggers a criminal prohibition on knowingly providing material support or resources to the designated organization. Another difference is that only E.O. 13224 designations provide the Department of the Treasury the derivative authority to designate

additional individuals or entities providing support to already designated individuals or entities.

### 3. What are the consequences of FTO and E.O. 13224 designations?

#### Executive Order:

- With limited exceptions set forth in the Order, or as authorized by the Treasury Department's Office of Foreign Assets Control (OFAC), all property and interests in property of designated individuals or entities that are in the United States or that come within the United States, or that come within the possession or control of U.S. persons, are blocked.
- With limited exceptions set forth in the Order, or as authorized by OFAC, any transaction or dealing by U.S. persons or within the United States in property or interests in property blocked pursuant to the Order is prohibited. This includes, but is not limited to, making or receiving any contribution of funds, goods, or services to or for the benefit of designated individuals or entities.
- Any transaction by any U.S. person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions in the Order, is prohibited. Any conspiracy formed to violate any of the prohibitions is also prohibited.
- Civil and criminal penalties may be assessed for violations.

#### Foreign Terrorist Organization:

- It is a crime for a person in the United States or subject to the jurisdiction of the United States to knowingly provide "material support or resources" to or receive military-type training from or on behalf of a designated FTO.
- Representatives and members of a designated FTO, if they are aliens, are inadmissible to and, in certain circumstances removable from, the United States.
- Except as authorized by the Secretary of the Treasury, any U.S. financial institution that becomes aware that it has possession of or control over funds in which an FTO or its agent has an interest must retain possession of or control over the funds and report the funds to Treasury.

### 4. Who can designate FTOs and SDGTs?

The Department of State is authorized to designate FTOs and SDGTs, while the Department of the Treasury has the authority to designate only SDGTs. Both departments pursue these designations in cooperation with the Department of Justice.

All of the Department of State's designations can be found [at <https://www.state.gov/j/ct/list/index.htm>]. Additionally, all State Department FTO and E.O. designations can also be found on the Treasury Department's OFAC website.

### 5. What are the criteria for designation?

The Secretary of State designates **Foreign Terrorist Organizations** in accordance with section 219 of the Immigration and Nationality Act. The legal criteria for designating a group as a Foreign Terrorist Organization are:

- The organization must be a foreign organization;
- The organization engages in terrorist activity or terrorism or retains the capability and intent to engage in terrorist activity or terrorism; and
- The terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.

Under **Executive Order 13224**, the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, may designate foreign individuals or entities that he

determines have committed, or pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States. In addition, the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, may designate individuals or entities that are determined:

- To be owned or controlled by, or act for or on behalf of an individual or entity listed in the Annex to the Order or by or for persons determined to be subject to the Order;
- To assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, acts of terrorism or individuals or entities designated in or under the Order; or
- To be otherwise associated with certain individuals or entities designated in or under the Order.

6. **What makes you decide to designate or not designate a group or entity?**

At the Department of State, the Bureau of Counterterrorism, in consultation with other bureaus, identifies and evaluates possible individuals or organizations for designation. Other Departments also recommend designation targets.

7. **How does the process work?**

For **Foreign Terrorist Organizations**, once an organization is identified, we prepare a detailed administrative record, which is a compilation of information, typically including both classified and open source information, demonstrating that the statutory criteria for designation have been satisfied.

- If the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, decides to make the designation, Congress is notified of the Secretary's intent to designate the organization seven days before the designation is published in the Federal Register, as section 219 of the Immigration and Nationality Act requires.
- Upon the expiration of the seven-day waiting period, and in the absence of Congressional action to object to the designation, notice of the designation is published in the *Federal Register*, at which point the designation takes effect.

We also prepare an administrative record for **Specially Designated Global Terrorists**.

Once it is completed and the Secretary of State or the Secretary of the Treasury designates an individual or entity, the assets of the individual or entity in the United States or in the possession or control of U.S. persons are frozen and OFAC takes appropriate action, including notification of the blocking order to U.S. financial institutions, directing them to block the assets of the designated individual or entity.

- Notice of the designation is also published in the *Federal Register*. OFAC also adds the individual or entity to its list of Specially Designated Nationals, by identifying such individuals or entities as Specially Designated Global Terrorists, and posts a notice of this addition on the OFAC website.
- A designation remains in effect until the designation is revoked or the Executive Order lapses or is terminated in accordance with U.S. law.

8. **What's the significance of the State Department designating a terrorist group as opposed to the Department of the Treasury?**

- The Departments of State and the Treasury have different authorities under E.O. 13224 to designate SDGTs. An individual who is designated under State's E.O. 13224 authority has committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

- Treasury is able to designate under E.O. 13224 using authorities that allow for the designation of individuals or entities that are determined to be owned or controlled by, or act for or on behalf of an individual or entity listed in the Annex to the Order or by or for persons determined to be subject to the Order; to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, acts of terrorism or individuals or entities designated in or under the Order; or to be otherwise associated with certain individuals or entities designated in or under the Order.

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(2) *Foreign Terrorist Organizations*

(i) *New Designations*

In 2018, the Secretary of State designated six additional organizations and their associated aliases as Foreign Terrorist Organizations (“FTOs”) under § 219 of the Immigration and Nationality Act: (1) ISIS-West Africa (ISIS-WA) and aliases, 83 Fed. Reg. 8730 (Feb. 28, 2018); (2) ISIS-Bangladesh and aliases, 83 Fed. Reg. 8729 (Feb. 28, 2018); (3) ISIS-Philippines and aliases, 83 Fed. Reg. 8730 (Feb. 28, 2018); (4) ISIS in the Greater Sahara (ISIS-GS) and aliases, 83 Fed. Reg. 23,987 (May 23, 2018); (5) al-Ashtar Brigades (AAB) and alias, 83 Fed. Reg. 32,179 (July 11, 2018); (6) Jama’at Nusrat al-Islam wal-Musulimin (“JNIM”) and aliases, 83 Fed. Reg. 45,298 (Sep. 6, 2018).

In a May 16, 2018 State Department media note, the Department spokesperson provided further background on the designation of ISIS in the Greater Sahara. Excerpts follow from the note, which is available at <https://www.state.gov/state-department-terrorist-designations-of-isis-in-the-greater-sahara-isis-gs-and-adnan-abu-walid-al-sahrawi/>.

ISIS-GS emerged when Adnan Abu Walid al-Sahrawi and his followers split from Al-Mourabitoun, an al-Qa’ida splinter group and U.S.-designated FTO and SDGT. Al-Sahrawi first pledged allegiance to ISIS in May 2015, and in October 2016, ISIS acknowledged it received a pledge of allegiance from the group under al-Sahrawi. ISIS-GS is primarily based in Mali operating along the Mali-Niger border and has claimed responsibility for several attacks under al-Sahrawi’s leadership, including the October 4, 2017 attack on a joint U.S.-Nigerien patrol in the region of Tongo Tongo, Niger, which killed four U.S. soldiers and five Nigerien soldiers.

A July 10, 2018 State Department media note, available at <https://www.state.gov/state-department-terrorist-designation-of-al-ashtar-brigades-aab/>, provides additional information about the designation of AAB:

Established in 2013, AAB is an Iran-backed terrorist organization aimed at overthrowing the Bahraini government. AAB has claimed responsibility for numerous terrorist attacks against police and security targets in Bahrain. In March 2014, AAB conducted a bomb attack that killed two local police officers

and an officer from the United Arab Emirates. In January 2017, AAB shot and killed a local police officer. AAB has also called for violence against the Bahraini, British, Saudi Arabian, and U.S. governments on social media.

In January 2018, AAB formally adopted Iran's Islamic Revolutionary Guard Corps (IRGC) branding and reaffirmed its loyalty to Tehran to reflect its role in an Iranian network of state and non-state actors that operates against the United States and its allies in the region. Additionally, AAB members have received weapons and explosives from Iran, training at IRGC-funded camps in Iraq, and senior AAB members have taken refuge in Iran to evade prosecution by Bahraini authorities.

A September 5, 2018 State Department media note, available at <https://www.state.gov/state-department-terrorist-designation-of-jamaat-nusrat-al-islam-wal-muslimin-jnim/>, includes the following about JNIM (which was simultaneously designated pursuant to E.O. 13224 as an SDGT):

JNIM has described itself as al-Qaida's official branch in Mali, and it has claimed responsibility for numerous attacks and kidnappings since it was formed in March 2017. JNIM carried out the June 2017 attack at a resort frequented by Westerners outside of Bamako, Mali; several deadly attacks on Malian troops; and the large-scale coordinated attacks in Ouagadougou, Burkina Faso, on March 2, 2018. JNIM is led by Iyad ag Ghaly, a U.S.-designated SDGT.

(ii) *Amendments of FTO Designations*

During 2018, the State Department amended the designations of several FTOs to include additional aliases.

The designation of Lashkar-e-Tayyiba was amended to include the following aliases: Tehreek-e-Azadi-e-Kashmir, Kashmir Freedom Movement, Tehreek Azadi Jammu and Kashmir, Tehreek-e- Azadi Jammu and Kashmir, TAJK, Movement for Freedom of Kashmir, Tehrik-i-Azadi-i Kashmir, Tehreek-e-Azadi-e-Jammu and Kashmir, Milli Muslim League, Milli Muslim League Pakistan, and MML. 83 Fed. Reg. 14,539 (Apr. 4, 2018). On April 2, the Department issued a media note regarding the amendment to the designation of Lashkar-e-Tayyiba. The note is excerpted below and available at <https://www.state.gov/amendments-to-the-terrorist-designation-of-lashkar-e-tayyiba/>.

Formed in the 1980s, LeT was responsible for the November 2008 terrorist attacks in Mumbai, India that killed 166 people, including six Americans, and has killed dozens of Indian security forces and civilians in recent years. LeT continues to operate freely within Pakistan, holding public rallies, raising funds, and plotting and training for terrorist attacks. The Department of State designated LeT as an FTO and SDGT on December 26, 2001. Its leader, Hafiz Muhammad Saeed, is also designated as an SDGT.

To avoid sanctions, LeT has repeatedly changed its name over the years. In January 2017, LeT began operating under the name Tehreek-e-Azadi-e-Kashmir. LeT has engaged in terrorist activities under this name, including inciting terrorism, as well as recruiting and fundraising. In August 2017, LeT chief Hafiz Saeed created the MML to serve as a political front for the group. LeT members make up MML's leadership and the so-called party openly displays Saeed's likeness in its election banners and literature.

The designation of Al-Nusrah Front was amended to include additional aliases: Hay'at Tahrir al-Sham, Hay'et Tahrir al-Sham, Hayat Tahrir al-Sham, HTS, Assembly for the Liberation of Syria, also known as Assembly for Liberation of the Levant, also known as Liberation of al-Sham Commission, also known as Liberation of the Levant Organisation, also known as Tahrir al-Sham, also known as Tahrir al-Sham Hay'at. 83 Fed. Reg. 25,497 (June 1, 2018). A State Department media note, released on May 31, 2018, explains the amendment to the designation of al-Nusrah Front. That media note is available at <https://www.state.gov/amendments-to-the-terrorist-designations-of-al-nusrah-front/>, and excerpted below.

In January 2017, al-Nusrah Front launched the creation of HTS as a vehicle to advance its position in the Syrian uprising and to further its own goals as an al-Qa'ida affiliate. Since January 2017, the group has continued to operate through HTS in pursuit of these objectives.

The Coordinator for Counterterrorism, Ambassador Nathan A. Sales, noted that "today's designation serves notice that the United States is not fooled by this al-Qa'ida affiliate's attempt to rebrand itself. Whatever name Nusrah chooses, we will continue to deny it the resources it seeks to further its violent cause."

(iii) *Reviews of FTO Designations*

During 2018, the Secretary of State continued to review designations of entities as FTOs consistent with the procedures for reviewing and revoking FTO designations in § 219(a) of the Immigration and Nationality Act, as amended by the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, 118 Stat. 3638. See *Digest 2005* at 113–16 and *Digest 2008* at 101–3 for additional details on the IRTPA amendments and review procedures.

The Secretary reviewed each FTO individually and determined that the circumstances that were the basis for the designations of the following FTOs have not changed in such a manner as to warrant revocation of the designations and that the national security of the United States does not warrant revocation: al-Shabaab, 83 Fed. Reg. 35,308 (July 25, 2018); Abu Sayyaf, 83 Fed. Reg. 41,140 (Aug. 17, 2018); Boko Haram, 83 Fed. Reg. 41,140 (Aug. 17, 2018); and Hizballah, 83 Fed. Reg. 56,894 (Nov. 14, 2018).

(3) *Rewards for Justice Program*

On March 8, 2018, the State Department announced in a media note, available at <https://www.state.gov/rewards-for-justice-reward-offer-for-information-on-tehrik-e-taliban-pakistan-and-factions-key-leaders/>, that the Rewards for Justice Program is offering rewards for information leading to the identification or location of three leaders of Tehrik-e-Taliban Pakistan (“TTP”) and its affiliates. The media note provides the following background on the three leaders:

**Maulana Fazlullah** is the leader of the TTP, a terrorist organization that has claimed responsibility for numerous terrorist acts against Pakistani and U.S. interests, including the failed attempt by Faisal Shahzad to detonate an explosive device in New York City’s Times Square on May 1, 2010. Under his leadership, the TTP has also claimed responsibility for the December 16, 2014, attack on a school in Peshawar, Pakistan in which gunmen killed 148 people, including 132 students. Fazlullah also is responsible for the June 2012, beheading of 17 Pakistani soldiers, and the October 9, 2012, shooting of Pakistani schoolgirl Malala Yousafzai. In 2015, the Department designated Fazlullah as a Specially Designated Global Terrorist under Executive Order 13224, which freezes all of his assets based in the United States or in possession or control of U.S. persons.

**Abdul Wali** is the leader of Jamaat ul-Ahrar (JUA), a militant faction affiliated with TTP. Under Wali’s leadership, JUA has staged multiple attacks in the region targeting civilians, religious minorities, military personnel, and law enforcement, and was responsible for the killing of two Pakistani employees of the U.S. Consulate in Peshawar in early March 2016.

**Mangal Bagh** is the leader of Lashkar-e-Islam, a militant faction affiliated with TTP. Under his leadership, Lel operatives have attacked NATO convoys. His group generates revenue from drug trafficking, smuggling, kidnapping, and collection of “taxes” on transit trade between Pakistan and Afghanistan. In September 2007, the Government of Pakistan announced a reward offer of about \$60,000 for the capture of, or information leading to the arrest of, Mangal Bagh.

On October 18, 2018, a State Department media note available at <https://www.state.gov/rewards-for-justice-reward-offer-for-information-on-al-qaida-in-the-arabian-peninsula-aqap-key-leaders/> announced a reward offer and an increase in the previous reward offer relating to certain leaders of Al-Qa’ida in the Arabian Peninsula (“AQAP”). The media note includes the following on the two leaders:

**Qasim al-Rimi** was named emir of AQAP in June 2015. The following month, he swore allegiance to al-Qa’ida leader Ayman al-Zawairi and called for renewed attacks against the United States. Born in Yemen in 1978, he trained terrorists at an al-Qa’ida camp in Afghanistan in the 1990s. Al-Rimi subsequently returned to

Yemen and became an AQAP military commander. He was sentenced to five years in prison in 2005 after being convicted in Yemen of plotting to assassinate the U.S. Ambassador to Yemen, and escaped from a Yemeni prison in 2006. Al-Rimi is linked to the September 2008 attack on the U.S. Embassy in Sana'a that left 10 Yemeni guards, four civilians, and six terrorists dead, and the December 2009 attempted suicide bombing by "underwear bomber" Umar Farouq Abdulmutallab aboard a U.S.-bound airliner. The government of Saudi Arabia placed al-Rimi on its list of most wanted terrorist suspects on February 3, 2009. In May 2010, the Department of State designated al-Rimi as a Specially Designated Global Terrorist (SDGT) under Executive Order (E.O.) 13224. ... In May 2010, al-Rimi was added to the United Nations (UN) 1267 Sanctions Committee's Consolidated List of individuals associated with al-Qa'ida/ISIL.

In a May 7, 2017 video, he urged supporters living in Western countries to conduct "easy and simple" attacks and praised Omar Mateen, who killed 49 people in a June 2016 mass shooting at a nightclub in Orlando Florida.

**Khalid al-Batarfi** is a senior member of AQAP in Yemen's Hadramaut Governorate and a former member of AQAP's shura council. Born in Saudi Arabia, in 1999 he traveled to Afghanistan, where he trained at al-Qa'ida's al-Farouq camp. In 2001, he fought alongside the Taliban against U.S. forces and the Northern Alliance. In 2010, al-Batarfi joined AQAP in Yemen, led AQAP fighters in taking over Yemen's Abyan Province, and was named AQAP's emir of Abyan. Following the death of AQAP leader Nasir Al-Wuhayshi in a June 2016 U.S. military strike, he issued a statement warning that al-Qa'ida would destroy the U.S. economy and attack other U.S. interests. After the United States announced that it would recognize Jerusalem as the capital of Israel, al-Batarfi appeared in an AQAP video in January 2018 threatening the United States and Jews. On January 23, 2018, the U.S. Department of State designated al-Batarfi as an SDGT under E.O. 13224.

On November 13, 2018, the State Department announced reward offers (up to \$5 million each) for information on leaders of Hamas and Hizballah. See media note, available at <https://www.state.gov/rewards-for-justice-reward-offer-for-information-on-hamas-and-hizballah-key-leaders/>. The following leaders were identified in the media note:

**Salih al-Aruri** is a deputy of the political bureau of the terrorist organization Hamas and one of the founders of the Izzedine al-Qassam Brigades, Hamas's military wing. Aruri is currently living freely in Lebanon, where he reportedly is working with Qasem Soleimani, leader of the Iranian Islamic Revolutionary Guard Corps' Quds Force. Aruri funded and directed Hamas military operations in the West Bank and has been linked to several terrorist attacks, hijackings, and kidnappings. In 2014, al-Aruri announced Hamas's responsibility for the June 12, 2014 terrorist attack that kidnapped and killed three Israeli teenagers in the West Bank, including dual U.S.-Israeli citizen Naftali Fraenkel. He publicly praised

the murders as a “heroic operation.” In September 2015, the U.S. Department of the Treasury designated al-Aruri as a Specially Designated Global Terrorist (SDGT) pursuant to Executive Order 13224.

**Khalil Yusif Mahmoud Harb** is a close adviser to Secretary General Hassan Nasrallah, leader of the Lebanese Hizballah terrorist group, and has served as the group’s chief military liaison to Iran and to Palestinian terrorist organizations. Harb has commanded and supervised Lebanese Hizballah’s military operations in the Palestinian territories and in several countries throughout the Middle East. In August 2013, the U.S. Department of the Treasury designated Harb as a Specially Designated Global Terrorist pursuant to Executive Order 13224. In May 2015, Saudi officials designated Harb as a terrorist and accused him of commanding Hizballah’s “central military unit” and of being responsible for Hizballah’s activities in Yemen.

**Haytham ‘Ali Tabataba’i** is a key Hizballah military leader who has commanded Hizballah’s special forces in both Syria and Yemen. Tabataba’i’s actions in Syria and Yemen are part of a larger Hizballah effort to provide training, materiel, and personnel in support of its destabilizing regional activities. In October 2016, the Department of State designated Tabataba’i as a Specially Designated Global Terrorist pursuant to Executive Order 13224.

On November 25, 2018, the State Department announced a reward offer of up to \$5 million for information on the 2008 Mumbai attack. See media note, available at <https://www.state.gov/rewards-for-justice-reward-offer-for-information-on-the-2008-mumbai-attack/>. Excerpts follow from the media note.

From November 26 to 29, 2008, ten individuals associated with the terrorist group Lashkar e-Tayyiba (LeT) carried out a series of coordinated assaults against multiple targets in Mumbai, India. The attack resulted in the deaths of 166 people, including six Americans.

The United States is committed to working with our international partners to identify and bring to justice those responsible for the 2008 Mumbai attack. Today’s announcement marks the third RFJ reward offer seeking information on the perpetrators of the Mumbai attack. In April 2012, the Department of State announced reward offers for information that brings to justice LeT founder Hafiz Mohammad Saeed and Hafiz Abdul Rahman Makki, another senior LeT leader.

In December 2001, the Department of State designated LeT as a Foreign Terrorist Organization (FTO) in accordance with section 219 of the Immigration and Nationality Act, as amended. FTO designations play a critical role in our fight against terrorism and are an effective means of curtailing support for terrorist activities and pressuring groups to get out of the terrorism business. In May 2005, the United Nations (UN) 1267 Sanctions Committee added LeT to the Consolidated UN Security Council Sanctions List.

More information about these reward offers is available on the Rewards for Justice website at [www.rewardsforjustice.net](http://www.rewardsforjustice.net).

## **2. Narcotics**

### **a. Majors List Process**

#### **(1) International Narcotics Control Strategy Report**

In March 2018, the Department of State submitted the 2018 International Narcotics Control Strategy Report (“INCSR”), an annual report to Congress required by § 489 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2291h(a). The report describes the efforts of foreign governments to address all aspects of the international drug trade in calendar year 2017. Volume 1 of the report covers drug and chemical control activities and Volume 2 covers money laundering and financial crimes. The full text of the 2018 INCSR is available at <https://www.state.gov/2018-international-narcotics-control-strategy-report/>.

#### **(2) Major Drug Transit or Illicit Drug Producing Countries**

On September 11, 2018, the White House issued Presidential Determination 2018-12 “Memorandum for the Secretary of State: Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2019.” 83 Fed. Reg. 50,239 (Oct. 4, 2018). In this year’s determination, the President named 22 countries: Afghanistan, The Bahamas, Belize, Bolivia, Burma, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, India, Jamaica, Laos, Mexico, Nicaragua, Pakistan, Panama, Peru, and Venezuela as countries meeting the definition of a major drug transit or major illicit drug producing country. A country’s presence on the “Majors List” is not necessarily an adverse reflection of its government’s counternarcotics efforts or level of cooperation with the United States. The President determined that Bolivia and Venezuela “failed demonstrably” during the last twelve months to make sufficient or meaningful efforts to adhere to their obligations under international counternarcotics agreements. Simultaneously, the President determined that support for programs to aid the people of Venezuela is vital to the national interests of the United States, thus ensuring that such U.S. assistance would not be restricted during fiscal year 2019 by virtue of § 706(3) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1424.

### **b. Interdiction Assistance**

On July 20, 2018 the President of the United States again certified, with respect to Colombia (Daily Comp. Pres. Docs., 2018 DCPD No. 00498, p. 1, July 20, 2018), that (1) interdiction of aircraft reasonably suspected to be primarily engaged in illicit drug

trafficking in that country's airspace is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and (2) the country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with such interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force is directed against the aircraft. President Trump made his determination pursuant to § 1012 of the National Defense Authorization Act for Fiscal Year 1995, as amended, 22 U.S.C. §§ 2291–4. For background on § 1012, see *Digest 2008* at 114.

**c. U.S. Participation in Multilateral Actions**

**(1) UN Commission on Narcotic Drugs**

The United States sent a delegation to the 61<sup>st</sup> UN Commission on Narcotic Drugs (“CND”), held from March 12 to 16, 2018 in Vienna, Austria. See March 12, 2018 State Department media note, available at <https://www.state.gov/united-states-to-seek-international-progress-on-combating-the-opioid-crisis-at-61st-un-commission-on-narcotic-drugs/>. At the CND, the United States advocated for international control of carfentanil, and sponsored a resolution aimed on the global response to the opioid crisis. *Id.* The United States also sponsored a side event on “New Methods of Synthetic Drug Trafficking.” *Id.*

On March 13, 2018, James A. Walsh, Head of the U.S. Delegation to the CND and Deputy Assistant Secretary of State for International Narcotics and Law Enforcement Affairs, delivered the U.S. statement at the CND. Mr. Walsh’s remarks are excerpted below and available at <https://www.state.gov/u-s-statement-to-the-61st-session-of-the-commission-on-narcotic-drugs/>.

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Now more than ever, our work in the Commission is vital to protecting the health and security of all our citizens. The world drug problem is ever-evolving and changing. Today, we are in the midst of a new drug trafficking paradigm where international criminal organizations trafficking in drugs are evading international controls by creating synthetic drugs—new psychoactive substances (or NPS)—that are mirror images of controlled substances. The UN Office on Drugs and Crime’s Global Synthetics: Monitoring, Analysis, Reporting, and Trends (SMART) program March 2018 update reports that these criminal organizations are producing at least one of these new substances every week, with SMART identifying 70 new substances in 2016 alone.

In this new paradigm, traffickers are also exploiting the online market through open and dark net sites, and then trafficking these substances through the international mail and express consignment shipments. ...

The dramatic increase in the misuse of synthetic drugs, particularly synthetic opioids—like carfentanil—is plaguing many of our countries. According to UNODC’s 2017 World Drug Report, opioid misuse remains high in Southwest Asia and Eastern Europe, and has been

expanding in Western Europe and others parts of North America. An estimated 190,000 deaths globally are attributed to drug use disorders, mostly among people using opioids.

Fighting this plague is also exacting a grisly human toll among many of our law enforcement colleagues. ...

Clearly, this international problem requires a smart, strategic, and coordinated international response, and our decisions here at the CND matter. We must work as an international community to curb this new paradigm in drug trafficking—lives depend upon it. We must work together to identify innovative options to curb the rapid proliferation of these new synthetic drugs. Some of the most dangerous substances in this category are synthetic opioids. Synthetic opioids are fueling thousands of deaths in many of our countries because they are incredibly lethal and difficult to detect.

One of the most dangerous synthetic opioids being trafficked in international criminal markets is carfentanil, which is 10,000 times more potent than morphine. It is an elephant tranquilizer, not approved for use in humans, that has made its way into the illicit drug market, and is being used, sometimes unknowingly. To hinder criminal access to carfentanil and reduce its presence in the illicit drug market, the United States requested that it be controlled under the UN Single Convention on Narcotic Drugs—the 1961 Convention. The World Health Organization's (WHO) Expert Committee on Drug Dependence (ECDD) reviewed this request and concluded that carfentanil should be controlled under Schedules I and IV and we urge the Commission to vote in favor of this request this week. ...

The United States has also sponsored a resolution this week aimed at enhancing international cooperation to address the threats presented by synthetic drugs, particularly these deadly synthetic opioids. The resolution promotes and amplifies existing tools within UNODC and the INCB to increase information sharing and data collection and analysis that can facilitate real-time cooperation among experts in the field to disrupt the illicit supply of synthetic drugs, and the chemicals used to produce them. The information derived through these efforts can then be used by the WHO to accelerate reviews of substances for international control. Currently, the international community is controlling these substances at a rate of about ten a year. We have to do better. The ideas offered in this resolution—increased information sharing and international cooperation—present options for us to more aggressively attack this threat together. We look forward to discussing the text with you this week, and hope we can mobilize a strategic and coordinated response to this challenge.

Another option to curb this threat is to generate a better understanding of the new drug trafficking pattern whereby synthetic drugs are being sold online and trafficked through express consignment shipments and the mail. To explore this new pattern, the United States sponsored a side event on “New Methods of Synthetic Drug Trafficking” with expert panel presentations on challenges and experiences related to synthetic drugs being sold and trafficked through this method. Through this event, we highlighted the new paradigm, whereby dangerous and deadly synthetic drugs, such as carfentanil, can easily arrive anywhere with an internet connection and international delivery services. With synthetic drugs being so potent, a small amount can be easily shipped and often has higher profit margins than other narcotics.

When you combine these new modalities with a large supply of heroin being trafficked into your country by sophisticated transnational criminal organizations, along with an increase in demand fueled by an excess of prescriptions pills, you have a crisis; a crisis where thousands of my fellow Americans are dying annually. In 2016, nearly 64,000 people died from drug

overdoses in the United States. Of these 64,000, over two-thirds, died from overdoses involving prescription or illicit opioids, including fentanyl. And we are not alone here.

This new trafficking pattern shows that we are all vulnerable. ...

In thinking proactively, we should prioritize life-saving efforts to address this international crisis beyond the 2019 High-Level Ministerial Segment of the 62<sup>nd</sup> CND. The “beyond 2019” drug-policy trajectory must focus on this “new reality.” In the 2016 outcome document from the UN General Assembly Special Session on the World Drug Problem (UNGASS), we highlighted the rapid proliferation of synthetic drugs, or NPS, as one of these new realities to be prioritized. The outcome document represents the latest international consensus that reaffirms the Commission’s primary role in international drug policy. On the road to 2019 and beyond, we want the Commission implementing the operational recommendations in the outcome document to promote a society free of drug abuse, with an acute focus on working together to address the new realities of “today’s” world drug problem.

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(2) G7

On June 13, 2018, Mr. Walsh delivered the opening remarks at a G7+ expert group meeting on "Innovative Responses to the Challenges Posed by Synthetic Drugs." His remarks are excerpted below and available at <https://www.state.gov/opening-remarks-at-the-g7-expert-group-meeting-on-innovative-responses-to-the-challenges-posed-by-synthetic-drugs/>.

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...This meeting is quite timely as we examine the commitments made a few months ago in Vienna during the 61<sup>st</sup> UN Commission on Narcotic Drugs (CND), where the international community unanimously adopted a resolution to mobilize a strategic response to the international challenges posed by synthetic opioids and voted to place additional, dangerous synthetic drugs under international control.

In the CND resolution, countries acknowledged their grave concerns about the new components of the world drug problem, whereby deadly synthetic drugs are rapidly manufactured, sold online, and distributed through the international mail or express consignment shipping services. There are more than 800 new known synthetic drugs, with approximately one new substance being created each week. Of these, INCB reports that they have identified 77 dangerous fentanyl analogues with no known medical use that are not controlled internationally, and are showing up in world drug markets. Yet, we are scheduling them at a rate of around 10 to 12 a year. We are not keeping pace, and we have to do better. Lives are at stake.

Traffickers are innovative and nimble, and can easily adapt and shift methodologies to evade national and international controls. In fact, we learned from the UN Office on Drugs and Crime (UNODC) that traffickers have developed new psychoactive substances (NPS) or new synthetic drugs that can mirror every major type of drug. These mirror images are not controlled within the international framework and therefore allow traffickers to evade law enforcement

detection. It is clear that our responses have to be more innovative, more nimble, and more adaptable if we want to out-pace these criminals. We are grateful that Canada convened these great minds here today to start thinking about creative solutions that will effectively mobilize the international response we committed to during the CND in March.

Our global authorities on the international threats posed by synthetic drugs—including UNODC, the International Narcotics Control Board (INCB), and the World Health Organization (WHO)—report that synthetic opioids are some of the most dangerous and profitable substances in the criminal markets. These drugs are fueling thousands of deaths because they are incredibly lethal and difficult to detect. For some, a dose as small as a few grains of sand can be fatal. According to UNODC’s 2017 World Drug Report, opioid misuse remains high in Southwest Asia and Eastern Europe, and it has been expanding in Western Europe and others parts of North America. An estimated 190,000 deaths globally are attributed to drug use disorders, mostly among people using opioids.

This trend certainly is manifesting itself in the United States and is fueling a drug crisis of devastating proportions. ...

For example, in February 2018, the Department of Justice, through its Drug Enforcement Administration, known as DEA, invoked its emergency temporary scheduling authorities to domestically control “fentanyl-related substances,” not already scheduled, as a class. Under this authority, the Department of Justice can prosecute anyone who possesses, imports, distributes, or manufactures any illicit fentanyl-related substance in the same way as other substances controlled in Schedule I of the Controlled Substances Act. My Justice Department and DEA colleagues are here today and will talk in greater detail about this temporary scheduling process as a possible tool for other countries to use to enhance controls on synthetic drugs.

Additionally, the United States is working diligently to curb demand for these dangerous drugs. As part of President Trump’s response to the opioid crisis, he directed the government to reduce the misuse of opioids through a variety of interventions, including through prescription drug monitoring programs, state-level legislation on prescription drug access, prescribing guidelines for the medical community, increased access to substance use disorder and recovery services, and educational programs to increase awareness on the dangers associated with the misuse of synthetic opioids. The United States is devoting more than \$4 billion to this effort.

On behalf of the United States, I look forward to sharing information learned from U.S. experiences in responding to these dangerous new threats; my colleagues from across the U.S. government and I are also eager to learn from each of you about your best practices and lessons learned. While we can each do more in our national frameworks to address these challenges, we also can do more together to increase vital voluntary cooperation through information sharing efforts.

Luckily for us, our international organization partners already support existing mechanisms that can facilitate this voluntary cooperation. The UNODC, the INCB, WHO, and regional bodies, such as the OAS’ Inter-American Drug Abuse Control Commission (CICAD) and the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), support information sharing platforms. These platforms not only inform us about new and emerging threats, but they also yield essential data needed to inform the treaty-mandated scientific reviews undertaken by WHO to generate scheduling recommendations to the CND. If our shared objective is to enhance international control of synthetic drugs, then we must collectively prioritize efforts to provide WHO with more data to inform its scientific reviews that assess a substance’s abuse potential and harms associated with its use.

These platforms can generate this needed data through information sharing among our expert practitioners working together to dismantle international illicit supply chains. The platforms also generate critical information on the misuse of certain drugs. For example, information derived from these portals helped us learn that fentanyl precursor chemicals are used to illicitly manufacture fentanyl.

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(3) *UN Global Call to Action on the World Drug Problem*

On September 24, 2018, the United States was among 31 countries hosting a high-level event at the UN to announce the “Global Call to Action on the World Drug Problem.” The non-binding document reaffirms commitments to existing principles and the work of the CND and UNODC and calls on the CND and Member States to take actions to address the world drug problem. The Global Call to Action on the World Drug Problem is available at <https://usun.usmission.gov/global-call-to-action-on-the-world-drug-problem/> and below.

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We, the undersigned Member States of the United Nations, reaffirm our commitment to effectively address and counter the world drug problem. We reaffirm our commitment to implement the Single Convention on Narcotic Drugs, the Convention on Psychotropic Substances, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and the United Nations Convention against Transnational Organized Crime.

We reaffirm our Joint Commitment to effectively addressing and countering the world drug problem, the outcome of the UN General Assembly’s 2016 Special Session on the World Drug Problem, which addressed new realities and was built on the foundation of the 2009 Political Declaration and Plan of Action.

We reaffirm our commitment to the work of the Commission on Narcotic Drugs (CND) as the policymaking body of the United Nations with prime responsibility for drug control matters, and our support and appreciation for the efforts of the United Nations, in particular the UN Secretary General, and the UN Office on Drugs and Crime (UNODC) as the leading entity of the UN system on international drug control policy, and further reaffirms the treaty-mandated roles of the International Narcotics Control Board (INCB) and the World Health Organization (WHO). We reaffirm our determination to tackle the world drug problem in full conformity with international law, including the purposes and principles of the Charter of the United Nations and the Universal Declaration of Human Rights, with full respect for the sovereignty and territorial integrity of States. We recognize the world drug problem presents evolving challenges, including newly emerging synthetic drugs, which we commit to address and counter through a comprehensive, scientific evidence-based approach, and we note the links between drug trafficking, corruption, and other forms of organized crime, and, in some cases, terrorism.

We recognize the need for the international drug-control system to adequately respond to dangerous emerging synthetic drugs in a timely manner, and we encourage the CND to act urgently to accelerate the scheduling rate of these dangerous drugs.

We further pledge to develop national action plans based on a four-pronged strategy:

(1) reduce demand for illicit drugs through education, awareness, and prevention of abuse; (2) expand treatment efforts to save lives and promote recovery; (3) strengthen international cooperation across judicial, law enforcement, and health sectors; and (4) cut off the supply of illicit drugs by stopping their production, whether through cultivation or manufacture, and flow across borders.

We encourage the CND and each signatory Member State to provide updates on progress made, lessons learned, and best practices at the Sixty-Second Session of the CND in March 2019.

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### **3. Trafficking in Persons**

#### ***a. Trafficking in Persons Report***

In June 2018, the Department of State released the 2018 Trafficking in Persons Report pursuant to § 110(b)(1) of the Trafficking Victims Protection Act of 2000 (“TVPA”), Div. A, Pub. L. No. 106-386, 114 Stat. 1464, as amended, 22 U.S.C. § 7107. The report covers the period April 2017 through March 2018 and evaluates the anti-trafficking efforts of countries around the world. Through the report, the Department determines the ranking of countries as Tier 1, Tier 2, Tier 2 Watch List, or Tier 3 based on an assessment of their efforts with regard to the minimum standards for the elimination of trafficking in persons as set out by the TVPA, as amended. The 2018 report lists 22 countries as Tier 3 countries, making them subject to certain restrictions on assistance in the absence of a Presidential national interest waiver. For details on the Department of State’s methodology for designating states in the report, see *Digest 2008* at 115–17. The report is available at <https://www.state.gov/trafficking-in-persons-report-2018/>. Chapter 6 in this *Digest* discusses the determinations relating to child soldiers.

On June 28, 2018, Secretary Pompeo delivered remarks at the 2018 ceremony announcing the release of the 2018 Trafficking in Persons Report. Secretary Pompeo’s remarks are excerpted below and available at <https://www.state.gov/remarks-at-the-2018-trafficking-in-persons-report-launch-ceremony/>. Prior to Secretary Pompeo’s remarks, a senior State Department official provided a briefing on the 2018 Trafficking in Persons Report, which is available at <https://www.state.gov/senior-state-department-official-on-the-2018-trafficking-in-persons-tip-report/>, and not excerpted herein.

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... [W]e're thankful for the work of the United States Advisory Council on Human Trafficking. This March, President Trump appointed nine members to this advisory council. Each member is a survivor of human trafficking, representing many different backgrounds, experiences, and it advises the Trump administration on federal anti-trafficking policies and programs.

The council also serves as a model, one that we hope other governments will consider creating as well. It gives survivors a meaningful seat at the table to help guide the creation of anti-trafficking policies and ensure governments adopt a victim-centered approach to resolving this.

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Every year our report focuses on a specific thing. This year's TIP Report highlights the critical work of local communities to stop traffickers and provide support to victims. Human trafficking is a global problem, but it's a local one too. Human trafficking can be found in a favorite restaurant, a hotel, downtown, a farm, or in their neighbor's home.

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If we're going to win this fight, national governments must empower local communities to proactively identify human trafficking and develop local solutions to address it.

As we have every year, the report also points out which countries are improving ... their efforts to tackle the crime and which countries are making it easier to carry it out. I'm glad to say we have ... progress to report.

In Estonia, the government implemented a new law that will help victims come forward and get the support that the victims need to recover.

The Government of Argentina convicted officials complicit in trafficking crimes, established additional legal protection for victims, and bolstered efforts to train frontline responders.

In Bahrain, the government worked to hold local traffickers criminally accountable and developed a mechanism to get victims needed shelter.

The Government of Cyprus bolstered efforts to convict traffickers and improve protections for victims as well.

We saw some positive movements across entire regions as well. Of the 48 African countries included in the report, 14 received upgrades—meaning we observed a strong trend of increased efforts to improve their overall response. Despite significant security threats, migration challenges, other financial constraints, and other obstacles, the region improved significantly. We commend those countries taking action, but we also will never shy away from pointing out countries that need to step up.

We read the horrific accounts of human trafficking and abuse of African migrants, refugees, and asylum-seekers in Libya, resulting in modern-day slave markets. We've engaged the Libyan Government of National Accord to bring the perpetrators to justice, including complicit government officials. We welcome its commitment to doing so and look forward to seeing real action.

In Southeast Asia, Burma's armed forces and others in the Rakhine State dislocated hundreds of thousands of Rohingya and members of other ethnic groups, many of whom were exploited through the region as a result. Some in the Burmese military also recruited child soldiers and subjected adults and children from ethnic minority groups to forced labor.

We see the tragic examples of forced labor in North Korea as well. Untold number of North Korean citizens are subjected to forced labor overseas by their own government, in many cases with the tacit approval of host governments.

And in Iran, trafficking victims are punished—the victims are punished—for acts they are forced to commit. For example, sex trafficking victims may face the death penalty for committing adultery. This is a horrible perversion of justice by a corrupt regime.

We take these stories to heart. We use them as fuel to motivate us to action as we work together to end human trafficking once and for all.

You'll see from today's report that there remains a great deal of work left to do. The world should know that we will not stop until human trafficking is a thing of the past.

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**b. Presidential Determination**

Consistent with § 110(c) of the Trafficking Victims Protection Act, as amended, 22 U.S.C. § 7107, the President annually submits to Congress notification of one of four specified determinations with respect to “each foreign country whose government, according to [the annual Trafficking in Persons report]—(A) does not comply with the minimum standards for the elimination of trafficking; and (B) is not making significant efforts to bring itself into compliance.” The four determination options are set forth in § 110(d)(1)–(4).

On November 29, 2018, the President issued a memorandum for the Secretary of State, “Presidential Determination With Respect to the Efforts of Foreign Governments Regarding Trafficking in Persons.” 83 Fed. Reg. 65,281 (Dec. 20, 2018). The President’s memorandum conveys determinations concerning the countries that the 2018 Trafficking in Persons Report lists as Tier 3 countries. See Chapter 3.B.3.a., *supra*, for discussion of the 2018 report.

**c. UN General Assembly**

On September 24, 2018, Deputy Secretary of State John J. Sullivan delivered remarks at the UN General Assembly at a side event on human trafficking entitled, “Stepping up Action to End Forced Labor, Modern Slavery, and Human Trafficking.” Deputy Secretary Sullivan’s remarks are excerpted below and available at <https://www.state.gov/remarks-on-stepping-up-action-to-end-forced-labor-modern-slavery-and-human-trafficking/>.

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Today, there are an estimated 25 million victims of forced labor around the world—a quarter of whom are children. Behind those victims is a massive industry that nets about \$150 billion in annual profits. Coordinated and sophisticated, it operates under the nose of each of our governments. The Call to Action recognized that we all share a responsibility to fight back and the United States remains determined to do our part.

At the event last year, I was proud to announce a \$25 million grant from U.S. Department of State to the Global Fund to End Modern Slavery to produce a substantial reduction in the prevalence of modern slavery around the world. The Global Fund is now in the process of awarding its first round of sub-grants totaling almost \$16 million to organizations combating sex and labor trafficking in India, Vietnam, and the Philippines.

The United States is proud of the outstanding work enabled by our initial grant—and now we want to do more.

So, today, I'm pleased to announce that we are working with our Congress to make a second \$25 million available to the Global Fund to End Modern Slavery as well as to the University of Georgia Research Foundation to work toward our mutual aim of ending modern slavery through transformative programs, innovative research methodologies, and the exchange of good practices. In addition, the U.S. Congress has made another \$25 million available for the Department's Program to End Modern Slavery in the coming year—bringing our total investment for this important program to \$75 million.

It's our hope that this will inspire other governments and private donors to contribute their own resources—as the United Kingdom has done—toward the shared goal of eradicating modern slavery in all its forms.

These funds are a continuation of the United States' efforts under this Administration's leadership to end human trafficking.

The U.S. government is also seeking new ways to leverage input from human trafficking survivors when crafting our laws and strategies.

In March, President Trump appointed nine members to the United States Advisory Council on Human Trafficking, an entity comprised entirely of survivor leaders.

At the State Department, we're taking new strides to integrate survivor input into our anti-trafficking policies and programs.

Our Office to Monitor and Combat Trafficking in Persons is developing a groundbreaking initiative that will incorporate input from survivor consultants to help us enhance our programs, while also compensating them for their expertise.

This initiative is a tremendous opportunity to heighten our effectiveness and refocus our work on the harsh realities of trafficking that only survivors can fully understand. More broadly, it is a part of our effort within the Department to open up a new chapter in our work on trafficking.

The Administration has also nominated a new leader to help us write that chapter. We are hopeful the U.S. Senate will soon confirm Mr. John Richmond as the State Department's new Ambassador-at-Large to Monitor and Combat Trafficking in Persons.

Let me close with one final announcement—this one in concert with the governments of Australia, Canada, New Zealand, and the United Kingdom. It is with great pride that the United States joins with these nations today in introducing a set of core principles to guide government action to combat human trafficking in global supply chains.

These principles outline key action in four areas critical to preventing forced labor in global supply chains: Government procurement, private sector cooperation, responsible

recruitment, and harmonization of laws and policies. We hope that these principles will serve as a mechanism for sharing the most promising practices between all of our governments.

However, we need to keep in mind that this responsibility does not rest solely on government. Effectively combating trafficking in supply chains requires strategic cooperation with civil society and most importantly, the business community. Fortunately, there are already many promising efforts underway in the private sector to discourage forced labor, and the principles we're releasing are intended to complement those efforts.

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#### 4. Organized Crime

See Chapter 16 for a discussion of sanctions related to transnational organized crime.

#### 5. Corruption

On May 23, 2018, Deputy Assistant Secretary Walsh delivered remarks at a UN General Assembly high-level segment on corruption. His remarks are excerpted below and available at <https://www.state.gov/participation-in-the-un-general-assembly-high-level-segment-with-interventions-from-member-states/>.

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Fifteen years ago, the international community joined together to sign a transformational document: a global legal framework for preventing and combating corruption. Since 2003, States Parties have implemented the Convention and today, we have much to show for it. Our frameworks, laws, and policies—and related international cooperation—are undoubtedly better today compared to 2003. However, our job is not finished.

The UNCAC provides us a common basis to take the necessary steps to prevent and combat corruption *if* we have enough political will and use the treaty effectively. In our collective efforts to prevent, criminalize, investigate, and prosecute corruption, and recover and return stolen assets, this Convention remains the comprehensive, global, legal framework for fighting corruption.

Our own commitment to the UNCAC remains resolute. The United States continues to aggressively address corruption and its corrosive effect on global security and prosperity. Our Department of Justice continues robust enforcement of our long-standing foreign anti-bribery statute, the Foreign Corrupt Practices Act (FCPA). In 2017, the United States had the greatest number of individual prosecutions, convictions, and guilty pleas for FCPA cases ever. States Parties' commitment to criminalize foreign bribery under the UNCAC is critical to global economic prosperity. Corruption undermines sustainable economic growth, and bribery contributes to a risky investment climate. But, when these standards are enforced, individuals are much less likely to request bribes. We have seen that prohibitions against bribes over time increase overseas competitiveness and improve national reputations. We call upon all States

Parties to implement the Convention in this regard to collectively advance economic growth and security.

International cooperation, through bilateral frameworks and facilitated under UNCAC, is instrumental to investigating and prosecuting complex corruption cases. More and more cases and evidence cross borders. We remain committed to targeting ill-gotten gains and holding kleptocrats accountable, consistent with the Treaty. Through international cooperation and our Kleptocracy Asset Recovery Initiative, the United States has seized or frozen over \$3.5 billion in corruption-related proceeds since 2010. The Department of Justice has returned more than \$150 million in confiscated assets to date with another \$30 million in process. We have also partnered closely with other governments to ensure that recovered proceeds of crime are returned in a manner that furthers the goals of transparency and oversight at all stages in the asset recovery process.

Additionally, in December 2017, President Trump announced financial sanctions and visa restrictions under the authority of a new Executive Order (E.O. 13818) and the Global Magnitsky Human Rights Accountability Act. These measures give the U.S. federal government new authority to impose targeted punitive measures on those who engage in public corruption, as well as serious human rights abuse. So far, the United States has sanctioned 13 individuals and 39 affiliates under this authority.

We also remain committed to having transparent and accountable systems in place to prevent corruption before it starts. In the last year, the U.S. Office of Government Ethics (OGE) updated and modernized the regulations governing executive branch ethics education programs, restrictions on the acceptance of gifts by executive branch officials, and procedures for tracking high-level officials' compliance with their agreements to avoid potential conflicts of interest. Our government has also embarked on a campaign to inform the public on ethics laws and the tools they can use to better hold government accountable.

Abroad, anti-corruption technical assistance and capacity building remains a significant component of our foreign policy. In our previous financial year, the U.S. Department of State and the U.S. Agency for International Development (USAID) provided approximately \$117 million in foreign assistance to fight corruption. We have worked with partner countries to (1) create a culture of integrity to prevent corruption, (2) mitigate risks of corruption, (3) develop consequences of corruption through laws and law enforcement, and (4) strengthen civil society and oversight bodies. Our foreign assistance programs: build transparent, accountable institutions; support legislative reforms consistent with UNCAC; develop capacity of law enforcement, anticorruption authorities, and prosecutors to manage complex corruption cases; and support specialized units and anticorruption courts to enforce anticorruption laws.

As we implement the UNCAC, we must work with all sectors of society to fight corruption, including civil society and the private sector. We must continue to support their engagement in the Conference of States Parties to the Convention and its subsidiary bodies. We encourage all States Parties to engage more actively with civil society and to be accountable to their citizens by publishing their full final UNCAC reports online. These reports are incredibly useful tools to inform technical assistance programs related to implementation of the UNCAC.

We are cognizant that good-faith efforts by the United States or any single country will never be enough: we all must work together to adopt and enforce international standards of integrity, accountability, and transparency. As such, the United States looks forward to having our own policies and practices reviewed under the second cycle of the UNCAC Review

Mechanism over the next year. I wish you much success as we work together to strengthen implementation of this important Convention.

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## C. INTERNATIONAL TRIBUNALS AND OTHER ACCOUNTABILITY MECHANISMS

### 1. International Criminal Court

#### a. *General*

On September 10, 2018, the Trump administration announced a new U.S. policy regarding the International Criminal Court (“ICC”). National Security Adviser John Bolton laid out the new policy in remarks entitled “Protecting American Constitutionalism and Sovereignty from International Threats,” delivered to the Federalist Society on September 10. The White House released a fact sheet concurrently with the speech, which appears below and is available at <https://www.whitehouse.gov/briefings-statements/protecting-american-constitutionalism-sovereignty-international-criminal-court/>.

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- The International Criminal Court (ICC) is an international court established in July 2002, upon the entry into force of a multilateral treaty known as the Rome Statute.
- Though the United States originally signed the Statute in 2000, the Senate failed to ratify it.
- In May 2002, President George W. Bush authorized then-Under Secretary of State John Bolton to “unsign” it based on the United States’ view that it was fundamentally illegitimate.
  - The United States’ view was grounded in concerns over the broad, unaccountable powers granted to the ICC and its Chief Prosecutor by the Rome Statute, powers that posed a significant threat to United States sovereignty and our constitutional protections.
- The United States is not a party to the Rome Statute and has consistently voiced its strong objections to any assertion of ICC jurisdiction over American personnel.
  - The United States is not an outlier—more than 70 nations, representing two-thirds of the world’s population and over 70% of the world’s armed forces, are not parties.
  - Some of our closest allies, including Israel, have pointed out the ICC’s flawed approach as constraining liberal, democratic nations in exercising their right of self-defense.
- It is a fundamental principle of international law that a treaty is binding only on its parties, and that it does not create obligations for non-parties without their consent.

- The Rome Statute cannot dispose of rights of the United States as a non-Party without United States consent.

**PROTECTING UNITED STATES SERVICE MEMBERS:** The Trump Administration will use any means necessary to protect our citizens, and those of our allies, from unjust prosecution by the ICC.

- On November 3, 2017, the Chief Prosecutor of the ICC released a statement regarding her request to begin an investigation into the situation in the Islamic Republic of Afghanistan.
- The Chief Prosecutor indicated this investigation would focus on Afghan National Security Forces, the Taliban, and the Haqqani network, alongside war crimes allegedly committed by United States service members and intelligence professionals during the war in Afghanistan since May 1, 2003.
- If the ICC formally proceeds with opening an investigation, the Trump Administration will consider the following steps:
  - We will negotiate even more binding, bilateral agreements to prohibit nations from surrendering United States persons to the ICC.
  - To the extent permitted by United States law, we will ban ICC judges and prosecutors from entering the United States, sanction their funds in the United States financial system, and, prosecute them in the United States criminal system.
  - We will consider taking steps in the United Nations Security Council to constrain the Court's sweeping powers, including to ensure that the ICC does not exercise jurisdiction over Americans and the nationals of our allies that have not ratified the Rome Statute.
- This Administration will fight back to protect American constitutionalism, our sovereignty, and our citizens. As always, in every decision we make, we will put the interests of the American People first.

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**b. General Assembly**

On October 30, 2018, U.S. Public Delegate Margarita Palau-Hernandez delivered an explanation of position at a meeting of the UN General Assembly on Agenda Item 77: Report of the International Criminal Court. Her explanation of position is excerpted below and available at <https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-77-report-of-the-international-criminal-court/>.

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The United States recently announced a change in its policy regarding the International Criminal Court. The reasons for this change in policy have been made public, including in the speech delivered on September 10 by National Security Advisor John Bolton, and are widely available, so we will not repeat them at length here.

The United States reiterates its continuing and longstanding principled objection to any assertion of ICC jurisdiction over nationals of states that are not parties to the Rome Statute, including the United States and Israel, absent a UN Security Council referral or the consent of such a state. We also wish to reiterate our serious and fundamental concerns with the ICC Prosecutor's proposed investigation of U.S. personnel in the context of the conflict in Afghanistan.

The United States remains a leader in the fight to end impunity and supports justice and accountability for international crimes, including war crimes, crimes against humanity, and genocide. The United States respects the decision of those nations that have chosen to join the ICC, and, in turn, we expect that our decision not to join and not to place our citizens under the court's jurisdiction will also be respected.

Accordingly, the United States dissociates itself from consensus on this resolution.

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**c. *Libya***

Mark Simonoff, Minister Counselor for Legal Affairs for the U.S. Mission to the United Nations, delivered remarks at a UN Security Council briefing on the International Criminal Court and Libya on May 9, 2018. His remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-international-criminal-court-libya/>.

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Thank you, Madam President, and thank you, Madam Prosecutor, for briefing on your office's work pursuant to Security Council Resolution 1970 to seek accountability for atrocity crimes committed in Libya.

As we have said many times before in these briefings, those responsible for crimes committed during the 2011 revolution must be held to account. The Security Council unanimously referred the situation in Libya to the International Criminal Court to guarantee that the atrocities of the Qadhafi regime would not go unpunished and that those victims would receive a measure of justice. Today we reiterate our demand for accountability. We have called for Saif Al-Islam Qadhafi to be brought to The Hague to stand trial for crimes against humanity for the murder and persecution of hundreds of civilians in 2011. We note that the International Criminal Court has also issued an arrest warrant for Al-Tuhamy Mohamed Khaled, the former head of Libya's notorious Internal Security Agency, in connection with the alleged torture and other serious crimes against individuals perceived to be enemies of the Qadhafi regime.

Madam President, turning to more recent events, the United States continues to have grave concerns about the human rights situation in Libya. We have noted the International Criminal Court's arrest warrant for Major al-Werfalli, who has been accused of unlawful killings. We remain deeply concerned by these allegations and reiterate our calls for the relevant Libyan authorities to ensure that al-Werfalli is held accountable for his alleged crimes in accordance with international law.

We are also horrified by appalling reports of human trafficking and an alleged slave market in Libya. We commend the Government of National Accord's condemnation of slavery and welcome its ongoing investigation into reports of abuse of migrants. We urge the Government of National Accord to accelerate its efforts to hold those responsible to account and cooperate closely with the UN High Commission for Refugees and the International Organization for Migration to assist migrants and improve their living conditions. The United States supports ongoing efforts to identify and designate individuals and entities who threaten the peace, stability, or security of Libya, including through the commission of serious human rights abuses and violations. In particular, designations of those who engage in migrant smuggling or human traffickers are an important part of the international effort to promote accountability in Libya.

To counter these and other abuses in the long term, Libya must first overcome its political impasse in order to achieve a stable, unified government capable of ending impunity, defeating terrorism, safeguarding the rule of law, and providing security and prosperity for all Libyans. To that end, we continue to support UN Special Representative Salamé as he works to advance political reconciliation and help Libya prepare for free and fair elections in Libya by the end of this year that are both credible and conducted in a peaceful manner. We look forward to continued collaboration with our international partners, including through the work and attention of the Security Council and the Human Rights Council, to achieve a peaceful and prosperous Libya.

In closing, I would reiterate U.S. concerns regarding the ICC's activity with respect to the situation in Afghanistan, including our longstanding and continuing principled objection to any ICC investigation or other activity concerning U.S. personnel absent U.S. consent or a UN Security Council referral.

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Ambassador Jonathan Cohen, U.S. Deputy Permanent Representative to the United Nations, delivered remarks at a UN Security Council briefing on the situation in Libya on November 8, 2018, also expressing support for holding accountable those responsible for atrocities committed in Libya. His statement is excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-situation-in-libya-5/>.

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Mr. President, seven years ago, the UN Security Council unanimously referred the situation in Libya to the International Criminal Court in the face of the horrific atrocities being committed by the Qadhafi regime. Today, much has changed in Libya, but it's still the case that Libyans are not free from violence, conflict, or instability. ...

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As we've said many times before in these briefings, the human rights situation in Libya is grave, and perpetrators of violence must face justice. Saif Al-Islam Qadhafi and Al-Tuhamy Mohamed Khaled, the former head of Libya's notorious Internal Security Agency, must be held to account for their crimes, including the murder and persecution of hundreds of civilians and alleged torture against individuals perceived to have been enemies of the Qadhafi regime.

We also reiterate our calls for the relevant Libyan authorities to ensure that Major al-Werfalli is held accountable for alleged unlawful killings.

We repeat our warning that those who tamper with security in Tripoli or elsewhere in Libya will be held accountable for their actions. ...

Mr. President, the United States remains deeply concerned about the vulnerability of migrants, refugees, and asylum-seekers in Libya, who are preyed upon by human smugglers and traffickers. Those responsible must be brought to justice. We encourage the Government of National Accord to continue efforts to hold such individuals accountable, including any complicit government officials.

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In looking over the broad landscape of where Libya is today, much work remains to be done to create lasting and stable peace. It's appropriate in today's setting to emphasize the crucial role accountability has in achieving that goal. Terrorists, armed groups, and criminal gangs must not be allowed to act with impunity.

Those responsible for egregious abuses and atrocities must be held accountable, not only to bring victims a measure of justice, but to signal to all future abusers that such crimes will not be tolerated.

The United States is committed to pursuing justice in Libya. We remain a steadfast partner of the Government of National Accord, the UN Security Council, and our international partners in working toward this goal and toward a more peaceful and prosperous Libya.

Mr. President, in closing, I reiterate U.S. concerns regarding the ICC's activity with respect to situations in Afghanistan and the West Bank and Gaza, including our objection to any ICC investigation or other activity concerning U.S. or Israeli personnel.

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**d. Sudan**

On June 20, 2018, Mr. Simonoff delivered remarks at a UN Security Council briefing by the ICC prosecutor on the situation in Darfur. Mr. Simonoff's remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-by-the-icc-prosecutor-on-the-situation-in-darfur/>.

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... The United States strongly supports justice and accountability for war crimes, crimes against humanity, and genocide. Although the best way to promote accountability for such atrocities may depend on the circumstances, the United States will always believe that victims, including the victims in Darfur, deserve justice.

Hundreds of thousands of people have been killed during the conflict in Darfur, with more than 2 million remaining internally displaced and 5 million people negatively affected since the onset of the conflict. Although there are now fewer reports of civilian displacement across Darfur, internally displaced persons still cannot safely return home and risk attacks when they leave IDP camps. As the May 21-23 attacks by Sudan's Rapid Support Forces on three separate IDP camps demonstrated, even IDPs who stay within camp boundaries face substantial risks.

The United States is troubled by the resurgence of violence in Jebel Marra in April and May that resulted in injuries and deaths of civilians, including children, the destruction of homes and food, and the displacement of 9,000 people. We also remain concerned by violence, including intercommunal violence, in other areas of Darfur, outside of Jebel Marra, and the lack of access in various parts of Darfur afforded to the African Union-United Nations Hybrid Operation in Darfur. Of particular concern are the increasing reports of a potentially calamitous harvest failure across Sudan in October 2018 because of the ongoing economic and fuel crises, which could potentially contribute to a return to large-scale conflict and conflict-related atrocities as conditions become more unstable and people become desperate for resources.

We call on the Sudanese government to show restraint and to allow UNAMID, the UN Country Team, humanitarian organizations, and the media unfettered access to the areas where violence has taken place and where communities remain vulnerable to violence so that they can investigate these troubling reports, monitor current needs and conditions, and provide assistance to those in need.

Mr. President, it is shameful that sexual violence, including such violence committed by personnel in military attire and RSF uniforms, remains prevalent in Darfur and that the Sudanese government often denies that this violence is taking place despite clear evidence to the contrary. As the UN Special Representative for Sexual Violence in Conflict has noted, conflict-related sexual violence against children has increased recently, and cases of conflict-related sexual violence in Darfur go uninvestigated. This deterioration and the lack of accountability are unacceptable. The culture of impunity that continues to surround these atrocities, in particular those involving sexual violence, must end.

With hopes that peace could return to Darfur, the United States included ceasing military offensives and aerial bombardments in Darfur and the Two Areas as a key component of the Five-Track Engagement Plan we launched with Sudan in June 2016. We are pleased that the Government of Sudan made some progress under this framework, including ceasing military offensives and aerial bombardments during that period. However, much more progress is needed. We are determined to remain engaged as we work to develop a "Phase II" follow-on engagement plan, which will aim for improved respect for human rights and religious freedom, a sustainable end to internal conflicts, and improvement in humanitarian access, among other priority objectives.

Mr. President, to achieve stable and lasting peace in Darfur, justice and accountability are essential. Those responsible for human rights violations and abuses in Darfur, including targeting civilians, must be held accountable. This includes allegations that official security forces use

excessive force against civilians and that members of armed militias perpetrate atrocities against civilians in Darfur.

We welcomed the arrest by the Sudanese government of former Janjaweed commander Musa Hilal, who is subject to UN sanctions for his commission of atrocities in Darfur, following clashes between the Sudanese security forces and armed militia loyal to Hilal. However, we are concerned about the lack of transparency around Hilal's military trial and the charges he faces. We call on the government to investigate promptly and credibly all allegations against Hilal, including those related to atrocities, in accordance with Sudan's human rights commitments and obligations, and to hold Hilal to account if he is found to have committed violations.

The United States has noted for many years that it is unacceptable that the suspects in the Darfur situation have not been brought to justice and remain at large. In particular, we have expressed disappointment that Sudanese President Omar al-Bashir continues to travel around the world. Being received on such visits has served only to diminish the seriousness of the charges against him and to compound the tremendous suffering of the victims.

Regardless of the power wielded by those who are responsible for violations and abuses, we must stand with the victims, as we have in the past. For example, in Cambodia and Sierra Leone where leaders have in the past committed atrocities against their own citizens, they have been called to answer for their alleged crimes.

Moving forward, we will use all appropriate tools at our disposal to press Sudan to improve its human rights practices, to protect fundamental freedoms, and to promote justice for the people of Darfur. A Sudan that adheres to the rule of law, respects human rights, allows unfettered humanitarian access to all populations in need, and breaks the cycle of impunity is one that will enjoy a sustainable peace and will prosper. We look forward to the day when Sudan is a demonstrable proponent of human rights.

In closing, I would reiterate U.S. concerns regarding the ICC's activity with respect to the situation in Afghanistan, which is different from this situation in many respects. We continue to have a longstanding and principled objection to any ICC investigation or other activity concerning U.S. personnel absent U.S. consent or a UN Security Council referral.

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## **2. International Criminal Tribunals for the Former Yugoslavia and Rwanda and the International Residual Mechanism for Criminal Tribunals**

### ***a. General***

On June 6, 2018, Mr. Simonoff delivered remarks at a UN Security Council briefing on the International Residual Mechanism for Criminal Tribunals ("Mechanism"). His remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-international-residual-mechanism-for-criminal-tribunals/>.

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The United States would like to begin by recognizing President Meron. He has led the International Residual Mechanism for Criminal Tribunals since 2012, overseeing the assumption of responsibilities from the tribunals for Rwanda and the former Yugoslavia. President Meron's efforts, through his leadership of the Mechanism, have helped ensure that victims of horrific atrocities addressed by the ICTR and ICTY receive meaningful measures of justice, and he has done so while running a lean, efficient operation.

The volume of work that the Mechanism conducts is impressive, given its lean operations. For example, 253 judicial decisions and orders issued in this past reporting period alone, in addition to an ongoing trial in the Stanisic and Simatovic case, ongoing appeal proceedings in the Karadzic and Mladic cases, and a preparation for appeals in the Ngirabatware case.

We would also like to recognize the work of Prosecutor Brammertz. In particular, we commend his office's continued efforts in managing trials and appeals cases, as well as the renewed focus on the tracking unit activities to apprehend and locate remaining fugitives. We also appreciate the ongoing efforts to provide assistance to national war crimes prosecutions, encourage regional judicial cooperation, and support reconciliation, all of which build on the legacy of accountability established by the Tribunals.

With regard to the future, we urge the Mechanism to continue to implement the recommendations of the Office of Internal Oversight Services, as described in its report issued in March of this year. It is important to note that the OIOS concluded that the Mechanism had "achieved much of what the Security Council envisaged" in Resolution 1966. The Mechanism took advantage of operational innovations to streamline its work further. Implementation of the OIOS recommendations will help the Mechanism become even more efficient and effective at continuing to achieve its mandate. We also welcome the revision of the Code of Professional Conduct for the Judges of the Mechanism to include a disciplinary mechanism.

We encourage the Mechanism to consider proposals to respond to concerns raised by some States about the early release regime. We note that some individuals who have been released early have subsequently denied responsibility for their crimes, and we share the concern that this denial undermines the fight against impunity. We recognize and encourage the practice of consulting with concerned States about the early release regime.

In the former Yugoslavia, we welcome the Prosecutor's report of productive cooperation between Bosnia and Serbia on transferred cases. At the same time, we are concerned about the Prosecutor's report that Croatian authorities are not engaging in a similar way, as well as the report of a breakdown in cooperation between Kosovo and Serbia regarding war crimes prosecutions.

We again highlight that although the ICTY may have closed last December, the pursuit of justice for atrocities related to the conflicts in the former Yugoslavia is not over. There are many hundreds of cases currently in the hands of national authorities in the region, and we call on all of the governments concerned to credibly investigate and prosecute, or otherwise resolve these cases, cooperating with one another and the Mechanism to that end.

The United States also remains concerned about the government of Serbia's failure to execute the three arrest warrants for individuals charged with contempt of court in relation to witness intimidation in the case of Vojislav Šešelj. We continue to encourage Serbia to fulfill its obligations, including with respect to cooperation with the Mechanism.

The United States urges all states to undertake efforts to arrest and surrender the eight remaining fugitives indicted by the ICTR as soon as possible. The United States continues to offer up to \$5 million for information leading to their arrest.

The work of the Mechanism, like that of the Rwanda and former Yugoslavia tribunals previously, reminds us that in the face of terrible atrocities, we can work together to hold perpetrators accountable and to achieve a measure of justice for victims. We look forward to continuing to support the Mechanism and the fight against impunity.

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**b. UN General Assembly on the Mechanism**

U.S. Public Delegate Palau-Hernandez delivered remarks at a meeting of the UN General Assembly on the Mechanism on October 17, 2018. Her remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-130-un-general-assembly-briefing-on-the-un-mechanism-for-international-criminal-tribunals/>.

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With the closure of the International Criminal Tribunal for the former Yugoslavia in December 2017, the United States thanks those who have served at the ICTY for their hard work in providing justice to the victims of atrocities and for their efforts in promoting international criminal accountability. Justice and accountability at the international and national levels remain critically important, particularly in the face of ongoing conflicts where grave crimes have been committed.

The United States commends the Mechanism for smoothly assuming the functions of the ICTY and the ICTR. During the reporting period, the Mechanism functioned without the support of either Tribunal for the first time and did so successfully and efficiently.

The United States recognizes President Meron for his continued leadership of the Mechanism. President Meron has faithfully served the Mechanism and, through his work, has helped ensure justice for victims of atrocities and due process for defendants.

During the reporting period, the Mechanism adopted amendments and polices to increase efficiency and clarity in regard to the procedures of the Mechanism. We are hopeful that the expenditure reduction plan implemented by the Mechanism will further increase its efficiency.

We recognize the efforts of Prosecutor Brammertz, particularly to collect new intelligence and leads on the eight fugitives indicted by the ICTR. Tracking activities have helped develop a clearer picture of the strategies used by the fugitives, and the United States remains hopeful that this will aid in the efforts to locate them.

The United States also commends the Prosecutor's assistance to national jurisdictions in their own prosecution of atrocity crimes. In response to requests from Member States, the Office of the Prosecutor handed over more than 310,000 pages of documentation, which will constitute meaningful assistance for the national prosecution of atrocity crimes. The efforts to increase the capacity within national judiciaries, especially in East Africa and the former Yugoslavia,

promote the justice and accountability the international community is committed to providing. Such efforts encourage sovereign national governments to take action and ensure legitimate and effective prosecution of international crimes and other atrocities.

The Mechanism has been, and should continue to be, supportive of appropriate prosecution by sovereign national governments. Attention to the Mechanism's mandate as a temporary institution is of particular importance in understanding the need to support national systems for justice. The transfer of nine persons to enforcement states to serve their sentences shows the Mechanism's commitment to its mandate.

This October marks the 20th anniversary of the first rewards, of up to \$5 million, that the United States authorized for information leading to the arrest of individuals responsible for war crimes, genocide, and crimes against humanity. In the past 20 years we have paid dozens of rewards totaling millions of dollars to bring those responsible for crimes in the former Yugoslavia and Rwanda to justice. But this pursuit of justice is not over. Eight Rwandans remain at large, and the United States is more committed than ever to ensuring that they are brought to justice. We will continue to offer large rewards for information leading to the arrest of these men and urge all states to remain relentless in their efforts to find, arrest, and surrender these fugitives.

To the victims of these individuals—you are not forgotten.

To these fugitives and those who harbor them—we will not cease our search.

To governments—we emphasize that the adjudicated facts established through the proceedings of these tribunals represent an actual historical record of crimes committed during the conflicts, including genocide. They offer an opportunity for us to reach a shared understanding of what happened and prevent recurrence. None of us gains when individuals or governments seek to falsely revise facts, deny history, politicize tragedy, or portray convicted war criminals as heroes. We must work together to reverse this trend in a spirit of truth and reconciliation and ensure the crimes of perpetrators continue to be publicly rejected.

The United States would like to emphasize its gratitude for those who worked with the ICTR, the ICTY, and the Mechanism, along with those who continue to work with the Mechanism. These efforts show that justice can be achieved when the international community comes together. May those who lost their lives in Rwanda and the former Yugoslavia continue to be remembered and the efforts to attain justice for them continue to remain strong. It is with great pride that we state our continued support of the Mechanism and our continued commitment to accountability for perpetrators and justice for victims of atrocities.

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### **3. Other Accountability Proceedings and Mechanisms**

#### ***a. CAR: Domestic Efforts to Promote Justice for Atrocity Crimes***

On January 31, 2018, the Department of State issued a press statement hailing the conviction in a domestic criminal court in the Central African Republic of Andjilo Rodrique Ngaibona. The press statement, available at <https://www.state.gov/central-african-republic-conviction-of-andjilo-rodrique-ngaibona/>, identifies the charges on which the leader was convicted as: murder, criminal conspiracy, aggravated robbery, arbitrary detention/kidnapping, and illegal possession of ammunition and weapons. *Id.*

The United States expressed its view of the conviction as “a significant step forward in the Central African Republic’s efforts to combat impunity and ensure accountability.” *Id.* The press statement further states:

We commend President Touadera, the Ministry of Justice, and the members of the Bangui Court of Appeals for demonstrating their commitment to the rule of law and justice for all citizens in the Central African Republic. We recognize and appreciate the courage and risk involved in this effort.

The United States, through more than \$30 million in criminal justice-sector funding from the Department of State’s Bureau of International Narcotics and Law Enforcement, strongly supports the criminal court system. We will continue to work with Central African and international partners to support its criminal justice system.

**b. South Sudan**

The United States has joined calls for the establishment of an African Union (“AU”) Hybrid Court for South Sudan. In a January 24, 2018 statement at a UN Security Council briefing on the UN Mission in South Sudan (“UNMISS”), available at <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-un-mission-in-south-sudan/>, U.S. Permanent Representative to the UN Ambassador Nikki R. Haley said:

At the upcoming AU Summit, we urge the African Union to consider seriously the accountability measures it pledged for those who refuse to pursue peace. The AU can hold these individuals responsible for violating the ceasefire and obstructing the peace process, including through the establishment of the Hybrid Court for South Sudan.

Again, at a subsequent Security Council briefing on UNMISS on September 18, 2018, Ambassador Cohen reiterated the call for an AU Hybrid Court:

There must also be accountability for the crimes of recent years. The establishment and activation of the AU Hybrid Court is long past due. This is an urgent priority; we call on our AU partners to make this court a reality, as called for in the latest agreement [the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan].

On September 6, 2018, the U.S. Embassy in Juba issued a statement welcoming the conviction by a military court martial in South Sudan of ten South Sudanese government soldiers of rape, sexual assault, looting, and the murder of a foreign journalist in the July 2016 attack on the Juba Terrain residential compound. The statement is available at <https://ss.usembassy.gov/statement-by-u-s-embassy-juba-spokesperson-terrain-hotel-verdict/> and also reiterates the call for the establishment of

an AU Hybrid Court. Excerpts follow from the September 6 statement. See also the statement issued by the U.S. Agency for International Development, available at <https://www.usaid.gov/news-information/press-releases/sep-7-2018-statement-spokesperson-clayton-m-mccleskey-terrain-hotel-verdict>.

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The United States sees today's verdict as an important step toward justice for the perpetrators of violence, including murder and sexual assault, at the Terrain Hotel compound in Juba, South Sudan, on July 11, 2016. We commend, in particular, those who provided testimony for their bravery in facing their attackers.

We urge the Government of South Sudan to continue to pursue accountability for all violent acts committed by its military especially against international assistance workers and journalists. While today's verdict is an important step, human rights violations and abuses and violations of international law continue to take place in South Sudan, as they have for years. We hope that this trial will precipitate additional action by the government to hold those responsible accountable for the violations and abuses being committed in South Sudan. At least 107 aid workers and 13 journalists have been killed trying to help the South Sudanese people or cover the conflict in South Sudan since it started in December 2013.

The United States remains concerned by reports of ongoing violations and abuses of human rights and international humanitarian law committed in South Sudan, including consistent, credible reports of rampant sexual violence. The United States calls on the Government of South Sudan to hold accountable those additional individuals responsible for other violent attacks that have killed tens of thousands and displaced millions in South Sudan. To that end, the Government of South Sudan should move immediately to conclude the Memorandum of Understanding with the African Union on the establishment of the Hybrid Court—which the government agreed to in the August 2015 peace agreement—to deliver accountability for those responsible for human rights violations and abuses, including those that involve sexual and gender-based violence.

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**c. *Extraordinary Chambers in the Courts of Cambodia***

On November 16, 2018, the State Department issued a press statement on the conviction of Khmer Rouge leaders Noun Chea and Khieu Samphan in the Extraordinary Chambers in the Courts of Cambodia for crimes against humanity and genocide. The press statement is available at <https://www.state.gov/conviction-of-khmer-rouge-leaders-noun-chea-and-khieu-samphan/>, and includes the following:

In their capacities as Head of State for the Khmer Rouge regime and as the Deputy Chairman of the Communist Party of Kampuchea, Khieu Samphan and Noun Chea, respectively, were charged with genocide against the Cham and the Vietnamese; forced marriages and rape; and crimes committed at the notorious

S-21, Ta Chan, Au Kanseng and Phnom Kraol Security Centers as well as at other forced labor sites. Their crimes were numerous, calculated, and grave. During the terror of the Khmer Rouge regime, nearly one quarter of the Cambodian population was murdered or died from starvation and deprivation. We especially commend the courage of the nearly 63 victims and 114 witnesses who testified, and we hope the truths uncovered through the fair and impartial trial will bring some measure of peace to the millions of victims and their families.

The United States is proud to have supported the efforts to hold these perpetrators of atrocity crimes to account. Let this be a message to other perpetrators of mass atrocities, even those at the highest levels, including former heads of state, that such actions will not be tolerated and they will ultimately be brought to justice.

**d. *UN International Impartial and Independent Mechanism***

The State Department issued a press statement on June 14, 2018 announcing additional funding for the UN’s International, Impartial and Independent Mechanism (“IIIM”), among other assistance in Syria. The press statement is available at <https://www.state.gov/funding-for-the-syrian-civil-defense-and-un-international-impartial-and-independent-mechanism/> and excerpted below.

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The President has authorized the United States Agency for International Development and the U.S. Department of State to release approximately \$6.6 million for the continuation of the vital, life-saving operations of the Syrian Civil Defense, more commonly known as the White Helmets, and the UN’s International, Impartial and Independent Mechanism (IIIM).

The United States Government strongly supports the White Helmets who have saved more than 100,000 lives since the conflict began, including victims of Assad’s chemical weapons attacks. These heroic first responders have one of the most dangerous jobs in the world and continue to be deliberately targeted by the Syrian regime and Russian airstrikes. Since 2013, more than 230 of these brave volunteers have been killed while working to save innocent Syrian civilians.

The IIIM’s work is vital to assisting the investigation and prosecution of persons responsible for the most serious crimes under international law committed in Syria since March 2011. Their mandate, collecting and analyzing evidence of violations of international humanitarian law and human rights abuses will help ensure those responsible for these crimes are ultimately held accountable.

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**Cross References**

*Children in Armed Conflict*, **Ch. 6.C.2**

*Wildlife trafficking*, **Ch. 13.C.3**

*Terrorism sanctions*, **Ch. 16.A.8**

*Sanctions relating to transnational crime*, **Ch. 16.A.12**

*Atrocities prevention*, **Ch. 17.C**

*Use of force issues relating to counterterrorism*, **Ch. 18.A.2**

*Detention of terrorists*, **Ch. 18.C**

## CHAPTER 4

### Treaty Affairs

#### A. TREATY LAW IN GENERAL

##### 1. Treaties and International Agreements Generally

Julian Simcock, Deputy Legal Adviser for the U.S. Mission to the United Nations, delivered remarks on October 5, 2018 at a Meeting of the Sixth Committee on “Agenda Item 91: Debate on Strengthening and Promoting the International Treaty Framework.” His remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-91-debate-on-strengthening-and-promoting-the-international-treaty-framework/>.

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We welcome the opportunity to address issues related to treaties. Treaties provide an important means by which states can establish frameworks to advance their common interests. The United States works actively to identify areas in which treaty relationships can enhance our cooperative efforts. We utilize treaties to promote law enforcement cooperation to fight crime and protect our citizens, to promote mutually beneficial terms for international trade, to coordinate efforts for mutual defense and security, and for many other important purposes. In the United States, we’ve been pleased this year that our Senate has provided advice and consent to ratification of five new treaties, addressing extradition, maritime boundaries, and intellectual property rules. We look forward to continued engagement with other states to make our treaty relationships effective and mutually beneficial.

In the context of considering means of strengthening the international treaty system, we have taken note of ideas for potential changes to regulations under Article 102 of the Charter regarding the registration of treaties. As we noted when the Secretary-General first addressed

possible changes to the regulations in 2016, we believe this Committee should focus its attention on proposals that could further contribute to efficiency, particularly through the effective use of information technology, and make the most productive use of available resources. At the same time, we would have concern about proposals that could have the effect of limiting the accessibility and usefulness to member states of information and treaty texts made available by the Secretary-General. More generally, we continue to believe that consideration of any such changes should proceed cautiously, and that the Committee should take careful account of the views of the Secretariat with regard to any implementation issues or challenges that might be posed by particular proposals. We look forward to further opportunities to give these important issues the careful and rigorous consideration they merit.

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## 2. ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice

The United States also submitted formal written comments on the International Law Commission's ("ILC") Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, and accompanying commentaries, which were also adopted on first reading in 2016. Excerpts follow (with footnotes omitted) from the U.S. comments, which are available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

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[T]he United States agrees with most of the black letter rules set forth in the Draft Conclusions themselves. We have had greater difficulty in evaluating the commentaries, given their length and breadth. ...[W]e believe the ILC product would be more useful to readers if the commentaries were limited to material that explains and supports the Draft Conclusions. Material deleted to produce a more focused final commentary would remain available to researchers and others who desire to explore the issue more deeply in the Commission's report from 2016.

Further, given their extensiveness, our failure to comment on any particular aspect of the commentaries should not be taken as U.S. agreement with it.

We take this opportunity to address the most significant of our concerns regarding the Draft Conclusions and commentaries that we have been able to identify.

### Approach

Before addressing specific Draft Conclusions and commentaries, the United States would like to make a general comment about the interpretative approach that has been adopted. The United States notes that this ILC topic primarily addresses a question of how best to interpret certain provisions of a particular treaty, the Vienna Convention on the Law of Treaties ("the Vienna Convention" or "VCLT"), *i.e.*, what do Articles 31(3)(a) and (b) and 32 mean? Secondly, this topic concerns how to understand the customary international law rules reflected in those provisions. Therefore, we believe that the Draft Conclusions and commentaries would be strengthened by explicit analyses of the meaning of Articles 31(3)(a) and (b) and 32

that apply the whole of Article 31 (and Article 32, where appropriate), as well as greater evidence of State practice and *opinio juris* establishing that the principles set forth in the Draft Conclusions are consistent with customary international law.

Comments on Specific Provisions of the Draft Conclusions or commentaries

**Draft Conclusion 3 (Subsequent agreements and subsequent practice as authentic means of interpretation), commentary paragraphs 4–7, and paragraph 24 of the commentary to Draft Conclusion 7**

The United States appreciates the Commission’s effort in paragraphs 4-7 of the commentary to Draft Conclusion 3 to distinguish between (1) subsequent agreements and subsequent practice under Article 31, paragraphs 3(a) and (b), that do not necessarily have a conclusive legal effect on the interpretation of the treaty, and (2) cases in which a subsequent interpretive agreement is itself a legally binding instrument or a conclusive interpretation of the treaty. In particular, the United States agrees with the reference to and description of Article 1131(2) of the North American Free Trade Agreement (NAFTA) as an example of the latter. It is an explicit treaty mechanism for arriving at binding subsequent interpretive agreements.

Paragraph 24 of the commentary to Draft Conclusion 7, however, referencing, e.g., *ADF Group Inc. v. United States* in footnote 678, states that “informal agreements that are alleged to derogate from treaty obligations should be narrowly interpreted.” The United States disagrees with this statement and believes it should be deleted from the commentary as lacking in adequate support. The terms of a treaty should be interpreted pursuant to the interpretive rules described in Articles 31 and 32 of the VCLT. Moreover, the *ADF* tribunal was discussing a binding (*i.e.*, “formal”) interpretation under NAFTA Article 1131(2), not an informal one. Second, the *ADF* tribunal was clear that it would not entertain the claimant’s allegation that the interpretation was an “amendment” of the NAFTA. Third, merely because an “alleg[ation]” of derogation has been put forward does not mean a narrow interpretation should follow. The remaining citations in footnote 678 similarly fail to support the proposition quoted above.

**Draft Conclusion 4 (Definition of subsequent agreement and subsequent practice), commentary paragraphs 8-11**

The United States also appreciates the effort reflected in Draft Conclusion 4 and its commentary to define and clarify the terms “subsequent agreement” and “subsequent practice” in Article 31, paragraphs 3(a) and (b), respectively. However, the United States does not believe that the conclusion drawn in paragraphs 8-11 of the commentary is supported by the material cited. Paragraph 9 of the commentary states that the reasoning of the NAFTA tribunal in *CCFT v. United States* “suggests that one difference between a ‘subsequent agreement’ and ‘subsequent practice’... lies in the different *forms* that embody the ‘authentic’ expression of the will of the parties” (emphasis added). Paragraph 10 states further that “[s]ubsequent agreements and subsequent practice ... are *hence* distinguished based on whether an agreement of the parties can be identified as such, in a *common act*...” (emphasis added). Yet the *CCFT* tribunal neither uses the terms “form” and “common act” nor suggests that they are what distinguishes subsequent agreements and subsequent practice. Indeed, the tribunal suggests that an additional, unilateral statement from Canada (albeit in the same form as the Mexican submission already before the tribunal, but different in form from the U.S. pleadings) might have been sufficient for it to conclude that a subsequent agreement had been reached.

Further, even if the *CCFT* tribunal had addressed the issues of form and a common act, a ruling of a single arbitral tribunal is not sufficient to support the conclusions reached in the commentary. (As noted in the discussion below concerning Draft Conclusion 10, a significant difference between a subsequent agreement and subsequent practice is rather that a subsequent agreement requires a common understanding regarding the interpretation of a treaty that the parties are aware of and accept, whereas subsequent practice does not.)

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**Draft Conclusion 4 (Definition of subsequent agreement and subsequent practice), commentary paragraph 20**

Paragraph 20 of the commentary to Draft Conclusion 4 contains a misreading of Article 31 of the Vienna Convention. Paragraph 20 states:

The requirement that subsequent practice in the application of a treaty under article 31, paragraph 3 (b), must be “regarding its interpretation” has the same meaning as the parallel requirement under article 31, paragraph 3 (a) (see paragraphs (13) and (14) above). It may often be difficult to distinguish between subsequent practice that specifically and purposefully relates to a treaty, that is “regarding its interpretation”, and other practice “in the application of the treaty”. The distinction, however, is important because only conduct that the parties undertake “regarding the interpretation of the treaty” is able to contribute to an “authentic” interpretation, whereas this requirement does not exist for other subsequent practice under article 32.

However, Article 31(3)(b) does not require that the parties’ practice be regarding its interpretation. Rather, Article 31(3)(b) requires that the practice be in the application of the treaty and that it establish an agreement of the parties regarding the treaty’s interpretation. This is clear from the language of Article 31(3), which states in pertinent part:

3. There shall be taken into account, together with the context:

- (a) ...;
- (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) ...

A State’s application of a treaty may reflect a view as to the State’s interpretation of a treaty provision, even where that practice does not involve a specific articulation of the interpretation in question (or, in the words of the commentary, involve practice specifically “regarding the interpretation of the treaty”). Such practice in the application of the treaty, together with similar practice by other States, could serve to establish the agreement of the parties regarding the interpretation of a treaty within the meaning of Article 31(3)(b).

The United States believes that the necessary corrections should be made throughout the commentaries.

**Draft Conclusion 5 (Attribution of subsequent practice)**

The United States also disagrees with the text of the first paragraph of Draft Conclusion 5, which states that subsequent practice “may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.” Paragraph 2 of the commentary explains that this language borrows from article 2(a) of the draft articles on responsibility of States for internationally wrongful acts, and covers not only conduct of a State,

but also conduct by others that is attributable to a State under international law. In our view, it is not appropriate to apply rules designed to address situations of State responsibility to questions of treaty interpretation as there are many acts that are attributed to a State for purposes of holding a State responsible that would not evidence a State's views regarding the meaning of a treaty to which it is party. An example would be the actions of a State agent contrary to instructions. Therefore, paragraph 1 of the Draft Conclusion should be revised to remove the reference to attribution.

The *Kasikili/Sedudu Island* case cited in the commentary is not to the contrary. In that case, the International Court of Justice found that the use of the disputed island by a local tribe did *not* constitute subsequent practice within the meaning of Article 31(3)(b). In doing so, it focused on the conduct and legal views of the parties in that case with respect to the actions of the tribe. It stated:

To establish such practice, at least two criteria would have to be satisfied: first, that the occupation of the Island by the Masubia was linked to a belief on the part of the Caprivi authorities that the boundary laid down by the 1890 Treaty followed the southern channel of the Chobe; and, second, that the Bechuanaland authorities were fully aware of and accepted this as a confirmation of the Treaty boundary.

Further, language similar to the attribution language in Draft Conclusion 5 was removed—properly in the U.S. view—from the Draft Conclusions on the Identification of Customary International Law. We believe that the two sets of Draft Conclusions should be consistent.

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The United States is also concerned about the commentary to paragraph 2 of Draft Conclusion 5. We agree that the conduct of entities other than parties to a treaty may be relevant to assessing the practice of the parties in the application of a treaty. For example, if the International Committee of the Red Cross (ICRC) proposes an interpretation of a treaty and the parties to the treaty respond, the ICRC's proposed interpretation contributes to the generation of, or may help in the assessment of, the practice of those parties. Similarly, where a treaty provides a role for non-party States with their consent, or otherwise intends to incorporate practice of non-party States, their conduct may be relevant to the interpretation of the treaty.

However, we believe that paragraphs 12 to 18 of the commentary need to be reworked to avoid suggesting that non-parties and their practice ha[ve] a role in the interpretation of a treaty that is inconsistent with Article 31 of the Vienna Convention. In particular, it should be made clear that non-party international organizations, the ICRC, and other non-parties may collect evidence of practice that may be a useful starting point in identifying the practice of the parties in the application of the treaty, or those non-parties may inspire the parties to engage in practice that constitutes subsequent practice, as in the ICRC example above. However, it is what the parties do in the application of the treaty that is relevant subsequent practice in interpreting the treaty. The views or conduct of a non-party as such have no such direct role in the interpretation of a treaty under either Articles 31 or 32. Nor should it be suggested that the views of certain international organizations “may enjoy considerable authority in the assessment of such practice” as stated in paragraph 15 of the commentary, as there is no support for that proposition.

Regarding paragraph 16 of the commentary's discussion of the role of the ICRC, we are concerned that it may be misunderstood by readers as endorsing the view that the ICRC has a mandate to interpret authoritatively the 1949 Geneva Conventions and their Additional Protocols. The mandate from the Statutes of the Movement does not have the legal effect of authorizing the ICRC to issue binding interpretations of the 1949 Geneva Conventions, which the term "interpretative guidance" may suggest. Moreover, the specific example of interpretive guidance provided in paragraph (16) was widely criticized. Thus, we recommend the commentary be revised to reflect that this example prompted criticism by States, including descriptions of contrary State practice.

**Conclusion 6 (Identification of subsequent agreements and subsequent practice), Paragraphs 15-18 of the commentary**

We appreciate the discussion of Article 118 of the Third Geneva Convention as a useful example that demonstrates, as noted in draft commentary paragraph 18, "the need to identify and interpret carefully subsequent agreements and subsequent practice, in particular to ask whether the parties, by an agreement or a practice, assume a position regarding the interpretation of a treaty or whether they are motivated by other considerations." However, we recommend refining the discussion of this example.

First, the discussion seems to focus on the issue of whether "the declared will of the prisoner of war must always be respected." However, the more significant issue of treaty interpretation presented by Article 118 is whether the wish of the POW not to be repatriated may be considered at all, consistent with the terms of the treaty provision.

Second, footnote 603 of the commentary cites "the United States manual," by reference to a quote found in the ICRC's study on Customary International Humanitarian Law. The actual manual being cited is a U.S. Department of the Army Field Manual last issued in 1976, and the effect of that manual must be considered in light of changes to U.S. law and Department of Defense procedures since that time. Moreover, the provision of that manual being cited is based on Article 109 of the Third Geneva Convention, not Article 118. The misinterpretation of U.S. practice in the draft commentary is understandable given that the ICRC study on Customary International Humanitarian Law does not provide this background when it presents what the ICRC regards as U.S. practice. The United States has indicated significant concerns with the methodology used in the ICRC's study, including its use of military manuals.

We recommend citing the U.S. Department of Defense Law of War Manual, June 2015, Updated December 2016, section 9.37.4.2., rather than what is currently provided in footnote 603. That discussion makes clear that a neutral intermediary other than the ICRC could be used and supports the interpretation offered by the United Kingdom.

**Draft Conclusion 8 (Interpretation of treaty terms as capable of evolving over time)**

The United States believes that Draft Conclusion 8 should be revised to eliminate the reference to the "presumed intention" of the parties. Although discerning the intent of the parties is the broad purpose of treaty interpretation, that purpose is served through the specific means of treaty interpretation set forth in Articles 31 and 32 of the Vienna Convention. In other words, intent is discerned by applying the approach set out in those articles, not through an independent inquiry into intent or "presumed intent." We believe that Draft Conclusion 8 is confusing in appearing to distinguish between the "intent" of the parties and their "presumed intent" and that it may be misinterpreted to suggest that a separate inquiry as to the "presumed intent" is appropriate, undercutting the interpretative rules of the Vienna Convention.

Although the United States appreciates the clarifying language in paragraph 9 of the commentary, we do not believe that it is sufficient to remove the potential for confusion from the term “presumed intent,” which we note does not appear to be supported by the text of the VCLT, its negotiating history, State practice, or tribunals’ interpretations of the VCLT.

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**Draft Conclusion 10 (Agreement of the parties regarding the interpretation of a treaty), paragraphs 4 and 10 of the commentary**

The United States believes that the text of paragraph 1 of Draft Conclusion 10 and at least two paragraphs of the commentary are incorrect and should be revised.

First, paragraph 1 of the Draft Conclusion and paragraph 8 of the commentary erroneously indicates that an agreement under article 31, paragraph 3(a) and (b), requires a common understanding regarding the interpretation of a treaty that the parties are aware of and accept. Paragraph 8 of the commentary offers the explanation that “it is not sufficient that the positions of the parties regarding the interpretation of the treaty happen to overlap, the parties must also be aware of and accept that these positions are common.” Although these statements are correct with regard to subsequent agreements under Vienna Convention Article 31(3)(a), they are not correct with respect to subsequent practice under subparagraph (b). Rather, the parties’ parallel practice in implementing a treaty, even if not known to each other, may evidence a common understanding or agreement of the parties regarding the treaty’s meaning and fall within the scope of Vienna Convention Article 31(3)(b). Indeed, we believe that that is one of the primary differences between a subsequent agreement and subsequent practice, i.e., subsequent practice “establishes” (to use the term in Vienna Convention Article 31(3)(b)) the agreement of the parties; the Vienna Convention does not require that the agreement exist independently.

Further, the International Court of Justice’s judgment in the *Kasikili/Sedudu Island* case does not support the language of paragraph 8. Rather than indicating that—for the purposes of Vienna Convention Article 31(3)(b)—the two parties had to be aware of their common interpretation, as suggested in the commentary, the passages cited simply require that both parties have engaged in subsequent practice evidencing their interpretation of the treaty.

Second, the last sentence of paragraph 4 of the commentary, regarding treaties “characterized by considerations of humanity or other general community interests,” should be deleted because there is no basis in the rules of treaty interpretation described in the Vienna Convention (whether applied as conventional or customary international law) for interpreting such treaties differently from any other treaty; nor would it be clear in all instances which treaties would fall within such a category. The draft commentary does not provide any legal support for the proposition set forth in that sentence.

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In addition, the United States questions whether there is sufficient practice and authority to support the conclusions in paragraph 25 of the commentary to Draft Conclusion 10 and believes it should be deleted if it cannot be better supported.

**Draft Conclusion 11 (Decisions adopted within the framework of a Conference of States Parties)**

With respect to Draft Conclusion 11, we are concerned that the Draft Conclusion and commentary may be understood to mean that the work of Conferences of States Parties (COPs) commonly involves acts that may constitute subsequent agreements or subsequent practice in the interpretation of a treaty. Subject to the terms of the treaty at issue, it is possible that a COP may produce a decision that constitutes a subsequent agreement of the parties regarding the interpretation of a treaty provision, if such a decision clearly reflects the agreement of all the treaty's parties (and not just those present at the COP), or that the parties may engage in actions within the COP that constitute subsequent practice within the meaning of Article 31(3)(b). However, those results are by far the rare exception, not the rule, with regard to the activities of COPs. Therefore, the general language of Draft Conclusion 11 should be modified to indicate that these results are neither widespread nor easily demonstrated.

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In addition, paragraph 3 of Draft Conclusion 10 may be particularly difficult for a reader to understand due to the placement of "including by consensus" at the end of the sentence. We understand from paragraphs 30 and 31 of the commentary that the phrase was added to make clear that a decision by consensus is not necessarily sufficient for a decision to constitute an agreement under VCLT Article 31(3). We agree with that view. However, the placement of the phrase "including by consensus" does not make that point. The commentary on Draft Conclusion 10 may also be confusing in that it cites a number of examples of consensus decisions before clarifying in paragraphs 30 and 31 that consensus is not necessarily sufficient. As such, either those examples should be deleted or an explanation should be added regarding how the examples are consistent with the recognition that consensus is not necessarily sufficient for a decision to constitute an agreement under VCLT Article 31(3).

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**Draft Conclusion 12 (Constituent instruments of international organizations)**

The United States agrees with paragraph 1 of Draft Conclusion 12, which states:

1. Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph 3, are, and other subsequent practice under article 32 may be, means of interpretation for such treaties.

However, the United States has a number of concerns regarding other aspects of the Draft Conclusion. Our first concern is with regard to paragraph 2, which reads:

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, or other subsequent practice under article 32, may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument.

The United States agrees that the practice of an international organization may trigger practice by the parties to a treaty that constitutes subsequent practice for the purposes of Article 31(3) or that the parties to the treaty may potentially act within an international organization in a way that constitutes subsequent practice. International organizations may also report on the subsequent practice of the parties. However, we believe it is important to recognize that it is only the practice of the parties to a treaty that constitutes subsequent practice within the meaning of Article 31(3)(b) and that paragraph 2 (including its reference to the “practice” of an international organization) should not be understood to suggest a broader role for the practice of an international organization.

Second, the United States remains very concerned regarding paragraph 3 of Draft Conclusion 12, which states that the “[p]ractice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32.”

The draft commentary explains that the purpose of this provision is to address the role of the practice of an international organization “as such” in the interpretation of the instrument by which it was created. In other words, it refers, not to the practice of the parties to the treaty creating the international organization, but to the conduct of the international organization itself. See paragraph 26 of the commentary. In citing Articles 31(1) and 32 of the Vienna Convention, the Commission recognized that the practice of that international organization is not “subsequent practice” for the purposes of the rule reflected in Article 31(3)(b). We believe that that conclusion is correct because the international organization itself is not a party to the constituent instrument and its practice as such, therefore, cannot contribute to establishing the agreement of the parties.

However, in light of the inapplicability of Article 31(3)(b), the Draft Conclusion states instead that consideration of the international organization’s practice is appropriate under paragraph 1 of Article 31 as well as Article 32 of the Vienna Convention.

Paragraph 1 of Article 31 is not relevant in this context and, therefore, reference to it should be deleted. Paragraph 1 reads: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in light of its object and purpose.” The factors to be considered pursuant to Article 31(1)—“ordinary meaning,” “context,” and “object and purpose”—do not encompass consideration of subsequent practice regardless of whether the actor is a party or the international organization. The draft commentary fails to explain how Article 31(1) can properly be interpreted in this way, consistent with the Vienna Convention itself. Indeed, it provides no support for this proposition; the decisions cited do not even appear to mention Article 31(1). Indeed, there may even be a risk that such “practice,” if located along with “text” in Article 31(1), might be viewed as superior to “subsequent practice” identified in Article 31(3), an outcome that is clearly not intended.

The United States accepts that Article 32 of the Vienna Convention, in certain circumstances, may provide a basis for considering the practice of an international organization with respect to the treaty by which it was created, particularly where the parties to the treaty are aware of and have endorsed the practice. As such, we can support retention of this reference. Of course, under Article 32, recourse may only be had to supplementary means of interpretation in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable. The practice of the international organization would be on par with the *travaux* of the treaty in this regard. We

believe that the circumstances in which the practice of the international organization may fall within Article 32, however, would need to be better explained in the commentary.

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### **Draft Conclusion 13 (Pronouncements of expert treaty bodies)**

The United States also recognizes that the work of expert treaty bodies, like that of the international organizations addressed in Draft Conclusion 12, “may give rise to, or refer to” a subsequent agreement or subsequent practice by parties to the treaty within the scope of Article 31(3). See paragraph 3 of the Draft Conclusion. However, we believe that this is not a frequent occurrence or easily demonstrated. Moreover, as with Draft Conclusion 12, it is important that it be understood that it is only the practice of the parties in the application of a treaty that constitutes subsequent practice within the meaning of Article 31(3)(b). Paragraph 9 of the commentary appropriately emphasizes this important point, stating “[a] pronouncement of an expert treaty body cannot as such constitute subsequent practice under article 31, paragraph 3(b), since this provision requires a subsequent practice of the parties that establishes their agreement regarding the interpretation of the treaty.” The reference in Paragraph 3 to the possibility that a statement of an expert treaty body may “give rise to, or refer to” subsequent practice by the parties should not be understood to suggest a broader role for expert treaty bodies, and it is on that understanding that we support that aspect of paragraph 3 to the Draft Conclusion.

However, three clarifying edits are required to the text of Draft Conclusion 13. First, Draft Conclusion 13 is titled and refers throughout to “pronouncements” of expert treaty bodies. The United States believes that the term “pronouncements” carries with it an inappropriate implication of authority. We believe that a more neutral term, like “views” or “statements,” should be used instead.

Second, we believe the reference to the “rules” of a treaty in paragraph 2 is likely to be confusing and believe “terms” should be used instead.

Third, the important, clarifying language from paragraph 9 of the commentary, quoted above, should be broadened and included as a new paragraph *2bis* to the Draft Conclusion.

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## **B. CONCLUSION, ENTRY INTO FORCE, ACCESSION, WITHDRAWAL, TERMINATION**

### **1. Termination of Treaty of Amity with Iran**

On October 3, 2018, Secretary of State Michael R. Pompeo announced that the United States was terminating the 1955 Treaty of Amity with Iran. See Chapter 9 for further discussion of the Secretary’s announcement. See Chapter 7 for discussion of proceedings before the International Court of Justice in which Iran alleged that the United States was violating the Treaty. The text of the October 3, 2018 diplomatic note from the U.S. Department of State to the Ministry of Foreign Affairs of the Islamic Republic of Iran providing notice of the termination of the Treaty follows.

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The U.S. Department of State refers the Ministry of Foreign Affairs of the Islamic Republic of Iran to the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, signed at Tehran on August 15, 1955 (“the Treaty”).

The policies and actions of the Government of the Islamic Republic of Iran against regional and international peace and security, including its material, financial, and other support for attacks and other hostile actions against United States persons, officials, and property, as well as United States partners and interests, have produced a situation which is incompatible with normal commercial and consular relations under a Treaty of Amity, Economic Relations and Consular Rights and with the peace and friendship which provided the basis on which the parties consented to be bound by the Treaty.

Accordingly, in accordance with Article XXIII, paragraph 3 of the Treaty and with its rights in light of the fundamental change in circumstances which has occurred with regard to those existing at the time of the conclusion of the Treaty, the United States hereby gives notice of the termination of the Treaty.

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## **2. Withdrawal from Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes**

On October 12, 2018, the United States effected its withdrawal from the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes by letter to the Secretary-General of the United Nations, acting as depositary. The text of the letter so notifying the Secretary-General is available at <https://treaties.un.org/doc/Publication/CN/2018/CN.487.2018-Eng.pdf>, and states:

I have the honor on behalf of the Government of the United States of America to refer to the Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes, done at Vienna on April 18, 1961.

This letter constitutes notification by the United States of America that it hereby withdraws from the aforesaid Protocol. As a consequence of this withdrawal, the United States will no longer recognize the jurisdiction of the International Court of Justice reflected in that Protocol.

## **3. Withdrawal from the Universal Postal Union**

As discussed in Chapter 11, President Trump directed the Department of State to file notice that the United States will withdraw from the Universal Postal Union (“UPU”), beginning a one-year withdrawal process, in accordance with the UPU Constitution. The Trump Administration indicated that it may rescind the notice of withdrawal depending on the outcome of negotiations for bilateral and multilateral agreements to resolve U.S. concerns with the current system of reimbursement for the delivery of mail. The

October 15, 2018 letter from Secretary Pompeo to Bishar Abdirahman Hussein, Director General of the International Bureau of the UPU in Berne, Switzerland, states as follows:

I have the honor on behalf of the Government of the United States of America to refer to the Constitution of the Universal Postal Union adopted at Vienna, July 10, 1964, as amended (the UPU Constitution).

This letter constitutes notification by the Government of the United States of America that it hereby denounces the UPU Constitution and, thereby, withdraws from the Universal Postal Union. Pursuant to Article 12 of the Constitution, the withdrawal of the United States shall be effective one year after the day on which you receive this notice of denunciation. I respectfully request your written confirmation of receipt of this notice.

#### **4. Efforts of the Palestinian Authority to Accede to Treaties**

The United States has consistently objected to efforts by the Palestinian Authority to accede to international treaties, purporting to act as the “State of Palestine.” See, *e.g.*, *Digest 2015* at 120. On June 18, 2018, the Secretary-General of the UN as depositary for the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction, communicated his receipt of the following notification from the United States (available at <https://treaties.un.org/doc/Publication/CN/2018/CN.295.2018-Eng.pdf>):

The United States Mission to the United Nations presents its compliments to the Executive Office of the Secretary-General of the United Nations and refers to the U.N. Secretary-General’s depositary notification C.N.250.2018.TREATIES-XXVI.3, dated May 18, 2018, regarding the purported accession of the ‘State of Palestine’ to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, done at Geneva September 3, 1992 (the Convention), for which the Secretary-General of the United Nations is the depositary.

The Government of the United States of America does not believe the ‘State of Palestine’ qualifies as a sovereign State and does not recognize it as such. Accession to the Convention is limited to sovereign States. Therefore, the Government of the United States of America believes that the ‘State of Palestine’ is not qualified to accede to the Convention and affirms that it will not consider itself to be in a treaty relationship with the ‘State of Palestine’ under the Convention.

A similar depositary notification was communicated by the UN Secretary-General on May 1, 2018 regarding the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, done at Geneva September 7, 1956 (the Convention). That communication is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.229.2018-Eng.pdf>. Also on May 1, 2018, the U.S. objection to purported accession by the “State of Palestine” to the Optional Protocol to the Vienna Convention on Diplomatic Relations, Concerning the Compulsory Settlement of Disputes was conveyed by the UN Secretary-General, and that communication is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.228.2018-Eng.pdf>.

The United States notified the Secretary-General of its objection to the Palestinian efforts to accede to multiple treaties on April 4, 2018. The communication regarding the Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol V) is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.191.2018-Eng.pdf>. The

communication regarding the United Nations Convention on Contracts for the International Sale of Goods is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.177.2018-Eng.pdf>. The

communication regarding the United Nations Convention Against Illicit Traffic in Narcotic Drugs and psychotropic Substances is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.185.2018-Eng.pdf>. The

communication regarding the Single Convention on Narcotic Drugs is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.176.2018-Eng.pdf>. The

communication regarding the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.175.2018-Eng.pdf>. The

communication regarding the Convention on Psychotropic Substances is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.172.2018-Eng.pdf>. The

communication regarding the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.170.2018-Eng.pdf>. The

communication regarding the Customs Convention on the International Transport of Goods Under Cover of TIR Carnets (TIR Convention) is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.169.2018-Eng.pdf>. The

communication regarding the International Convention for the Suppression of Acts of Nuclear Terrorism is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.168.2018-Eng.pdf>. The

communication regarding the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography is available at

<https://treaties.un.org/doc/Publication/CN/2018/CN.192.2018-Eng.pdf>.

## **5. Testimony in Support of U.S. Ratification of the Marrakesh Treaty**

On April 18, 2018, Assistant Secretary of State for Economic and Business Affairs Manisha Singh testified at the Senate Foreign Relations Committee hearing on the Marrakesh Treaty to Facilitate Access to Public Works for Persons Who Are Blind,

Visually Impaired, or Otherwise Print Disabled, Done at Marrakesh on June 27, 2013 ([Treaty Doc.: 114-6](#)); Submitted to the Senate on February 10, 2016. For background on the Marrakesh Treaty, see *Digest 2016* at 507; and *Digest 2013* at 335-36. Assistant Secretary Singh's testimony in support of the Marrakesh Treaty is excerpted below and available at <https://www.foreign.senate.gov/hearings/treaties-041818>.

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...Today, there is a shortage of print materials formatted to be accessible for the many millions of people around the world, including Americans at home and abroad, who are blind, visually impaired, or who have other disabilities that prevent them from reading standard formats. Less than 10 percent of books published worldwide every year are available in braille, large print, or accessible digital files, according to figures compiled by the World Intellectual Property Organization. This lack of resources creates a deficit of information, culture, and education for persons with what are known as "print disabilities."

The Marrakesh Treaty addresses the gap in access to print materials for these persons by providing, with appropriate safeguards, that copyright restrictions should not impede the creation and distribution of copies of published works in specialized formats accessible to individuals who are blind, visually impaired, or with other print disabilities. It also fosters the cross-border exchange of such accessible format copies internationally.

I would now like to say a bit about the history of the Treaty and what accession would mean in terms of U.S. law.

The United States was actively involved in the preparatory work for the treaty over a number of years and played a leadership role at the Diplomatic Conference in the successful negotiation of the treaty, culminating with its adoption by consensus, on June 27, 2013 in Marrakesh, Morocco, at a gathering of 600 representatives from World Intellectual Property Organization (WIPO) member states.

This achievement was a tribute to the sustained commitment, effort and engagement of a number of U.S. federal agencies as well as stakeholders from the private and non-profit sectors. In particular, the U.S. Patent and Trademark Office led the U.S. negotiating team, assisted and joined by experts from the U.S. Copyright Office, the Office of the United States Trade Representative, the Department of State, the Department of Justice, the Department of Education, and the Institute of Museum and Library Services.

Our negotiators consulted closely throughout with U.S. stakeholders representing intellectual property rights-holders, blind and other individuals with print disabilities, libraries, and other organizations that play a vital role in distributing copies of accessible format materials. Many of them were in Marrakesh when the Treaty was finalized, and it is a pleasure to see a number of them here in the room today.

The United States signed the Marrakesh Treaty in October 2013 and, in February 2016, it was transmitted by the White House to the Senate for its advice and consent to ratification. The Treaty entered into force on September 30, 2016 when Canada became the 20th nation to ratify. Today, 35 countries have ratified or acceded to the Treaty. But none has the range of print materials that the United States has.

The Marrakesh Treaty contains two principal obligations. First, it requires parties to provide exceptions in their national copyright laws for the creation and distribution of accessible format copies for persons with print disabilities. Second, it requires parties to allow the cross-border dissemination of accessible format copies, increasing the number of accessible works available in each country, including the United States.

The provisions of the Treaty keep the scope of the required exception within the parameters of existing international copyright agreements and are generally compatible with existing U.S. law. The Treaty requires other countries to adopt exceptions modeled closely on exceptions already found in U.S. law. Since 1996, section 121 of the Copyright Act (the Chafee amendment) has provided a copyright exception that permits authorized entities, such as libraries, to reproduce and distribute accessible format copies to persons who are blind or visually impaired.

This Treaty is seen as critical to providing access to learning by the blind community and individuals with other print disabilities worldwide. Ratification by the United States of the Marrakesh Treaty, together with enactment of implementing legislation that has been proposed, will have a significantly positive effect. It will allow Americans who are blind or visually impaired or with other print disabilities to access an estimated 350,000 additional works that they currently cannot read.

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## 6. Suspension of Obligations under the INF Treaty

On December 4, 2018, Secretary Pompeo announced that the United States had found Russia in material breach of the Intermediate-Range Nuclear Forces (“INF”) Treaty and planned to suspend its obligations under the Treaty as a remedy effective in 60 days unless Russia returned to full and verifiable compliance. See Chapter 19 for further discussion of the U.S. determination regarding the INF Treaty. The text of the diplomatic note provided by the U.S. Embassy to the Russian Federation follows. Similar notes were transmitted to the other parties to the INF Treaty.

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The Embassy of the United States of America ... refers to the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles signed at Moscow December 8, 1987 (INF Treaty).

For a number of years, the Russian Federation has not been complying with its obligations under the Treaty not to possess, produce, or flight-test a ground-launched cruise missile with a range capability equal to or in excess of 500 kilometers but not in excess of 5,500 kilometers or to possess or produce launchers of such missiles. The Russian Federation continues to produce and field new units of a missile system, known as the 9M729, covered by these obligations. As of late 2018, the Russian Federation has fielded multiple battalions of the 9M729 missile system.

The United States engaged the Russian Federation repeatedly since 2013 in an effort to find a diplomatic resolution to its compliance concerns regarding the 9M729 system. These concerns were raised in numerous senior political engagements and at least five meetings of technical experts, including two sessions of the INF Treaty’s Special Verification Commission convened at U.S. request in 2016 and 2017. Notwithstanding these sustained efforts on the part of the United States, the Russian Federation failed to take steps to return to verifiable compliance. The United States has concluded that the current situation, in which the Russian Federation continues to violate the Treaty while the United States abides by it, is untenable. In such circumstances, remaining bound by Treaty obligations that the Russian Federation is not complying with on a reciprocal basis would threaten the security of the United States.

The United States considers that the Russian Federation’s continued production, possession, and deployment of an intermediate-range ground-launched cruise missile system, as described above, constitutes a material breach of the Russian Federation’s obligations to the United States under Articles I, IV, and VI of the Treaty. These obligations not to possess, produce, or flight-test intermediate-range ground-launched cruise missiles, or to possess or produce launchers of such missiles, are central obligations under the Treaty and are essential to the accomplishment of the Treaty’s object and purpose. As a consequence, and in view of the urgent need to pursue expeditiously all measures necessary to protect its national security, the United States will suspend its obligations under the Treaty between the United States and other Treaty Parties, effective on the date that is 60 days from the date of this note, unless the Russian Federation returns to full and verifiable compliance.

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## C. LITIGATION INVOLVING TREATY LAW ISSUES

### 1. *Texas v. New Mexico*

On December 21, 2018, the United States filed a brief in support of its motion for judgment on the pleadings in a case in the U.S. Supreme Court in which New Mexico brought counterclaims against Texas and the United States. *Texas v. New Mexico*, No. 141. The portion of the U.S. brief relating to the claim with regard to U.S. enforcement of the U.S.-Mexico water convention (“1906 Convention”) is excerpted below. The brief is available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

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New Mexico’s Ninth Claim alleges that the United States has failed to enforce the 1906 Convention with Mexico, to stop the pumping of groundwater hydrologically connected to the Rio Grande and unauthorized surface diversions from the Rio Grande that allegedly have “greatly increased in Mexico above Fort Quitman, Texas, since 1906.” N.M. Countercls. ¶ 126. New Mexico alleges that such groundwater pumping and unauthorized diversions in Mexico have exceed the 60,000 acre-feet of Rio Grande water to which Mexico is entitled annually under the 1906 Convention (*id.*) and have created “deficits in the shallow alluvial aquifer that have

reduced Project efficiency, impacted Project releases, reduced return flows, and decreased the amount of water in Project Storage available for future use.” *Id.* However, New Mexico’s Prayer for Relief does not seek relief specific to the 1906 Convention and references the United States’ alleged failure to enforce the Convention only insofar as the failure allegedly resulted in the United States’ violation of the Compact. *See* N.M. Countercls., Prayer for Relief, ¶ J (“Declare that the United States, its officers, and its agencies have violated the Compact by failing to enforce the 1906 Convention”). Thus, it is unclear whether New Mexico intends to assert its Ninth Claim as a separate and distinct claim upon which relief may be granted or if the alleged failure to enforce the 1906 Convention is asserted only as part of New Mexico’s claim that the United States has violated the Compact.

- a. New Mexico’s Ninth Claim fails to state a claim for relief under the 1906 Convention

Assuming New Mexico intends to challenge the United States’ alleged failure to enforce Article IV of the 1906 Convention as a separate and distinct cause of action, the Ninth Claim fails to state a cognizable cause of action against the United States. The Ninth Claim is premised on New Mexico’s allegation that Mexico has received “in excess of the 60,000 acre-fee annually guaranteed to” it under the Convention, which in turn has had a “negative effect on Project deliveries.” *Id.* ¶¶ 125, 127-29. New Mexico appears to allege that, by receiving the allegedly excess water, Mexico has violated Article IV of the Convention, in which it agreed to “waive[] any and all claims to the waters of the Rio Grande for any purpose whatever between the head of the present Mexico Canal and Fort Quitman, Texas.” *Id.* To the extent there is any allegation of a violation of the 1906 Convention, it is not against the United States but against Mexico.

Nonetheless, New Mexico’s Ninth Claim includes assertions that the United States has “failed to enforce” Article IV of the Convention. *Id.* Even assuming Mexico’s actions as alleged by New Mexico could support a finding that Mexico is in violation of Article IV of the 1906 Convention, New Mexico’s attempt to challenge an alleged failure by the United States to take action against Mexico in response to any such violation fails to state a claim upon which relief may be granted. As observed by this Court, “[a] treaty is, of course, ‘primarily a compact between independent nations.’” *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884)). A treaty will often “depend[] for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.” *Id.* Any alleged breach of a treaty obligation, then, “becomes the subject of international negotiations and reclamations ... [and] ... the judicial courts had nothing to do and can give no redress.” *Id.* (citations and internal quotation marks omitted).

The authority to decide whether a foreign state has breached a treaty obligation in fact owed to the United States and, if so, what if any action to take in response lies exclusively with the President. U.S. Const. art. II, §§ 2, 3 (assigning the President powers over foreign affairs); *Goldwater v. Carter*, 617 F.2d 697, 706 (D.C. Cir. 1979) (acknowledging executive’s power to terminate a treaty because of breach), *vacated on other grounds*, 444 U.S. 996 (1979); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 335 cmt. (b) (1987) (“Under United States law, the President has exclusive authority to determine the existence of a material breach by another party and to decide whether to invoke the breach as a ground for terminating or suspending the agreement.”); *cf.* *Charlton v. Kelly*, 229 U.S. 447, 473 (1913) (If the U.S. treaty partner violated an “obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its

abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which, in its judgment, had occurred, and conform to its own obligation as if there had been no such breach.”). Even assuming New Mexico has sufficiently alleged facts that would provide the United States with a legally sufficient basis upon which to find Mexico in breach of Article IV of the 1906 Convention, the decision to declare Mexico in violation of the treaty and to respond are committed to the President’s sole authority and discretion.

b. The 1906 Convention does not provide for a private right of action for which the Court can provide relief

That enforcement of Article IV of the 1906 Convention lies solely with the Executive is further underscored by the fact that the 1906 Convention does not provide a private right of action for which the Court can provide relief. Treaties are presumed not to create rights that are privately enforceable in the federal courts:

[T]he background presumption is that international agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts. Accordingly, a number of the [United States] Courts of Appeals have presumed that treaties do not create privately enforceable rights in the absence of express language to the contrary.

*Medellin v. Texas*, 552 U.S. at 506 n.3 (2008) (citations and quotation marks omitted); *see, e.g., Garza v. Lappin*, 253 F.3d 918, 924 (7th Cir. 2001) (“[A]s a general rule, international agreements, even those benefitting private parties, do not create private rights enforceable in domestic courts.”).

Consistent with this presumption, at least one federal district court has held that the 1906 Convention “contains no ‘specific provision permitting a private action, or one to be clearly inferred.’” *EPCWID v. Int’l Boundary & Water Comm’n*, 701 F. Supp. 121, 124 (W.D. Texas 1988) (quoting *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 546 (D.D.C. 1981), *aff’d*, 726 F.2d 774 (D.C. Cir. 1981)). In that case, the district court dismissed EPCWID’s claim under the 1906 Convention, holding that the plaintiffs “failed to demonstrate that the [1906 Convention] under which it claims its rights arise does, indeed, confer rights upon it.” *Id.* at 125. New Mexico points to nothing to show to the contrary here. There is no indication that the Executive Branch contemplated that Article IV of the 1906 Convention granted any private individual rights or remedies at all, let alone a right of action to enforce Mexico’s agreement to waive any additional claims to Rio Grande waters as consideration for the United States’ agreement to deliver 60,000 acre-feet.

For the foregoing reasons, New Mexico’s Ninth Claim fails to state a claim against the United States for which this Court can provide relief, and should be dismissed.

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## 2. *Center for Biological Diversity*

In April 2018, the Center for Biological Diversity (“CBD”) filed suit against the Department of State in the U.S. District Court for the District of Columbia, alleging in part that the Department failed to comply with a reporting deadline under the United Nations Framework Convention on Climate Change (“UNFCCC”). In briefs filed by the U.S. Government in 2018, the Government argued, among other things, that in order for CBD to have a claim enforceable in U.S. courts, CBD would need to demonstrate both that any obligation to meet a reporting deadline under the UNFCCC was self-executing and that the UNFCCC provided for a private right of action in U.S. courts. Excerpts follow from the U.S. Government’s motion to partially dismiss CBD’s complaint, filed on August 29, 2018. *Center for Biological Diversity v. United States Department of State*, No. 1:18-cv-99563. The brief is available in full at <https://www.state.gov/digest-of-United-states-practice-in-international-law/>.

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In the absence of legislation requiring the United States to comply with the UNFCCC reporting provisions, such provisions must themselves constitute a “directive to domestic courts” to enforce them. *Id.* at 508. While the United States fully recognizes and does not dispute that Articles 4 and 12 of the Convention include certain international obligations, those provisions (and indeed the entire UNFCCC) are non-self-executing as a matter of U.S. law. Nothing in these provisions suggests that they were “designed to have immediate effect” in domestic courts, *Republic of Marshall Islands*, 865 F.3d at 1195 (citation omitted), even with the benefit of suitable interpretive aids. Rather, the UNFCCC and its reporting provisions amount to “a compact between independent nations.” *Medellin*, 552 U.S. at 505 (citations and internal quotation marks omitted). They are enforceable only as between the “governments which are parties to it.” *Id.* Any alleged breach of the obligation, then, “becomes the subject of international negotiations and reclamations ... [and] ... the judicial courts have nothing to do and can give no redress.” *Id.* (citations and internal quotation marks omitted).

The Second Amended Complaint points to only two articles in the UNFCCC to support its claims: Articles 4 and 12. Article 4 requires Annex I parties to “[c]ommunicate to the Conference of the Parties information related to implementation, in accordance with Article 12.” UNFCCC, Art. 4.1(j). Article 12 elaborates on this requirement and specifies that Annex I parties “shall communicate to the Conference of the Parties, through the Secretariat” various categories of information. *See generally id.*, Art. 12.1-3 (emphasis added). With respect to timing, Article 12 provides that the first communication was to be submitted “within six months of the entry into force” of the UNFCCC for that Party. *Id.* Art. 12.5. Thereafter, “[t]he frequency of subsequent communications by all Parties shall be determined by the Conference of the Parties.” *Id.*

Plaintiff claims a single deadline for submitting the UNFCCC Reports that the Federal Defendants allegedly missed: January 1, 2018. *See, e.g.*, SAC ¶¶ 2, 21, 25. Plaintiff does not identify a UNFCCC provision that creates this deadline. Rather, Plaintiff alleges that this purported deadline is established from a 2012 “decision” document of the UNFCCC Conference of the Parties, *i.e.*, Decision 2/CP.17. *Id.* ¶ 21. The Federal Defendants agree that the UNFCCC

itself does not establish the January 1, 2018, date at issue in this case. Nor does the UNFCCC establish the particular form of reports described in the Second Amended Complaint (*i.e.*, the “national communication” and “biennial report”). Rather, the decision by the Conference of the Parties for Parties to submit these particular reports by this particular date was established in Decision 2/CP.17 (well after the UNFCCC itself was ratified in 1992). ...

Plaintiff points to nothing in the relevant UNFCCC provisions suggesting that any aspect of the Convention’s reporting obligations are self-executing and therefore enforceable in domestic courts, let alone a “directive to domestic courts” to enforce them. *Medellín*, 552 U.S. at 508. Neither article contains an indication of domestic enforcement. Rather, both are “silent as to any enforcement mechanism” in the event of a delay in submitting the reports. *Id.* In particular, Article 12, the *only* provision addressing the timing and other details of submissions by Parties, “is not a directive to domestic courts” at all but, instead, only “call[s] upon governments to take certain action.” *Id.* (quoting *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988)).

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As the Supreme Court has explained, “[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that ‘[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.’” *Id.* at 506 n.3 (quoting 2 Restatement (Third) of Foreign Relations Law of the United States § 907, cmt. a (1987)). The D.C. Circuit “presume[s] that treaties do not create privately enforceable rights in the absence of *express language* to the contrary.” *Id.* (citing *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980)) (emphasis added). As the D.C. Circuit has observed, treaties that only set forth substantive rules of conduct, and do not explicitly call upon the courts for enforcement of such rules, do not create private rights of action. *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 488-89, 491 (D.C. Cir. 2008) (“In the absence of a textual invitation to judicial participation, we conclude the President and the Senate intended to enforce the Treaty of Amity through bilateral interaction between its signatories”); *see also Diggs*, 555 F.2d at 851 (after finding Security Council resolution provisions at issue to be non-self-executing, observing that the provisions “do not by their terms confer rights upon individual citizens; they call upon governments to take certain action. The provisions deal with the conduct of our foreign relations, an area traditionally left to executive discretion.”). Therefore, even if the UNFCCC reporting obligations were self-executing—and thus “ha[d] the force and effect of a legislative enactment,” *Medellín*, 552 U.S. at 505-6 (citation omitted)—Plaintiff could not seek relief pursuant to those provisions in this Court unless the treaty explicitly provided a cause of action to do so.

Importantly, on this definitive point warranting dismissal in its own right, Plaintiff has conceded in prior briefing that that the UNFCCC *does not* confer a private right of action. ... In any case, ... Plaintiff points to nothing in the Convention, or anything in its drafting or negotiating history, to support the existence of a private right of action under the UNFCCC. This is unsurprising. As discussed in Section II.B.2 *supra*, the provisions that Plaintiff relies upon evince an intention to operate on the international plane. They involve only the UNFCCC Conference of the Parties, the secretariat, and the various UNFCCC subsidiary bodies charged with implementing elements of the treaty. Indeed, the text of the reporting provisions makes clear that the reports are for submission to, and the primary benefit of, Parties, the secretariat, and various multilateral subsidiary bodies under the Convention, not private parties like Plaintiff.

*Cf.* Art. 12.1 (specifying that Annex I parties “shall communicate to the Conference of the Parties, through the Secretariat” the various categories of information comprising the national communication). As such, if the UNFCCC provisions at issue establish a substantive rule, they do not provide for that rule to be enforced in national courts. *See McKesson*, 539 F.3d at 488-89; *cf. Comm. of U.S. Citizens Living in Nicaragua*, 859 F.2d at 938 (“We find in these clauses no intent to vest citizens who reside in a U.N. member nation with authority to enforce an ICJ decision against their own government. The words of Article 94 do not by their terms confer rights upon individual citizens; they call upon governments to take certain action.”). Moreover, courts are to “give ‘great weight’” to the views of the United States with regard to whether a treaty provides a private right of action. *See McKesson*, 539 F.3d at 474.

Plaintiff simply has failed to identify a right stemming from the UNFCCC that is enforceable in this Court or a cause of action to enforce that alleged right. Nor is there a federal implementing statute that could supply Plaintiff a private right of action. Consequently, Plaintiff’s claims premised on the UNFCCC should be dismissed for this additional reason.

\* \* \* \*

**Cross References**

*Extradition Treaties*, **Ch. 3.A.1.**

*Agreement to amend the Compact Review Agreement with Palau*, **Ch. 5.E**

*U.S. comments on the ILC's Draft Conclusions on the Identification of Customary International Law*, **Ch. 7.C.1**

*ILC's 70<sup>th</sup> Session (including work on interpretation of treaties)*, **Ch. 7.C.2**

*Termination of Treaty of Amity with Iran*, **Ch. 9.A.2**

*Russian purported agreement with South Ossetia*, **Ch. 9.B.2**

*Air transport agreements*, **Ch. 11.A**

*U.S.-Mexico-Canada Agreement*, **Ch. 11.D.2**

*U.S.-Korea Free Trade Agreement*, **Ch. 11.D.3**

*Termination of U.S.-Ecuador BIT*, **Ch. 11.D.5**

*Universal Postal Union*, **Ch. 11.F.2**

*Maritime Boundary Treaties*, **Ch. 12.A.4**

*Cultural property MOUs*, **Ch. 14.A**

*Iran/JCPOA*, **Ch. 16.A.1.a**

*Bilateral and multilateral defense agreements and arrangements*, **Ch. 18.A.3**

*Nonproliferation Treaty*, **Ch. 19.B.1**

*Treaty on the Prohibition of Nuclear Weapons*, **Ch. 19.C.1.a**

*Comprehensive Nuclear Test Ban Treaty*, **Ch. 19.C.2**

*New START Treaty*, **Ch. 19.C.4**

*INF Treaty*, **Ch. 19.C.5**

*Open Skies Treaty*, **Ch. 19.C.6**

*Biological Weapons Convention*, **Ch. 19.D.6**

## CHAPTER 5

### Foreign Relations

#### A. LITIGATION INVOLVING FOREIGN RELATIONS, NATIONAL SECURITY, AND FOREIGN POLICY ISSUES

##### 1. *Animal Science Products v. Hebei Welcome Pharmaceutical Company*

In *Animal Science Products v. Hebei Welcome Pharmaceutical Company*, No. 16-1220, the Supreme Court granted certiorari to consider the proper weight to give to a foreign government’s representation of its law. The U.S. Court of Appeals for the Second Circuit had given conclusive weight to the Chinese government’s submission that its agency required sellers of vitamin C in the U.S. market to coordinate their export prices and quantities. On March 5, 2018, the United States filed its amicus brief. That brief is excerpted below.

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\* \* \* \*

#### **A FEDERAL COURT DETERMINING FOREIGN LAW IS NOT BOUND BY THE VIEWS EXPRESSED IN A SUBMISSION FROM THE RELEVANT FOREIGN GOVERNMENT**

Federal Rule of Civil Procedure 44.1 provides that a federal district court faced with a question of foreign law should resolve it as a matter of law and may base its determination on “any relevant material or source.” A submission expressing the views of the foreign government is highly relevant, and courts should ordinarily afford such submissions substantial weight. ...[T]he ultimate responsibility for determining the governing law lies with the court. The court is neither bound to adopt the characterization urged by the foreign government nor barred from considering materials that support a different interpretation.

### A. Rule 44.1 Grants Federal Courts Broad Latitude To Decide Questions Of Foreign Law Based On Any Relevant Material Or Source

1. Federal courts encounter questions of foreign law in many different contexts. In some cases, choice-of-law principles point to foreign law as the rule of decision for the parties' dispute. See, e.g., *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 3-4 (1975) (per curiam). In others, foreign law controls or bears upon a specific issue in a case that is otherwise governed by U.S. law:

- As this case illustrates, foreign law may in some circumstances prevent the imposition of liability under the U.S. antitrust laws. See p. 3, *supra*.
- The Lacey Act Amendments of 1981, 16 U.S.C. 3372(a)(2)(A), impose civil and criminal penalties for the importation of "fish or wildlife taken, possessed, transported, or sold in violation of \* \* \* any foreign law." See, e.g., *United States v. Mitchell*, 985 F.2d 1275, 1279-1280 (4th Cir. 1993).
- A mail- or wire-fraud prosecution may be based on a scheme to defraud involving foreign property, which may require "a court to recognize foreign law to determine whether the defendant violated U.S. law." *Pasquantino v. United States*, 544 U.S. 349, 369 (2005).
- The application of the federal tax laws sometimes turns on "foreign law." *Guardian Indus. Corp. v. United States*, 477 F.3d 1368, 1371 (Fed. Cir. 2007) (citation omitted) (credits for payment of foreign taxes).
- A contract governed by foreign law may provide a defense to a claim under federal intellectual-property law. See, e.g., *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 625-628 (7th Cir. 2010).
- A foreign law prohibiting disclosure may in some circumstances excuse or affect the remedy for noncompliance with an order requiring the production of documents located abroad. See *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522, 544-546 & n.29 (1987) (*Aérospatiale*).
- Federal Rule of Civil Procedure 4(f), which governs service of process in a foreign country, incorporates "the foreign country's law for service in that country." Fed. R. Civ. P. 4(f)(2)(A); see, e.g., *Prewitt Enters., Inc. v. Organization of Petroleum Exporting Countries*, 353 F.3d 916, 923-924 & n.11 (11th Cir. 2003), cert. denied, 543 U.S. 814 (2004).

2. English and American common law treated foreign law "as a question of fact to be pleaded and proved as a fact by the party whose cause of action or defense depend[ed] upon alien law." Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 Mich. L. Rev. 613, 617 (1967) (Miller). In 1801, this Court endorsed the common-law rule, instructing that "the laws of a foreign nation" must be "proved as facts." *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 37-38 (1801); see, e.g., *Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 236-237 (1804) ("Foreign laws are well understood to be facts.").

Treating questions of foreign law as questions of fact "had a number of undesirable practical consequences." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2441, at 324 (3d ed. 2008) (Wright & Miller). Foreign law "had to be raised in the pleadings" and proved "in accordance with the rules of evidence." *Ibid.* Courts were restricted to the evidence submitted by the parties. *Ibid.* And appellate review was deferential and limited to the record made in the trial court. *Ibid.*

After the adoption of the Federal Rules of Civil Procedure in 1938, some federal courts began to invoke state procedures that departed from the common-law approach by allowing courts to take judicial notice of foreign law. Miller 654-656; see Fed. R. Civ. P. 43(a) (1964) (incorporating state evidentiary rules). But those state procedures varied, and some were “time consuming and expensive.” Fed. R. Civ. P. 44.1 advisory committee’s note (1966) (Adoption) (Advisory Committee’s Note).

The process of determining foreign law thus remained “cumbersome.” *Pasquantino*, 544 U.S. at 370.

3. In 1966, this Court promulgated Rule 44.1 to “furnish Federal courts with a uniform and effective procedure for raising and determining an issue concerning the law of a foreign country.” Advisory Committee’s Note. The rule accomplishes that goal by providing that, “[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.” Fed. R. Civ. P. 44.1. The rule also specifies that the court’s determination “must be treated as a ruling on a question of law,” rather than as a finding of fact. *Ibid.*

Rule 44.1 “improves on [the procedures] available at common law.” *Pasquantino*, 544 U.S. at 370. By allowing courts to rely on any relevant material, regardless of its admissibility under the Federal Rules of Evidence, the rule “provides flexible procedures for presenting and utilizing material on issues of foreign law.” Advisory Committee’s Note. By specifying that the court’s determination is a conclusion of law, the rule ensures de novo appellate review. *Ibid.* And by providing that courts are not limited to materials submitted by the parties, the rule recognizes that courts “may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail.” *Ibid.* The “obvious” purpose of those changes was “to make the process of determining alien law identical with the method of ascertaining domestic law to the extent that it is possible to do so.” 9A Wright & Miller § 2444, at 338-342.

Courts deciding questions of foreign law under Rule 44.1 rely on a variety of materials, including “[s]tatutes, administrative materials, and judicial decisions”; “secondary sources such as texts and learned journals”; “expert testimony”; and “any other information” that may be probative. 9A Wright & Miller § 2444, at 342-343 (3d ed. 2008 & Supp. 2017). In evaluating those materials, a court “is free \* \* \* to give them whatever probative value [it] thinks they deserve.” *Id.* at 343. The guiding principle is that courts “should use the best of the available sources” to reach an accurate interpretation of foreign law. *Bodum USA*, 621 F.3d at 628.

### **B. A Foreign Government’s Characterization Of Its Own Law Is Ordinarily Entitled To Substantial Weight, But Is Not Binding On Federal Courts**

Federal courts deciding questions of foreign law under Rule 44.1 are sometimes presented with the views of the relevant foreign government. Those views always warrant respectful consideration, and they will ordinarily be entitled to substantial weight. But the appropriate weight in each case will depend on the circumstances, and a federal court is neither bound to adopt the foreign government’s characterization nor required to ignore other relevant materials.

1. Federal courts considering questions of foreign law may be presented with the views of the relevant foreign government through a variety of formal and informal mechanisms. Often, the foreign state (or one of its agencies or instrumentalities) is itself a party to the litigation. See, e.g., *Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of the Republic of Venezuela*, 575 F.3d 491, 496-498 & n.8 (5th Cir. 2009); *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1108-1109 (D.C. Cir. 2001) (*McKesson*), cert. denied, 537 U.S. 941 (2002), vacated

in part on other grounds, 320 F.3d 280 (D.C. Cir. 2003); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1289, 1312 (7th Cir. 1992) (*Amoco Cadiz*).

As this case illustrates, foreign governments (and their agencies and officials) may also express their views through amicus briefs or similar submissions in cases where no foreign governmental entity is a party. Pet. App. 189a-223a; see, e.g., *United States v. McNab*, 331 F.3d 1228, 1239-1240 & n.23 (11th Cir. 2003), cert. denied, 540 U.S. 1177 (2004). Alternatively, a party may submit an affidavit or testimony from a foreign official. See, e.g., *United States v. Schultz*, 333 F.3d 393, 400-401 (2d Cir. 2003), cert. denied, 540 U.S. 1106 (2004); *United States v. 2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1109-1110 (S.D. Fla. 1988). Or a party may rely on an interpretation that the relevant foreign sovereign has issued outside the context of the litigation. See, e.g., *Abbott v. Abbott*, 560 U.S. 1, 10 (2010) (letter from a Chilean agency); *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (circular issued by a Mexican agency), cert. denied, 531 U.S. 917 (2000).

2. Neither Rule 44.1 nor any other rule or statute specifically addresses the weight that a federal court determining foreign law should give to the views of the foreign government. As a general matter, courts in deciding such questions should be guided by principles of international comity, “the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.” *Aérospatiale*, 482 U.S. at 543 n.27. In other contexts, this Court has “long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation.” *Id.* at 546. To afford appropriate respect for “[t]he dignity of a foreign state,” *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008), a federal court should carefully consider that state’s proffered views about the meaning of its own laws.

Granting substantial weight to the views of the relevant foreign government is also eminently sensible. “Among the most logical sources for [a] court to look to in its determination of foreign law are the foreign officials charged with enforcing the laws of their country,” who are intimately familiar with the context and nuances of the foreign legal system. *McNab*, 331 F.3d at 1241; cf. *Bodum USA*, 621 F.3d at 638-639 (Wood, J., concurring) (noting the risk that an unaided U.S. reader may “miss nuances in the foreign law”). Ordinarily, a court therefore “reasonably may assume” that interpretations offered by the relevant foreign agencies or officials “are a reliable and accurate source” of the meaning of foreign law. *McNab*, 331 F.3d at 1241.

3. The federal courts have generally adhered to the foregoing principles. Courts have recognized that “a foreign sovereign’s views regarding its own laws merit— although they do not command—some degree of deference.” *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002), cert. denied, 539 U.S. 904 (2003); see, e.g., *Access Telecom*, 197 F.3d at 714 (“[C]ourts may defer to foreign government interpretations.”); *Amoco Cadiz*, 954 F.2d at 1312 (“A court of the United States owes substantial deference to the construction France places on its domestic law.”). In *Abbott*, for example, this Court stated that the views of a Chilean agency were “notable” and “support[ed] the [Court’s] conclusion” about the meaning of Chilean law. 560 U.S. at 10.

Courts have not, however, treated a foreign government’s characterization of its own law as binding. Instead, they have recognized that the weight given to such a characterization should depend on the circumstances. For example, when “a foreign government changes its original position” or otherwise makes conflicting statements, a court is not bound to accept its most recent statement, or the one offered in litigation. *McNab*, 331 F.3d at 1241; see, e.g., *Export-Import Bank of the Republic of China v. Central Bank of Liberia*, No. 15-cv-9565, 2017 WL

1378271, at \*4 (S.D.N.Y. Apr. 12, 2017). A court likewise may decline to adopt an interpretation if it is unclear or unsupported, if it fails to address relevant authorities, or if it is implausible in light of other relevant materials. See, e.g., *Themis Capital, LLC v. Democratic Republic of Congo*, 626 Fed. Appx. 346, 348 (2d Cir. 2015); *McKesson*, 271 F.3d at 1108-1109.

4. In describing the weight that should be given to a foreign government's views about its own law, parties and lower courts have sometimes borrowed domestic administrative-law standards. See, e.g., Resp. Supp. Br. 2-3; *Amoco Cadiz*, 954 F.2d at 1312. In our view, such analogies are generally unhelpful because those standards are grounded in domestic considerations. For example, courts defer to reasonable agency interpretations under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), in specific circumstances, including when Congress has "delegated authority to the agency generally to make rules carrying the force of law" and "the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001). The standard articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), is more flexible, but it too has domestic-law roots and a specific meaning acquired through repeated domestic applications. See *Mead*, 533 U.S. at 234-235.

Those administrative-law doctrines do not readily translate to the Rule 44.1 context. "[T]he world's many diverse legal and governmental systems" differ greatly from ours and from each other. *McNab*, 331 F.3d at 1237 (citation omitted). The views of foreign governments about those varying systems are presented to the federal courts under a wide range of different circumstances. And the submissions themselves differ greatly in their formality, thoroughness, and authority. See pp. 16-17, *supra*. Deference standards that were crafted for specific areas of federal administrative law and that carry decades of accumulated domestic-law meanings are ill-suited for this very different context.

5. Rather than transplanting a standard from domestic administrative law, a federal court confronted with a disputed question of foreign law should proceed in the same manner as a court facing any other unsettled legal question: By seeking to resolve it "with the aid of such light as is afforded by the materials for decision at hand." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 227 (1991) (brackets and citation omitted). As this Court emphasized in addressing the analogous problem of determining the law of former Mexican territories before their annexation into the United States, "it has always been held that it is for the court to decide what weight is to be given" to the legal materials available in a particular case. *Fremont v. United States*, 58 U.S. (17 How.) 542, 557 (1855).

When those materials include an interpretation by the relevant foreign government, that interpretation should be afforded respectful consideration and will ordinarily be entitled to substantial weight. The precise weight that is appropriate in a particular case will necessarily depend on the circumstances. Those circumstances are too diverse to be reduced to a formula or rule, but the relevant considerations include the interpretation's clarity, thoroughness, and support; its context and purpose; the nature and transparency of the foreign legal system; the role and authority of the entity or official offering the interpretation; its consistency with the foreign government's past positions; and any other corroborating or contradictory materials.

### **C. The Court Of Appeals Erred By Treating The Ministry's Amicus Brief As Binding And By Disregarding Other Relevant Materials**

The court of appeals held that, when a foreign government "directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court

is bound to defer.” Pet. App. 25a. In applying that standard and concluding that the Ministry’s characterization of Chinese law was “reasonable,” the court generally limited its inquiry to the four corners of the Ministry’s brief and the sources cited therein. *Id.* at 27a-29a. The court also emphasized that a federal court may not “embark on a challenge to a foreign government’s official representation to the court regarding its laws or regulations.” *Id.* at 26a.

In practical effect, therefore, the court of appeals held that a federal court is bound to adopt a foreign government’s submission characterizing its own law—and may not consider other relevant material—so long as that characterization is *facially* reasonable. That rigid rule is inconsistent with the policies underlying Rule 44.1 and with this Court’s treatment of analogous submissions from U.S. States. And the court of appeals erred in concluding that its approach was supported by *United States v. Pink*, 315 U.S. 203 (1942), or by considerations of comity and reciprocity.

***1. The court of appeals’ rule of binding deference is inconsistent with the policies embodied in Rule 44.1***

As the court of appeals observed, Rule 44.1 does not expressly address the weight a federal court should give to a foreign government’s submission characterizing its laws. Pet. App. 22a. In at least two respects, however, the court’s approach departs from the policies embodied in that rule.

a. Rule 44.1 seeks to align the treatment of foreign and domestic law by providing district courts with broad latitude to “determin[e] foreign law” based on “any relevant material or source.” That direction reflects a judgment that “whenever possible issues of foreign law should be resolved on their merits and on the basis of a full presentation and evaluation of the available materials.” 9A Wright & Miller § 2444, at 351.

The court of appeals’ approach is inconsistent with that sound policy because it precludes a court from considering other relevant material whenever it is presented with a facially reasonable submission from a foreign government. Here, for example, the district court concluded that the Ministry’s submissions “fail[ed] to address critical provisions of the [governing legal regime],” Pet. App. 119a, and that they incorrectly implied that a superseded legal regime “was still controlling,” *id.* at 132a n.45. The court also highlighted, *inter alia*, China’s statement to the WTO that it had “g[i]ve[n] up ‘export administration... of vitamin C’ ” at the end of 2001, *id.* at 74a (citation omitted), and the Chamber’s statements that respondents had “voluntarily” agreed on prices and quantities “without any government intervention,” *id.* at 173a-174a (citation and emphases omitted).

The court of appeals did not conclude that the district court’s reliance on that material was substantively wrong or irrelevant to the proper interpretation of Chinese law. To the contrary, it stated that, “if the Chinese Government had not appeared in this litigation, the district court’s careful and thorough treatment of the evidence \* \* \* would have been entirely appropriate.” Pet. App. 30a n.10. But because the Ministry had filed a brief that the court deemed facially reasonable, it concluded that the district court had erred by considering additional material and thereby “embark[ing] on a challenge to [the Ministry’s] official representation.” *Id.* at 26a. A standard that does not permit a court even to consider such relevant information is inconsistent with federal courts’ responsibility to “determin[e] foreign law” based on “any relevant material or source.” Fed. R. Civ. P. 44.1.

b. The court of appeals also departed from the policies embodied in Rule 44.1 by placing dispositive weight on the fact that the Ministry had “directly participate[d]” in the litigation by offering what the court called a “sworn evidentiary proffer.” Pet. App. 25a; see *id.* at 23a

(distinguishing a case in which the foreign government “did not appear before the court”). That is true for two reasons.

First, the court of appeals’ characterization of the Ministry’s submission as “a sworn evidentiary proffer,” Pet. App. 25a, was inapt. Rule 44.1 abrogated the common-law rule treating questions of foreign law as questions of fact, and it specifies that a district court’s determination of an issue of foreign law “must be treated as a ruling on a question of law.” Although the Ministry’s amicus brief was surely relevant to the district court’s determination whether Chinese law required the anticompetitive conduct at issue in this case, that legal brief was neither a “sworn” document nor an “evidentiary proffer.” See Pet. Br. 35-36. By the same token, a court that considers but ultimately rejects a foreign government’s characterization of its laws does not thereby accuse the foreign government of misrepresenting the pertinent facts. Cf. pp. 26-27, *infra* (explaining that federal courts give significant but not controlling weight to a state attorney general’s characterization of state law).

Second, the court of appeals erred by holding that greater deference is required when a foreign government participates directly in litigation. That fact may bear on the weight a foreign government’s views should receive. It ensures, for example, that the government has focused on the specific foreign-law issue that is actually before the court. But many other factors also bear on the weight that should be afforded to a foreign government’s interpretation, see p. 21, *supra*, and the court of appeals did not explain why it placed dispositive weight on this single consideration. In some circumstances, moreover, a U.S. court might justifiably view a pronouncement prepared for litigation purposes with greater skepticism than it would view a similar pronouncement drafted with no specific controversy in mind. Cf. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (“Deference to what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate.”).

The court of appeals’ rule, moreover, would automatically inure to the benefit of any foreign government that appears in U.S. court as a plaintiff or defendant in a case controlled in whole or in part by its domestic laws—a relatively common occurrence. The court identified no sound reason why a federal court should be bound, in any suit to which a foreign government is a party, by whatever facially reasonable litigating position that party may assert concerning the proper understanding of its own laws. That result would be particularly anomalous because Rule 44.1 allows courts to look beyond the “material presented by the parties” specifically to ensure that courts have the ability to “reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail.” Advisory Committee Note. That consideration applies with full force when the litigant is a foreign government.

***2. The court of appeals’ rule of binding deference is inconsistent with this Court’s treatment of analogous submissions from U.S. States***

The court of appeals’ rule of binding deference is inconsistent with this Court’s approach in the other principal circumstance in which federal courts are presented with the views of other sovereigns on the proper interpretation of their laws. When federal courts receive submissions by U.S. States addressing the proper interpretation of state law, the courts give those submissions significant but not controlling weight. Nothing in the text, history, or purposes of Rule 44.1 suggests that a federal court determining foreign law must give greater weight to the views of a foreign sovereign.

This Court has long held that “[t]he law of any State of the Union \* \* \* is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof.” *Lamar v. Micou*, 114 U.S. 218, 223 (1885). If the applicable state law is established by a decision of “the State’s highest court,” that decision is “binding on the federal courts.” *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam); see *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). Otherwise, a federal court must “consider all of the available legal sources” to predict “how the state’s highest court would answer the open questions.” 19 Wright & Miller § 4507, at 178-179 (3d ed. 2016); see *Salve Regina Coll.*, 499 U.S. at 227.

In deciding questions of state law, the views of the State as expressed by its attorney general are “entitled to weight.” 19 Wright & Miller § 4507, at 157-158; see *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 n.30 (1997) (citing with approval an opinion concluding that the “reasoned opinion of [a] State Attorney General should be accorded respectful consideration”). This Court has made clear, however, that those views are not entitled to “controlling weight.” *Stenberg v. Carhart*, 530 U.S. 914, 940 (2000); see, e.g., *Virginia v. American Booksellers Ass’n.*, 484 U.S. 383, 395 (1988). The court of appeals gave no sound reason for requiring that federal courts give greater weight to the views of foreign governments.

**3. This Court’s decision in *Pink* does not support the court of appeals’ rule of binding deference**

The court of appeals believed that its rigid approach was compelled by this Court’s pre-Rule 44.1 decision in *Pink*. Pet. App. 20a, 22a-23a. That is not correct. *Pink* arose out of an action brought by the United States to recover assets of the U.S. branch of a Russian insurance company that had been nationalized in 1918 after the Russian revolution. 315 U.S. at 210. In 1933, the government of the Soviet Union assigned the nationalized assets to the United States. *Id.* at 211. The disposition of the case turned on the extraterritorial effect of the nationalization decree—specifically, whether the decree had reached the assets of the Russian insurance company located in the United States, or instead had been limited to property in Russia. *Id.* at 213-215, 217.

To support its position that the nationalization decree had reached all of the company’s assets, the United States obtained an “official declaration by the Commissariat for Justice” of the Russian Socialist Federal Soviet Republic. *Pink*, 315 U.S. at 218. The declaration certified that the decree had reached “the funds and property of former insurance companies \* \* \* irrespective of whether it was situated within the territorial limits of [Russia] or abroad.” *Id.* at 220 (citation omitted). This Court held that “the evidence supported [a] finding” that “the Commissariat for Justice ha[d] power to interpret existing Russian law.” *Ibid.* “That being true,” the Court concluded that the “official declaration [wa]s conclusive so far as the intended extraterritorial effect of the Russian decree [wa]s concerned.” *Ibid.*

This Court’s treatment of the declaration as conclusive was thus premised on an independent finding about the Commissariat’s authority within the Soviet legal system. *Pink*, 315 U.S. at 220. The declaration was also obtained by the United States, through official “diplomatic channels.” *Id.* at 218. The Commissariat’s declaration was thus in some respects akin to a state supreme court’s answer to a question of state law certified by a federal court. Cf. *Arizonans for Official English*, 520 U.S. at 76-77. There was apparently no indication that the declaration was incomplete or inconsistent with the Soviet Union’s past statements, and the Court emphasized that the declaration was consistent with expert evidence that “gave great credence to [the] position” that the nationalization decree reached property located abroad. *Pink*, 315 U.S. at 218. The Court’s statement that the Commissariat’s declaration was “conclusive” under those unusual

circumstances does not suggest that *every* submission by a foreign government is entitled to the same weight.

***4. Considerations of reciprocity and comity do not support the court of appeals' rule of binding deference***

The court of appeals also reasoned that a foreign government's characterization of its own laws should be afforded "the same respect and treatment that we would expect our government to receive in comparable matters." Pet. App. 26a. That concern for reciprocity was sound, but it does not support the court's approach. In fact, the opposite is true.

When the United States litigates questions of U.S. law in foreign tribunals, it expects that the views submitted on its behalf will be afforded substantial weight, and that its characterizations of U.S. law will be accepted because they are accurate and well-supported. But the United States historically has not argued that foreign courts are *bound* to accept its characterizations or precluded from considering other relevant material. And although other nations' approaches to determining foreign law vary, we are not aware of any foreign-court decision holding that representations by the United States are entitled to such conclusive weight.

The understanding that a government's expressed view of its own law is ordinarily entitled to substantial but not conclusive weight is also consistent with two international treaties that establish formal mechanisms by which one government may obtain from another an official statement characterizing its laws. Those treaties specify that "[t]he information given in reply shall not bind the judicial authority from which the request emanated." European Convention on Information on Foreign Law art. 8, June 7, 1968, 720 U.N.T.S. 147, 154; see Organization of American States, Inter-American Convention on Proof of and Information on Foreign Law art. 6, May 8, 1979, O.A.S.T.S. No. 53, 1439 U.N.T.S. 107, 111 (similar). Although the United States is not a party to those treaties, they reflect an international practice that is inconsistent with the court of appeals' approach, and they confirm that the court's rule of binding deference is not supported by considerations of international comity.

**D. This Court Should Vacate The Decision Below And Remand The Case To Allow The Court Of Appeals To Apply The Correct Legal Standard**

Because the court of appeals concluded that the district court was bound to defer to the Ministry's amicus brief, the court did not consider the shortcomings that the district court had identified in the Ministry's submissions or the other aspects of "the district court's careful and thorough treatment of the evidence before it." Pet. App. 30a n.10. The question whether the district court correctly interpreted Chinese law is not before this Court, and we do not take a position on it. But the materials identified by the district court were, at minimum, relevant to the weight that the Ministry's submissions should receive and to the question whether Chinese law required respondents' conduct. This Court should therefore vacate the decision below and remand to allow the court of appeals to consider that question under the correct legal standard.

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On June 14, 2018, the U.S. Supreme Court vacated and remanded the appellate court's decision, holding that while the court should consider a foreign government's submission, it should also consider other indications and not give the government's statement conclusive effect. The Supreme Court's unanimous opinion is excerpted below (with footnotes omitted).

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When foreign law is relevant to a case instituted in a federal court, and the foreign government whose law is in contention submits an official statement on the meaning and interpretation of its domestic law, may the federal court look beyond that official statement? The Court of Appeals for the Second Circuit answered generally “no,” ruling that federal courts are “bound to defer” to a foreign government’s construction of its own law, whenever that construction is “reasonable.” *In re Vitamin C Antitrust Litigation*, 837 F. 3d 175, 189 (2016).

We hold otherwise. A federal court should accord respectful consideration to a foreign government’s submission, but is not bound to accord conclusive effect to the foreign government’s statements. Instead, Federal Rule of Civil Procedure 44.1 instructs that, in determining foreign law, “the court may consider any relevant material or source . . . whether or not submitted by a party.” As “[t]he court’s determination must be treated as a ruling on a question of law,” Fed. Rule Civ. Proc. 44.1, the court “may engage in its own research and consider any relevant material thus found,” Advisory Committee’s 1966 Note on Fed. Rule Civ. Proc. 44.1, 28 U.S. C. App., p. 892 (hereinafter Advisory Committee’s Note). Because the Second Circuit ordered dismissal of this case on the ground that the foreign government’s statements could not be gainsaid, we vacate that court’s judgment and remand the case for further consideration.

\* \* \* \*

At common law, the content of foreign law relevant to a dispute was treated “as a question of fact.” Miller, *Federal Rule 44.1 and the “Fact” Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 Mich. L. Rev. 613, 617–619 (1967) (Miller). In 1801, this Court endorsed the common-law rule, instructing that “the laws of a foreign nation” must be “proved as facts.” *Talbot v. Seeman*, 1 Cranch 1, 38 (1801); see, e.g., *Church v. Hubbard*, 2 Cranch 187, 236 (1804) (“Foreign laws are well understood to be facts.”). Ranking questions of foreign law as questions of fact, however, “had a number of undesirable practical consequences.” 9A C. Wright & A. Miller, *Federal Practice and Procedure* §2441, p. 324 (3d ed. 2008) (Wright & Miller). Foreign law “had to be raised in the pleadings” and proved “in accordance with the rules of evidence.” *Ibid.* Appellate review was deferential and limited to the record made in the trial court. *Ibid.*; see also Miller 623.

Federal Rule of Civil Procedure 44.1, adopted in 1966, fundamentally changed the mode of determining foreign law in federal courts. The Rule specifies that a court’s determination of foreign law “must be treated as a ruling on a question of law,” rather than as a finding of fact. Correspondingly, in ascertaining foreign law, courts are not limited to materials submitted by the parties; instead, they “may consider any relevant material or source . . . , whether or not . . . admissible under the Federal Rules of Evidence.” *Ibid.* Appellate review, as is true of domestic law determinations, is *de novo*. Advisory Committee’s Note, at 892. Rule 44.1 frees courts “to reexamine and amplify material . . . presented by counsel in partisan fashion or in insufficient detail.” *Ibid.* The “obvious” purpose of the changes Rule 44.1 ordered was “to make the process of determining alien law identical with the method of ascertaining domestic law to the extent that it is possible to do so.” Wright & Miller §2444, at 338–342.

Federal courts deciding questions of foreign law under Rule 44.1 are sometimes provided with the views of the relevant foreign government, as they were in this case through the *amicus* brief of the Ministry. See *supra*, at 2–3. As the Court of Appeals correctly observed, Rule 44.1 does not address the weight a federal court determining foreign law should give to the views presented by the foreign government. See 837 F. 3d, at 187. Nor does any other rule or statute. In the spirit of “international comity,” *Société Nationale Industrielle Aérospatiale v. United States Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 543, and n. 27 (1987), a federal court should carefully consider a foreign state’s views about the meaning of its own laws. See *United States v. McNab*, 331 F. 3d 1228, 1241 (CA11 2003); cf. *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F. 3d 624, 638–639 (CA7 2010) (Wood, J., concurring). But the appropriate weight in each case will depend upon the circumstances; a federal court is neither bound to adopt the foreign government’s characterization nor required to ignore other relevant materials. When a foreign government makes conflicting statements, see *supra*, at 5, or, as here, offers an account in the context of litigation, there may be cause for caution in evaluating the foreign government’s submission.

Given the world’s many and diverse legal systems, and the range of circumstances in which a foreign government’s views may be presented, no single formula or rule will fit all cases in which a foreign government describes its own law. Relevant considerations include the statement’s clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement’s consistency with the foreign government’s past positions.

Judged in this light, the Court of Appeals erred in deeming the Ministry’s submission binding, so long as facially reasonable. That unyielding rule is inconsistent with Rule 44.1 (determination of an issue of foreign law “must be treated as a ruling on a question of law”; court may consider “any relevant material or source”) and, tellingly, with this Court’s treatment of analogous submissions from States of the United States. If the relevant state law is established by a decision of “the State’s highest court,” that decision is “binding on the federal courts.” *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (*per curiam*); see *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). But views of the State’s attorney general, while attracting “respectful consideration,” do not garner controlling weight. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76–77, n. 30 (1997); see, e.g., *Virginia v. American Booksellers Assn., Inc.*, 484 U.S. 383, 393–396 (1988). Furthermore, because the Court of Appeals riveted its attention on the Ministry’s submission, it did not address other evidence, including, for example, China’s statement to the WTO that China had “g[i]ve[n] up export administration ... of vitamin C” at the end of 2001. 810 F. Supp. 2d, at 532 (internal quotation marks omitted).

The Court of Appeals also misperceived this Court’s decision in *United States v. Pink*, 315 U.S. 203 (1942). See 837 F. 3d, at 186–187, 189. *Pink*, properly comprehended, is not compelling authority for the attribution of controlling weight to the Ministry’s brief. We note, first, that *Pink* was a pre-Rule 44.1 decision. Second, *Pink* arose in unusual circumstances. *Pink* was an action brought by the United States to recover assets of the U.S. branch of a Russian insurance company that had been nationalized in 1918, after the Russian revolution. 315 U.S., at 210–211. In 1933, the Soviet Government assigned the nationalized assets located in this country to the United States. *Id.*, at 211–212. The disposition of the case turned on the extraterritorial effect of the nationalization decree—specifically, whether the decree reached assets of the Russian insurance company located in the United States, or was instead limited to property in Russia. *Id.*, at 213–215, 217. To support the position that the decree reached all of the company’s

assets, the United States obtained an “official declaration of the Commissariat for Justice” of the Russian Socialist Federal Soviet Republic. *Id.*, at 218. The declaration certified that the nationalization decree reached “the funds and property of former insurance companies ... irrespective of whether [they were] situated within the territorial limits of [Russia] or abroad.” *Id.*, at 220 (internal quotation marks omitted). This Court determined that “the evidence supported [a] finding” that “the Commissariat for Justice ha[d] power to interpret existing Russian law.” *Ibid.* “That being true,” the Court concluded, the “official declaration [wa]s conclusive so far as the intended extraterritorial effect of the Russian decree [wa]s concerned.” *Ibid.*

This Court’s treatment of the Commissariat’s submission as conclusive rested on a document *obtained by the United States*, through official “diplomatic channels.” *Id.*, at 218. There was no indication that the declaration was inconsistent with the Soviet Union’s past statements. Indeed, the Court emphasized that the declaration was consistent with expert evidence in point. See *ibid.* That the Commissariat’s declaration was deemed “conclusive” in the circumstances *Pink* presented scarcely suggests that all submissions by a foreign government are entitled to the same weight.

The Court of Appeals also reasoned that a foreign government’s characterization of its own laws should be afforded “the same respect and treatment that we would expect our government to receive in comparable matters.” 837 F. 3d, at 189. The concern for reciprocity is sound, but it does not warrant the Court of Appeals’ judgment. Indeed, the United States, historically, has not argued that foreign courts are *bound* to accept its characterizations or precluded from considering other relevant sources.

The understanding that a government’s expressed view of its own law is ordinarily entitled to substantial but not conclusive weight is also consistent with two international treaties that establish formal mechanisms by which one government may obtain from another an official statement characterizing its laws. Those treaties specify that “[t]he information given in the reply shall not bind the judicial authority from which the request emanated.” European Convention on Information on Foreign Law, Art. 8, June 7, 1968, 720 U. N. T. S. 154; see Inter-American Convention on Proof of and Information on Foreign Law, Art. 6, May 8, 1979, O. A. S. T. S. 1439 U. N. T. S. 111 (similar). Although the United States is not a party to those treaties, they reflect an international practice inconsistent with the Court of Appeals’ “binding, if reasonable” resolution.

Because the Court of Appeals concluded that the District Court was bound to defer to the Ministry’s brief, the court did not consider the shortcomings the District Court identified in the Ministry’s position or other aspects of “the [D]istrict [C]ourt’s careful and thorough treatment of the evidence before it.” 837 F. 3d, at 191, n. 10. The correct interpretation of Chinese law is not before this Court, and we take no position on it. But the materials identified by the District Court were at least relevant to the weight the Ministry’s submissions should receive and to the question whether Chinese law required the Chinese sellers’ conduct. We therefore vacate the judgment of the Court of Appeals and remand the case for renewed consideration consistent with this opinion.

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**2. *Detroit International Bridge Company v. Canada***

On October 15, 2018, the U.S. Supreme Court dismissed the petition for writ of certiorari filed by Detroit International Bridge Company. No. 18-161. See *Digest 2017* at 128-30 for a discussion of the decision by the U.S. Court of Appeals for the D.C. Circuit, rejecting the challenge to the issuance of a permit for construction of a new international bridge.

**3. *Leibovitch v. Iran***

On February 2, 2018, the United States filed a statement of interest in *Leibovitch v. Iran* in response to the district court's request for U.S. views on whether permitting discovery sought by plaintiffs would "interfere with U.S. foreign policy toward Iran by obstructing a key component of the international nuclear deal." The brief was filed prior to the U.S. announcement that it would cease participating in the Joint Comprehensive Plan of Action ("JCPOA"), the nuclear deal with Iran. See Chapter 19 for discussion of the May 8, 2018 announcement regarding the JCPOA. In *Leibovitch*, plaintiffs sought discovery in order to locate Iranian assets to execute on a judgment against Iran for providing support for a terrorist attack in Israel by the Palestine Islamic Jihad ("PIJ"). The discovery requested pertained to the Boeing Company's transactions with Iran Air, which were permitted by the JCPOA. Boeing argued that the discovery requests would interfere with U.S. foreign policy toward Iran. Excerpts follow from the U.S. statement of interest, which is available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

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This proceeding implicates several important foreign policy interests of the United States, including: the ability of U.S. victims of terrorism to seek compensation for their injuries; implementation of the U.S. commitment under the JCPOA to allow for the sale of commercial passenger aircraft and related parts and services to Iran; and the appropriate scope of discovery into foreign state property in U.S. courts. This Statement of Interest addresses these foreign policy interests in relation to this proceeding and the requested discovery. The United States does not take a position on whether the Court should order the requested discovery, including whether the discovery sought would be relevant to identifying assets that would be subject to execution in satisfaction of a judgment. Instead, and without opining on a number of other issues that are raised by the parties' pleadings, the United States wishes to make clear that the United States is implementing its JCPOA commitments, and that those commitments do not require the Executive Branch to take any specific action with respect to efforts by judgment creditors of Iran to pursue post-judgment discovery or other enforcement proceedings. However, as in any case regarding discovery with respect to a foreign sovereign, if the Court were to determine the requested discovery to be legally appropriate, the United States believes the Court should

supervise such discovery carefully, taking into account the sensitive nature of discovery into property of foreign states and their agencies and instrumentalities.

First, the United States condemns the terrorist actions that gave rise to the case, and expresses its deepest sympathy for the victims and their family members. The United States is committed to vigorously pursuing those responsible for violence against U.S. nationals, and it has an interest in U.S. victims of terrorism being able to seek compensation for their injuries.

Second, the United States remains a participant in the JCPOA and continues to implement its commitments under the deal as part of a broader strategy toward Iran, a key element of U.S. foreign policy. As part of the JCPOA, the United States committed to:

[a]llow for the sale of commercial passenger aircraft and related parts and services to Iran by licensing the (i) export, re-export, sale, lease or transfer to Iran of commercial passenger aircraft for exclusively civil aviation end-use, (ii) export, re-export, sale, lease or transfer to Iran of spare parts and components for commercial passenger aircraft, and (iii) provision of associated service[s], including warranty, maintenance, and repair services and safety-related inspections, for all the foregoing, provided that licensed items and services are used exclusively for commercial passenger aviation.

JCPOA Annex II § 5.1.1, available at <https://www.state.gov/documents/organization/245320.pdf>.

The civil aviation-related commitment was—and continues to be—a key component of the sanctions relief provided to Iran under the JCPOA. In furtherance of that commitment, in September 2016, the United States issued a license to Boeing to authorize transactions associated with the proposed sales to Iran Air, as described above. . . . However, the United States is not a party to any contract or agreement between Boeing and Iran Air and has not taken part in any negotiations between those parties related to transactions contemplated by such an agreement.

As a result, the United States does not have certain information regarding Boeing and Iran Air’s commercial arrangements that may be relevant to the Court’s question regarding discovery. . . . Moreover, the JCPOA does not require the United States to take any specific action with respect to efforts by judgment creditors of Iran to pursue post-judgment discovery or other enforcement proceedings, including in the matter pending before the Court, nor do any other U.S. commitments under the JCPOA.

The United States also has a substantial interest in ensuring that any U.S. court supervising post-judgment discovery into presumptively immune foreign-state property carefully adhere to basic principles of relevance and be sensitive to the significant comity, reciprocity, and foreign relations concerns raised by overly broad and burdensome discovery. Any court-ordered discovery in aid of execution on the assets of a foreign state or its agency or instrumentality should, as a general matter, take into consideration whether the discovery is directed at property that would be subject to execution in satisfaction of a judgment pursuant to the Foreign Sovereign Immunities Act, as well as considerations of international comity and the potential reciprocal implications for the United States in foreign courts. See *Republic of Argentina v. NML Capital Ltd.*, 134 S. Ct. 2250, 2258 n.6 (2014) (acknowledging the range of considerations district courts will need to take into account in this context).

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#### 4. *Sokolow*

As discussed in *Digest 2015* at 144-45, the United States filed a statement of interest in a case against the Palestinian Authority (“PA”) and the Palestinian Liberation Organization (“PLO”) urging the court to take into account national security and foreign policy interests in deciding whether to stay execution of a judgment against the PA and whether to impose a bond requirement pending appeal. On August 31, 2016, the U.S. Court of Appeals for the Second Circuit decided that the district court lacked general or specific personal jurisdiction over the PA and PLO in the case and vacated the judgment of the district court. *Waldman v. PLO*, 835 F.3d 317 (2d. Cir. 2016). Plaintiffs filed a petition for certiorari on March 3, 2017. *Sokolow v. PLO*, No. 16-1071. On June 26, 2017, the Supreme Court invited the United States to file a brief expressing its views. The U.S. brief filed on February 22, 2018 is excerpted below. On April 2, 2018, the Supreme Court denied the petition for certiorari, as the United States recommended.

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Private actions under the Anti-Terrorism Act are an important means of fighting terrorism and providing redress for the victims of terrorist attacks and their families. The court of appeals held here, however, that this particular action is barred by constitutional constraints on the exercise of personal jurisdiction because the district court had neither general nor specific jurisdiction over respondents in this suit arising from overseas terrorist attacks. Petitioners challenge that conclusion on three grounds: they argue that respondents lack any rights at all under the Due Process Clause of the Fifth Amendment (Pet. 22-27); in the alternative the court of appeals erred in applying principles of personal jurisdiction developed under the Due Process Clause of the Fourteenth Amendment to assess jurisdiction under the Due Process Clause of the Fifth Amendment (Pet. 27-30); and in any event the court of appeals erred in its application of specific-jurisdiction principles to the facts of this case (Pet. 30-34). The court of appeals’ rejection of those arguments does not conflict with any decision of this Court, implicate any conflict among the courts of appeals, or otherwise warrant this Court’s intervention at this time.

1. The court of appeals’ conclusion that respondents are entitled to due process protections does not warrant this Court’s review.

a. The court of appeals’ determination does not conflict with any decision of this Court. The Fifth and Fourteenth Amendments prohibit the federal government and the States, respectively, from depriving any “person” of “life, liberty, or property, without due process of law.” U.S. Const. Amends. V, XIV. ...

Because the Due Process Clauses of the Fifth and Fourteenth Amendments “speak[] only of ‘persons,’ ” *Livnat v. Palestinian Auth.*, 851 F.3d 45, 48 (D.C. Cir. 2017) (citation omitted), petition for cert. pending, No. 17-508 (filed Sept. 28, 2017), whether an entity receives due process protections depends on whether the entity qualifies as a “person.” This Court has recognized one class of entities that are not “persons” for purposes of due process: the States of the Union. *South Carolina v. Katzenbach*, 383 U.S. 301, 323-324 (1966), abrogated on other grounds by *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013). In reaching that result, the Court stated only that “[t]he word ‘person’ in the context of the Due Process Clause of the Fifth

Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union.” *Ibid.*

This Court has not recognized any other class of entities—whether natural or artificial—as outside the category of “persons” for purposes of due process. It has treated as “persons” domestic and foreign entities of various types, such as corporations. See, e.g., *International Shoe*, 326 U.S. at 316-317 (domestic corporation); *Daimler AG v. Bauman*, 134 S. Ct. 746, 750-752 (2014) (German public stock company); *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915, 918- 920 (2011) (foreign subsidiaries of a U.S. tire manufacturer). Because this Court’s existing jurisprudence has set only States of the Union outside of the category of “persons,” this Court’s decisions do not establish that foreign entities like respondents are barred from invoking due process protections.

b. The Second Circuit’s treatment of respondents as entities that receive due process protections also does not conflict with any decision of another court of appeals. In fact, the decision below accords with the D.C. Circuit’s decision in *Livnat*, *supra*, which also held that the PA is entitled to due process protections. 851 F.3d at 48, 50. ...

Petitioners err in contending (Pet. 24-25) that the decision below conflicts with federal appellate decisions addressing the status of foreign sovereigns. As petitioners note (Pet. 24), the Second and D.C. Circuits have held that foreign sovereigns lack due process rights—a question on which this Court reserved decision in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992) (assessing personal jurisdiction over Argentina under specific-jurisdiction principles, while “[a]ssuming, without deciding, that a foreign state is a ‘person’ for purposes of the Due Process Clause”). See *Frontera Res. Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393, 399-400 (2d Cir. 2009); *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 95-100 (D.C. Cir. 2002). But as noted above, the Second and D.C. Circuits have recognized that the reasoning of those decisions is limited to sovereigns, and they have held that non-sovereign foreign entities like respondents do receive due process protections. Pet. App. 19a-20a; see *Livnat*, 851 F.3d at 48, 50.

\* \* \* \*

Petitioners contend (Pet. 21) that this Court should decide whether respondents are entitled to due process protections in the absence of a conflict because the decision below may “interfere with the Executive’s foreign-affairs prerogatives.” In the view of the United States, petitioners’ approach poses a greater threat of such interference. The power to recognize foreign governments is exclusively vested in the President. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015); see *ibid.* (“Recognition is a topic on which the Nation must speak ... with one voice.”) (citations and internal quotation marks omitted). The President’s recognition of a foreign state “is a ‘formal acknowledgement’ that a particular ‘entity possesses the qualifications for statehood’ or ‘that a particular regime is the effective government of a state,’” *Id.* at 2084 (quoting 1 Restatement (Third) of Foreign Relations Law of the United States § 203 cmt. a (1987))—not merely a determination that the United States will “accord [a government] certain benefits,” Pet. 26. An approach under which courts would assess the extent to which foreign entities operate as “the effective government of a state” or “possess[] the qualifications for statehood,” *Zivotofsky*, 135 S. Ct. at 2084 (citation omitted), risks judicial determinations at odds with Presidential determinations underlying recognition.

c. The Court has not seen any need to revisit the scope of the term “person” under the Due Process Clauses since *Katzenbach*, and in any event this case would not be an appropriate vehicle for doing so for two reasons. First, petitioners’ argument relies (Pet. 23-24) on analogizing respondents to foreign sovereigns and municipalities, but this Court has not yet passed upon the status of those entities for due process purposes. Second, because respondents are *sui generis* entities with a unique relationship to the United States government, a ruling on whether respondents have due process protections is unlikely to have broad utility in resolving future cases concerning other entities. See Pet. 8-9 (stating that respondents are not recognized as sovereign by the United States but “interact with the United States as a foreign government,” “employ ‘foreign agents’ ” that are registered “as agents of the ‘Government of a foreign country’ ” under the Foreign Agents Registration Act of 1938, 22 U.S.C. 611, and “have received over a billion dollars” from the United States in “government-to-government assistance”) (citation omitted).

2. Certiorari is also not warranted to consider petitioners’ novel argument that federal courts may exercise personal jurisdiction under the Fifth Amendment whenever “a defendant’s conduct interfered with U.S. sovereign interests as set out in a federal statute, and the defendant was validly served with process in the United States pursuant to a nationwide-service-of-process provision.” ...

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b. The Second Circuit’s approach to jurisdiction under the Fifth Amendment also does not conflict with any decision of another court of appeals. Statutes such as the ATA present questions concerning Fifth Amendment jurisdictional limitations because they contain nationwide service-of-process and venue provisions that permit a federal court to exercise jurisdiction over defendants who would not be subject to suit in the courts of the State in which the federal court is located. See Fed. R. Civ. P. 4(k)(1)(A) and (C) (authorizing service of process on a defendant who is not “subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located” if service is “authorized by a federal statute”); 18 U.S.C. 2334(a) (providing that an ATA defendant “may be served in any district where the defendant resides, is found, or has an agent”).

In analyzing such statutes, courts of appeals generally have adapted Fourteenth Amendment jurisdictional principles to the Fifth Amendment context in the manner that the court below did: by considering a defendant’s contacts with the Nation as a whole, rather than only contacts with a particular State, in deciding whether the defendant had the contacts needed for personal jurisdiction. See, e.g., *In re Application to Enforce Admin. Subpoenas Duces Tecum of SEC*, 87 F.3d 413, 417 (10th Cir. 1996) (“When the personal jurisdiction of a federal court is invoked based upon a federal statute providing for nationwide or worldwide service, the relevant inquiry is whether the respondent has had sufficient minimum contacts with the United States.”); *Livnat*, 851 F.3d at 55.3 The decision below is consistent with those decisions, because the Second Circuit concluded that the district court lacked jurisdiction on the ground that respondents’ contacts with the United States as a whole were inadequate to ground either general or specific jurisdiction. Pet. App. 23a-50a.

Petitioners point to no decision adopting their far broader “sovereign interests” theory, under which the Fifth Amendment’s due process limitations are satisfied so long as the “defendant’s conduct interfered with U.S. sovereign interests as set out in a federal statute, and

the defendant was validly served with process in the United States pursuant to a nationwide-service-of-process provision.” Pet. Reply Br. 11 (emphasis omitted). Indeed, the D.C. Circuit concluded that “[n]o court has ever” adopted such an argument. *Livnat*, 851 F.3d at 54.4

Several courts also have suggested that if a defendant has sufficient contacts, a court must determine that “the plaintiff’s choice of forum [is] fair and reasonable.” *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1212 (10th Cir. 2000); see *Republic of Panama v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 947 (11th Cir. 1997); see also *Livnat*, 851 F.3d at 55 n.6 (noting that issue but declining to express a view).

c. Review of petitioners’ broad Fifth Amendment arguments would be premature. Few courts have had the opportunity to consider such arguments. And the contours and implications of petitioners’ jurisdictional theory—which turns on whether a defendant’s conduct “interfered with U.S. sovereign interests as set out in a federal statute,” Pet. Reply Br. 11—are not themselves well developed. Under these circumstances, further development in the lower courts is likely to be useful before this Court addresses arguments that the federal courts may, in particular circumstances, exercise personal jurisdiction over civil cases without regard to the principles of specific and general jurisdiction developed under the Fourteenth Amendment.

d. Review of petitioners’ theory is not currently warranted on the ground that application of Fourteenth Amendment-derived jurisdictional principles “leaves the [ATA] a practical nullity” and “would bar most suits under the Act based on overseas attacks.” Pet. 17. It is far from clear that the court of appeals’ approach will foreclose many claims that would otherwise go forward in federal courts. As the court of appeals explained, its approach permits U.S. courts to exercise jurisdiction over defendants accused of targeting U.S. citizens in an act of international terrorism. . . . It permits U.S. courts to exercise jurisdiction if the United States was the focal point of the harm caused by the defendant’s participation in or support for overseas terrorism. . . . And the court of appeals stated that it would permit U.S. courts to exercise jurisdiction over defendants alleged to have purposefully availed themselves of the privilege of conducting activity in the United States, by, for example, making use of U.S. financial institutions to support international terrorism. See *id.* at 46a-47a (discussing *Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161 (2d Cir. 2013)). In addition, nothing in the court’s opinion calls into question the United States’ ability to prosecute defendants under the broader due process principles the courts have recognized in cases involving the application of U.S. criminal laws to conduct affecting U.S. citizens or interests. See *id.* at 44a; accord *Livnat*, 851 F.3d at 56. Under these circumstances, in the absence of any conflict or even a developed body of law addressing petitioners’ relatively novel theory, this Court’s intervention is not warranted.

3. Finally, certiorari is not warranted to address the court of appeals’ factbound application of established specific-jurisdiction principles. See Pet. 30-34. As a threshold matter, the court of appeals correctly identified those principles. The court analyzed whether “the defendant’s suit-related conduct \* \* \* create[d] a substantial connection with the forum State.” Pet. App. 32a (quoting *Walden*, 134 S. Ct. at 1121); see *id.* at 33a (framing the inquiry as “whether the defendants’ suit-related conduct—their role in the six terror attacks at issue—creates a substantial connection with the forum State pursuant to the ATA”). Petitioners misread the decision below as holding that petitioners could establish specific jurisdiction only if respondents “‘specifically targeted’ U.S. citizens or territory.” Pet. Reply Br. 11 (quoting Pet. App. 45a). The court of appeals stated that respondents had not “specifically targeted United States citizens,” Pet. App. 45a, in distinguishing two cases invoked by petitioners, in which the defendants were accused of providing material support or financing to terrorist organizations

whose “specific aim” was to “target[] the United States,” or to “kill Americans and destroy U.S. property,” *id.* at 42a, 45a (citations omitted); see *id.* at 42a-45a (discussing *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659 (2d Cir. 2013); *United States v. al Kassar*, 660 F.3d 108 (2d Cir. 2011), cert. denied, 566 U.S. 986 (2012)). But the court of appeals recognized that specific jurisdiction may exist when “the brunt” or “the focal point” of the harm from an intentional tort is felt in the forum State. *Id.* at 43a (quoting *Calder*, 465 U.S. at 789). The court found petitioners’ claims did not meet that standard because Israel, not the United States, was “the focal point of the torts alleged in this litigation.” *Ibid.*

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## **B. ALIEN TORT STATUTE AND TORTURE VICTIM PROTECTION ACT**

### **1. Overview**

The Alien Tort Statute (“ATS”), sometimes referred to as the Alien Tort Claims Act (“ATCA”), was enacted as part of the First Judiciary Act in 1789 and is codified at 28 U.S.C. § 1350. It provides that U.S. federal district courts “shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States.” In 2004 the Supreme Court held that the ATS is “in terms only jurisdictional” but that, in enacting the ATS in 1789, Congress intended to “enable[] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.” *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). By its terms, this statutory basis for suit is available only to aliens.

The Torture Victim Protection Act (“TVPA”), which was enacted in 1992, Pub. L. No. 102-256, 106 Stat. 73, appears as a note to 28 U.S.C. § 1350. It provides a cause of action in federal courts against “[a]n individual ... [acting] under actual or apparent authority, or color of law, of any foreign nation” for individuals, including U.S. nationals, for torture and/or extrajudicial killing. The TVPA contains an exhaustion requirement and a ten-year statute of limitations.

The following entries discuss 2018 developments in a selection of cases brought under the ATS and the TVPA in which the United States participated.

### **2. ATS and TVPA Cases Post-*Kiobel***

In 2013, the U.S. Supreme Court dismissed ATS claims in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). For further background on the case, see *Digest 2013* at 111-17 and *Digest 2011* at 129-36. The majority of the Court reasoned that the principles underlying the presumption against extraterritoriality apply to claims under the ATS, and that “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”

**a. Al-Tamimi**

As discussed in *Digest 2017* at 131-35, the United States filed briefs in support of its motion to dismiss claims against a former U.S. government official for allegedly enabling unlawful acts against Palestinians by Israel Defense Forces (“IDF”). The district court dismissed and plaintiffs appealed. The section of the July 5, 2018 U.S. brief on appeal to the U.S. Court of Appeals for the D.C. Circuit regarding the TVPA and ATS is excerpted below. *Al-Tamimi v. Adelson*, No. 17-5207 (D.C. Cir. 2019). The section of the brief regarding the political question doctrine is excerpted *infra*.<sup>\*</sup> The brief is available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

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\* \* \* \*

Even if the political question doctrine did not render the plaintiffs’ claims non-justiciable, the district court would still lack jurisdiction to hear them because they do not fall within any statutory grant of jurisdiction. The district court did not consider these arguments because all of the plaintiffs’ claims were covered by its political question and FTCA rulings. But this Court “may affirm a district court on grounds other than those upon which it relied.” *United States Int’l Trade Comm’n v. Tenneco W.*, 822 F.2d 73, 80 (D.C. Cir. 1987).

**A. The Alien Tort Statute**

The amended complaint invoked the Alien Tort Statute, 28 U.S.C. § 1350 (ATS), as the source of jurisdiction for Count II (war crimes, crimes against humanity, and genocide) and Count III (aiding and abetting the same) for the majority of individual plaintiffs. The ATS provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350.

In *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013), the Supreme Court held that “the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.” While the presumption is not typically applied to statutes that are “strictly jurisdictional,” the Court observed that “the principles underlying the canon” applied equally to the ATS. *Id.* at 116. Specifically, the presumption “helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.” *Id.* (quoting *EEOC v. Arabian American Oil. Co.*, 499 U.S. 244, 248 (1991)). “[T]he danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do.” *Id.* Courts faced with claims under the ATS should therefore be “particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.” *Id.* (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)).

The Supreme Court explained that “even where” claims asserted under the ATS “touch and concern the territory of the United States,” jurisdiction will lie only if the claims “do so with sufficient force to displace the presumption against extraterritorial application” of domestic law.

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<sup>\*</sup> Editor’s note: On February 19, 2019, the Court of Appeals issued its decision, reversing the district court’s dismissal for lack of subject matter jurisdiction due to the nonjusticiable political questions raised by the case.

*Kiobel*, 569 U.S. at 124-25. This inquiry takes place against the backdrop of the ATS's function, see *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016); *Kiobel*, 569 U.S. at 123-24; *Sosa*, 542 U.S. at 714-18, 722-24 & n.15, including, for example, to provide redress in situations in which the United States could be viewed as having harbored or otherwise provided refuge to an actual torturer or other "enemy of all mankind." *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

The claims in this case, however, are brought primarily by Palestinians living abroad, seeking recovery for injuries caused by Israeli armed forces or Israeli settlers acting on foreign soil. See Op. 18 (finding that all of the plaintiffs' injuries were suffered in a foreign country). On their face, and absent the identification of any United States interest to support jurisdiction here, such claims do not displace the presumption against extraterritoriality. The plaintiffs concede that their claims cannot be based on any allegations "which arise out of [Abrams's] eight years of public service as a government employee." Br. 22. Thus, any allegations regarding discussions with Israeli officials must be disregarded (and would be too removed from supposed war crimes and genocide to be controlling in any event).

The remaining allegations relating to Abrams's domestic conduct, most of which concern his public expressive activities, are far too insubstantial to displace the presumption against extraterritorial application. For example, the plaintiffs allege that Abrams published articles, gave speeches, and testified before Congress regarding issues of great public importance. ... "A claim is too 'insubstantial and frivolous' to support federal question jurisdiction when it is 'obviously without merit' or when 'its unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" *Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192, 1194-95 (D.C. Cir. 2004) (quoting *Hagens v. Lavine*, 415 U.S. 528, 538 (1974)). The claims that Abrams's expressive activities—all protected by the core of the First Amendment—amount to war crimes or genocide in a foreign country (or aiding and abetting the same), and that the plaintiffs are entitled to \$1 billion in damages as a result, fall within both categories. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 993 (1982) ("The use of speeches ... cannot provide the basis for a damages award."); see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("[T]he advocacy of a politically controversial viewpoint ... is the essence of First Amendment expression.").

Other allegations of wrongdoing are entirely conclusory or threadbare. ... Such allegations are insufficient to displace the presumption against extraterritorial application of the ATS. See, e.g., *Mustafa v. Chevron Corp.*, 770 F.3d 170, 190 (2d Cir. 2014) ("[O]ur jurisdictional analysis need not take into account allegations that, on their face, do not satisfy basic pleading requirements.").

Some of the allegations in this category suggest, without providing any details, that Abrams was involved in (or at least physically near) the raising of funds to support the activities alleged to constitute war crimes. ... In some non-ATS contexts, the actual solicitation of funds for unlawful foreign activities, or the use of the domestic banking system to transfer funds for use in such activities, might support an application of U.S. law that is not explicitly extraterritorial. Compared to private plaintiffs, the U.S. Government traditionally exercises a considerable "degree of self-restraint and consideration of foreign governmental sensibilities." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 171 (2004) .... Accordingly, Congress may be presumed to require a less substantial domestic nexus in a statute enforced by the government—which can take into account the potential impact on foreign relations in deciding

whether to prosecute an action—than it might require for a statute enforced through private civil actions. See *RJR Nabisco*, 136 S. Ct. at 2110. In the context of the ATS, however, attenuated, vague, and conclusory allegations involving fundraising efforts—like the ones involving Abrams—do not constitute a sufficient domestic nexus to displace the presumption of extraterritoriality. The “need for judicial caution” about “foreign policy concerns” when “considering which claims c[an] be brought under the ATS” may counsel forbearance even in circumstances where an express statutory cause of action under domestic law, reflecting the considered judgment of Congress and the Executive, might be found applicable. *Kiobel*, 569 U.S. at 116.

#### B. Torture Victim Protection Act

Presumably because the jurisdictional grant in the ATS is limited to suits brought “by an alien,” 28 U.S.C. § 1350, the plaintiffs purported to invoke the Torture Victim Protection Act of 1991, Pub L. No. 102-256, 106 Stat. 73 (1992), “on behalf of the U.S. citizen plaintiffs against all Defendants in Count II, similar to and on the same bases as the ATS invoked on behalf of the non-U.S. citizen Plaintiffs.” Am. Compl. ¶ 3 (JA \_\_\_). “Though the Torture Victim Act creates a cause of action for official torture, this statute, unlike the Alien Tort Act, is not itself a jurisdictional statute.” *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir.1995). Moreover, there is no question that “Congress exempted American government officers and private U.S. persons from the statute.” *Saleh v. Titan Corp.*, 580 F.3d 1, 13 n.9 (D.C. Cir. 2009). Count II must be dismissed as brought against Abrams by U.S. citizens as well.

\* \* \* \*

#### b. *Jesner v. Arab Bank*

As discussed in *Digest 2017* at 139-50, the United States filed an amicus brief in *Jesner v. Arab Bank*, No. 16-499, asserting that a corporation can be a defendant in an action under the ATS. The Supreme Court decided the case on April 24, 2018, affirming the decision of the Court of Appeals. Justice Kennedy’s opinion reasoning that foreign corporations are not proper defendants in actions under the ATS, in which a majority of the court concurred, is excerpted below.

\* \* \* \*

#### I A

Petitioners are plaintiffs in five ATS lawsuits filed against Arab Bank in the United States District Court for the Eastern District of New York. The suits were filed between 2004 and 2010.

A significant majority of the plaintiffs in these lawsuits—about 6,000 of them—are foreign nationals whose claims arise under the ATS. These foreign nationals are petitioners here. They allege that they or their family members were injured by terrorist attacks in the Middle East over a 10-year period. Two of the five lawsuits also included claims brought by American nationals under the Anti-Terrorism Act, 18 U. S. C. §2333(a), but those claims are not at issue.

Arab Bank is a major Jordanian financial institution with branches throughout the world, including in New York. ... Petitioners allege that Arab Bank helped finance attacks by Hamas

and other terrorist groups. Among other claims, petitioners allege that Arab Bank maintained bank accounts for terrorists and their front groups and allowed the accounts to be used to pay the families of suicide bombers.

Most of petitioners' allegations involve conduct that occurred in the Middle East. Yet petitioners allege as well that Arab Bank used its New York branch to clear dollar-denominated transactions through the Clearing House Interbank Payments System. That elaborate system is commonly referred to as CHIPS. It is alleged that some of these CHIPS transactions benefited terrorists.

\* \* \* \*

In addition to the dollar-clearing transactions, petitioners allege that Arab Bank's New York branch was used to launder money for the Holy Land Foundation for Relief and Development (HLF), a Texas-based charity that petitioners say is affiliated with Hamas. According to petitioners, Arab Bank used its New York branch to facilitate the transfer of funds from HLF to the bank accounts of terrorist-affiliated charities in the Middle East.

During the pendency of this litigation, there was an unrelated case that also implicated the issue whether the ATS is applicable to suits in this country against foreign corporations. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F. 3d 111 (CA2 2010). ... In *Kiobel*, the Court of Appeals held that the ATS does not extend to suits against corporations. *Id.*, at 120. This Court granted certiorari in *Kiobel*. 565 U. S. 961 (2011).

After additional briefing and reargument in *Kiobel*, this Court held that, given all the circumstances, the suit could not be maintained under the ATS. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U. S. 108, 114, 124–125 (2013). The rationale of the holding, however, was not that the ATS does not extend to suits against foreign corporations. That question was left unresolved. The Court ruled, instead, that “all the relevant conduct took place outside the United States.” *Id.*, at 124. Dismissal of the action was required based on the presumption against extraterritorial application of statutes.

So while this Court in *Kiobel* affirmed the ruling that the action there could not be maintained, it did not address the broader holding of the Court of Appeals that dismissal was required because corporations may not be sued under the ATS. Still, the courts of the Second Circuit deemed that broader holding to be binding precedent. As a consequence, in the instant case the District Court dismissed petitioners' ATS claims based on the earlier *Kiobel* holding in the Court of Appeals; and on review of the dismissal order the Court of Appeals, also adhering to its earlier holding, affirmed. *In re Arab Bank, PLC Alien Tort Statute Litigation*, 808 F.3d 144 (2015). This Court granted certiorari in the instant case. 581 U. S. \_\_\_\_ (2017).

Since the Court of Appeals relied on its *Kiobel* holding in the instant case, it is instructive to begin with an analysis of that decision. The majority opinion in *Kiobel*, written by Judge Cabranes, held that the ATS does not apply to alleged international-law violations by a corporation. 621 F. 3d, at 120. Judge Cabranes relied in large part on the fact that international criminal tribunals have consistently limited their jurisdiction to natural persons. *Id.*, at 132–137.

Judge Leval filed a separate opinion. He concurred in the judgment on other grounds but disagreed with the proposition that the foreign corporation was not subject to suit under the ATS. *Id.*, at 196. Judge Leval conceded that “international law, of its own force, imposes no liabilities on corporations or other private juridical entities.” *Id.*, at 186. But he reasoned that corporate liability for violations of international law is an issue of “civil compensatory liability” that

international law leaves to individual nations. *Ibid.* Later decisions in the Courts of Appeals for the Seventh, Ninth, and District of Columbia Circuits agreed with Judge Leval and held that corporations can be subject to suit under the ATS. See *Flomo v. Firestone Nat. Rubber Co.*, 643 F. 3d 1013, 1017–1021 (CA7 2011); *Doe I v. Nestle USA, Inc.*, 766 F. 3d 1013, 1020–1022 (CA9 2014); *Doe VIII v. Exxon Mobil Corp.*, 654 F. 3d 11, 40–55 (CADC 2011), vacated on other grounds, 527 Fed. Appx. 7 (CADC 2013). The respective opinions by Judges Cabranes and Leval are scholarly and extensive, providing significant guidance for this Court in the case now before it.

With this background, it is now proper to turn to the history of the ATS and the decisions interpreting it.

## B

Under the Articles of Confederation, the Continental Congress lacked authority to “cause infractions of treaties, or of the law of nations to be punished.” *Sosa v. Alvarez-Machain*, 542 U. S. 692, 716 (2004) (quoting J. Madison, Journal of the Constitutional Convention 60 (E. Scott ed. 1893)). The Continental Congress urged the States to authorize suits for damages sustained by foreign citizens as a result of violations of international law; but the state courts’ vindication of the law of nations remained unsatisfactory. Concerns with the consequent international-relations tensions “persisted through the time of the Constitutional Convention.” 542 U. S., at 717.

Under the Articles of Confederation, the inability of the central government to ensure adequate remedies for foreign citizens caused substantial foreign-relations problems. . . .

The Framers addressed these matters at the 1787 Philadelphia Convention; and, as a result, Article III of the Constitution extends the federal judicial power to “all cases affecting ambassadors, other public ministers and consuls,” and “to controversies... between a state, or the citizens thereof, and foreign states, citizens, or subjects.” §2. The First Congress passed a statute to implement these provisions: The Judiciary Act of 1789 authorized federal jurisdiction over suits involving disputes between aliens and United States citizens and suits involving diplomats. §§9, 11, 1 Stat. 76–79.

The Judiciary Act also included what is now the statute known as the ATS. §9, *id.*, at 76. As noted, the ATS is central to this case and its brief text bears repeating. Its full text is: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U. S. C. §1350. The ATS is “strictly jurisdictional” and does not by its own terms provide or delineate the definition of a cause of action for violations of international law. *Sosa*, 542 U. S., at 713–714. But the statute was not enacted to sit on a shelf awaiting further legislation. *Id.*, at 714. Rather, Congress enacted it against the backdrop of the general common law, which in 1789 recognized a limited category of “torts in violation of the law of nations.” *Ibid.*

In the 18th century, international law primarily governed relationships between and among nation-states, but in a few instances it governed individual conduct occurring outside national borders (for example, “disputes relating to prizes, to shipwrecks, to hostages, and ransom bills”). *Id.*, at 714–715 (internal quotation marks omitted). There was, furthermore, a narrow domain in which “rules binding individuals for the benefit of other individuals overlapped with” the rules governing the relationships between nation-states. *Id.*, at 715. As understood by Blackstone, this domain included “three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy.” *Ibid.* (citing 4 W. Blackstone, Commentaries on the Laws of

England 68 (1769)). “It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on the minds of the men who drafted the ATS.” 542 U.S., at 715.

This history teaches that Congress drafted the ATS “to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations.” *Id.*, at 720. The principal objective of the statute, when first enacted, was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen. See *id.*, at 715–719; *Kiobel*, 569 U. S., at 123–124.

Over the first 190 years or so after its enactment, the ATS was invoked but a few times. Yet with the evolving recognition—for instance, in the Nuremberg trials after World War II—that certain acts constituting crimes against humanity are in violation of basic precepts of international law, courts began to give some redress for violations of international human-rights protections that are clear and unambiguous. In the modern era this began with the decision of the Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980).

In *Filartiga*, it was alleged that a young man had been tortured and murdered by Peruvian police officers, and that an officer named Pena-Irala was one of the supervisors and perpetrators. Some members of the victim’s family were in the United States on visas. When they discovered that Pena-Irala himself was living in New York, they filed suit against him. The action, seeking damages for the suffering and death he allegedly had caused, was filed in the United States District Court for the Eastern District of New York. The Court of Appeals found that there was jurisdiction under the ATS. For this holding it relied upon the universal acknowledgment that acts of official torture are contrary to the law of nations. *Id.*, at 890. This Court did not review that decision.

In the midst of debates in the courts of appeals over whether the court in *Filartiga* was correct in holding that plaintiffs could bring ATS actions based on modern human-rights laws absent an express cause of action created by an additional statute, Congress enacted the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following 28 U. S. C. §1350. H. R. Rep. No. 102–367, pp. 3–4 (1991) (H. R. Rep.) (citing *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774 (CADDC 1984)); S. Rep. No. 102–249, pp. 3–5 (1991) (S. Rep.) (same). The TVPA—which is codified as a note following the ATS—creates an express cause of action for victims of torture and extrajudicial killing in violation of international law.

After *Filartiga* and the TVPA, ATS lawsuits became more frequent. Modern ATS litigation has the potential to involve large groups of foreign plaintiffs suing foreign corporations in the United States for alleged human-rights violations in other nations. For example, in *Kiobel* the plaintiffs were Nigerian nationals who sued Dutch, British, and Nigerian corporations for alleged crimes in Nigeria. 569 U. S., at 111–112. The extent and scope of this litigation in United States courts have resulted in criticism here and abroad. See *id.*, at 124 (noting objections to ATS litigation by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom).

In *Sosa*, the Court considered the question whether courts may recognize new, enforceable international norms in ATS lawsuits. 542 U. S., at 730–731. The *Sosa* Court acknowledged the decisions made in *Filartiga* and similar cases; and it held that in certain narrow circumstances courts may recognize a common-law cause of action for claims based on the present-day law of nations, in addition to the “historical paradigms familiar when §1350 was enacted.” 542 U. S., at 732. The Court was quite explicit, however, in holding that ATS litigation

implicates serious separation-of-powers and foreign-relations concerns. *Id.*, at 727–728. Thus, ATS claims must be “subject to vigilant doorkeeping.” *Id.*, at 729.

This Court next addressed the ATS in *Kiobel*, the case already noted. There, this Court held that “the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts the presumption.” 569 U. S., at 124. The Court added that “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.” *Id.*, at 124–125.

## II

With these principles in mind, this Court now must decide whether common-law liability under the ATS extends to a foreign corporate defendant. It could be argued, under the Court’s holding in *Kiobel*, that even if, under accepted principles of international law and federal common law, corporations are subject to ATS liability for human-rights crimes committed by their human agents, in this case the activities of the defendant corporation and the alleged actions of its employees have insufficient connections to the United States to subject it to jurisdiction under the ATS. Various *amici* urge this as a rationale to affirm here, while the Government argues that the Court should remand this case so the Court of Appeals can address the issue in the first instance. There are substantial arguments on both sides of that question; but it is not the question on which this Court granted certiorari, nor is it the question that has divided the Courts of Appeals.

The question whether foreign corporations are subject to liability under the ATS should be addressed; for, if there is no liability for Arab Bank, the lengthy and costly litigation concerning whether corporate contacts like those alleged here suffice to impose liability would be pointless. In addition, a remand to the Court of Appeals would require prolonging litigation that already has caused significant diplomatic tensions with Jordan for more than a decade. So it is proper for this Court to decide whether corporations, or at least foreign corporations, are subject to liability in an ATS suit filed in a United States district court.

Before recognizing a common-law action under the ATS, federal courts must apply the test announced in *Sosa*. An initial, threshold question is whether a plaintiff can demonstrate that the alleged violation is “of a norm that is specific, universal, and obligatory.” 542 U. S., at 732 (internal quotation marks omitted). And even assuming that, under international law, there is a specific norm that can be controlling, it must be determined further whether allowing this case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before corporate liability can be imposed. See *id.*, at 732–733, and nn. 20–21. “[T]he potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.” *Id.*, at 727.

It must be said that some of the considerations that pertain to determining whether there is a specific, universal, and obligatory norm that is established under international law are applicable as well in determining whether deference must be given to the political branches. For instance, the fact that the charters of some international tribunals and the provisions of some congressional statutes addressing international human-rights violations are specifically limited to individual wrongdoers, and thus foreclose corporate liability, has significant bearing both on the content of the norm being asserted and the question whether courts should defer to Congress. The two inquiries inform each other and are, to that extent, not altogether discrete.

With that introduction, it is proper now to turn first to the question whether there is an international-law norm imposing liability on corporations for acts of their employees that contravene fundamental human rights.

## A

Petitioners and Arab Bank disagree as to whether corporate liability is a question of international law or only a question of judicial authority and discretion under domestic law. The dispute centers on a footnote in *Sosa*. In the course of holding that international norms must be “sufficiently definite to support a cause of action,” the Court in *Sosa* noted that a “related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.” *Id.*, at 732, and n. 20.

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...[T]he Court need not resolve the questions whether corporate liability is a question that is governed by international law, or, if so, whether international law imposes liability on corporations. There is at least sufficient doubt on the point to turn to *Sosa*’s second question—whether the Judiciary must defer to Congress, allowing it to determine in the first instance whether that universal norm has been recognized and, if so, whether it is prudent and necessary to direct its enforcement in suits under the ATS.

## B 1

*Sosa* is consistent with this Court’s general reluctance to extend judicially created private rights of action. The Court’s recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law, where this Court has “recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.” 542 U. S., at 727 (citing *Correctional Services Corp. v. Malesko*, 534 U. S. 61, 68 (2001); *Alexander v. Sandoval*, 532 U. S. 275, 286–287 (2001)). That is because “the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability.” *Ziglar v. Abbasi*, 582 U. S. \_\_\_, \_\_\_ (2017) (slip op., at 12) (internal quotation marks omitted). Thus, “if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, ... courts must refrain from creating the remedy in order to respect the role of Congress.” *Id.*, at \_\_\_ (slip op., at 13).

This caution extends to the question whether the courts should exercise the judicial authority to mandate a rule that imposes liability upon artificial entities like corporations. Thus, in *Malesko* the Court held that corporate defendants may not be held liable in *Bivens* actions. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). Allowing corporate liability would have been a “marked extension” of *Bivens* that was unnecessary to advance its purpose of holding individual officers responsible for “engaging in unconstitutional wrongdoing.” *Malesko*, 534 U. S., at 74. Whether corporate defendants should be subject to suit was “a question for Congress, not us, to decide.” *Id.*, at 72.

Neither the language of the ATS nor the precedents interpreting it support an exception to these general principles in this context. In fact, the separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS. See *infra*, at 25–26. The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns. See *Kiobel*, 569 U. S., at 116–117. That

the ATS implicates foreign relations “is itself a reason for a high bar to new private causes of action for violating international law.” *Sosa, supra*, at 727.

In *Sosa*, the Court emphasized that federal courts must exercise “great caution” before recognizing new forms of liability under the ATS. 542 U. S., at 728. In light of the foreign-policy and separation-of-powers concerns inherent in ATS litigation, there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS. But the Court need not resolve that question in this case. Either way, absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations.

2

Even in areas less fraught with foreign-policy consequences, the Court looks to analogous statutes for guidance on the appropriate boundaries of judge-made causes of action. See, e.g., *Miles v. Apex Marine Corp.*, 498 U. S. 19, 24 (1990); *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 736 (1975). Doing so is even more important in the realm of international law, where “the general practice has been to look for legislative guidance before exercising innovative authority over substantive law.” *Sosa, supra*, at 726.

Here, the logical place to look for a statutory analogy to an ATS common-law action is the TVPA—the only cause of action under the ATS created by Congress rather than the courts. As explained above, Congress drafted the TVPA to “establish an unambiguous and modern basis for a cause of action” under the ATS. H. R. Rep., at 3; S. Rep., at 4–5. Congress took care to delineate the TVPA’s boundaries. In doing so, it could weigh the foreign-policy implications of its rule. Among other things, Congress specified who may be liable, created an exhaustion requirement, and established a limitations period. *Kiobel*, 569 U. S., at 117. In *Kiobel*, the Court recognized that “[e]ach of these decisions carries with it significant foreign policy implications.” *Ibid.* The TVPA reflects Congress’ considered judgment of the proper structure for a right of action under the ATS. Absent a compelling justification, courts should not deviate from that model.

The key feature of the TVPA for this case is that it limits liability to “individuals,” which, the Court has held, unambiguously limits liability to natural persons. *Mohamad v. Palestinian Authority*, 566 U. S. 449, 453–456 (2012). Congress’ decision to exclude liability for corporations in actions brought under the TVPA is all but dispositive of the present case. That decision illustrates that significant foreign-policy implications require the courts to draw a careful balance in defining the scope of actions under the ATS. It would be inconsistent with that balance to create a remedy broader than the one created by Congress. Indeed, it “would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.” *Sosa, supra*, at 726.

According to petitioners, the TVPA is not a useful guidepost because Congress limited liability under that statute to “individuals” out of concern for the sovereign immunity of foreign governmental entities, not out of general hesitation about corporate liability under the ATS. The argument seems to run as follows: The TVPA provides a right of action to victims of torture and extrajudicial killing, and under international law those human-rights violations require state action. For a corporation’s employees to violate these norms therefore would require the corporation to be an instrumentality of a foreign state or other sovereign entity. That concern is absent, petitioners insist, for crimes that lack a state-action requirement—for example, genocide, slavery, or, in the present case, the financing of terrorists.

At least two flaws inhere in this argument. First, in *Mohamad* the Court unanimously rejected petitioners' account of the TVPA's legislative history. 566 U. S., at 453, 458–460. The Court instead read that history to demonstrate that Congress acted to exclude all corporate entities, not just the sovereign ones. *Id.*, at 459–460 (citing Hearing and Markup on H. R. 1417 before the House Committee on Foreign Affairs and Its Subcommittee on Human Rights and International Organizations, 100th Cong., 2d Sess., 87–88 (1988)); see also 566 U. S., at 461–462 (BREYER, J., concurring). Second, even for international-law norms that do not require state action, plaintiffs can still use corporations as surrogate defendants to challenge the conduct of foreign governments. In *Kiobel*, for example, the plaintiffs sought to hold a corporate defendant liable for “aiding and abetting the Nigerian Government in committing,” among other things, “crimes against humanity.” 569 U. S., at 114; see also, e.g., *Sarei v. Rio Tinto, PLC*, 671 F. 3d 736, 761–763 (CA9 2011) (en banc) (corporate defendant allegedly used Papua New Guinea's military to commit genocide), vacated and remanded, 569 U. S. 945 (2013).

Petitioners contend that, instead of the TVPA, the most analogous statute here is the Anti-Terrorism Act. That Act does permit suits against corporate entities. See 18 U. S. C. §§ 2331(3), 2333(d)(2). In fact, in these suits some of the foreign plaintiffs joined their claims to those of United States nationals suing Arab Bank under the Anti-Terrorism Act. But the Anti-Terrorism Act provides a cause of action only to “national[s] of the United States,” and their “estate, survivors, or heirs.” §2333(a). In contrast, the ATS is available only for claims brought by “an alien.” 28 U. S. C. §1350. A statute that excludes foreign nationals (with the possible exception of foreign survivors or heirs) is an inapt analogy for a common-law cause of action that provides a remedy for foreign nationals only.

To the extent, furthermore, that the Anti-Terrorism Act is relevant it suggests that there should be no common-law action under the ATS for allegations like petitioners'. Otherwise, foreign plaintiffs could bypass Congress' express limitations on liability under the Anti-Terrorism Act simply by bringing an ATS lawsuit. The Anti-Terrorism Act, as mentioned above, is part of a comprehensive statutory and regulatory regime that prohibits terrorism and terrorism financing. The detailed regulatory structures prescribed by Congress and the federal agencies charged with oversight of financial institutions reflect the careful deliberation of the political branches on when, and how, banks should be held liable for the financing of terrorism. It would be inappropriate for courts to displace this considered statutory and regulatory structure by holding banks subject to common-law liability in actions filed under the ATS.

In any event, even if the Anti-Terrorism Act were a suitable model for an ATS suit, Congress' decision in the TVPA to limit liability to individuals still demonstrates that there are two reasonable choices. In this area, that is dispositive—Congress, not the Judiciary, must decide whether to expand the scope of liability under the ATS to include foreign corporations.

3

Other considerations relevant to the exercise of judicial discretion also counsel against allowing liability under the ATS for foreign corporations, absent instructions from Congress to do so. It has not been shown that corporate liability under the ATS is essential to serve the goals of the statute. As to the question of adequate remedies, the ATS will seldom be the only way for plaintiffs to hold the perpetrators liable. See, e.g., 18 U. S. C. §1091 (criminal prohibition on genocide); §1595 (civil remedy for victims of slavery). And plaintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS. If the Court were to hold that foreign corporations have liability for international-law violations, then

plaintiffs may well ignore the human perpetrators and concentrate instead on multinational corporate entities.

As explained above, in the context of criminal tribunals international law itself generally limits liability to natural persons. Although the Court need not decide whether the seeming absence of a specific, universal, and obligatory norm of corporate liability under international law by itself forecloses petitioners' claims against Arab Bank, or whether this is an issue governed by international law, the lack of a clear and well-established international-law rule is of critical relevance in determining whether courts should extend ATS liability to foreign corporations without specific congressional authorization to do so. That is especially so in light of the TVPA's limitation of liability to natural persons, which parallels the distinction between corporations and individuals in international law.

If, moreover, the Court were to hold that foreign corporations may be held liable under the ATS, that precedent-setting principle "would imply that other nations, also applying the law of nations, could hale our [corporations] into their courts for alleged violations of the law of nations." *Kiobel*, 569 U. S., at 124. This judicially mandated doctrine, in turn, could subject American corporations to an immediate, constant risk of claims seeking to impose massive liability for the alleged conduct of their employees and subsidiaries around the world, all as determined in foreign courts, thereby "hinder[ing] global investment in developing economies, where it is most needed." Brief for United States as *Amicus Curiae* in *American Isuzu Motors, Inc. v. Ntsebeza*, O. T. 2007, No. 07-919, p. 20 (internal quotation marks omitted).

In other words, allowing plaintiffs to sue foreign corporations under the ATS could establish a precedent that discourages American corporations from investing abroad, including in developing economies where the host government might have a history of alleged human-rights violations, or where judicial systems might lack the safeguards of United States courts. And, in consequence, that often might deter the active corporate investment that contributes to the economic development that so often is an essential foundation for human rights.

It is also true, of course, that natural persons can and do use corporations for sinister purposes, including conduct that violates international law. That the corporate form can be an instrument for inflicting grave harm and suffering poses serious and complex questions both for the international community and for Congress. So there are strong arguments for permitting the victims to seek relief from corporations themselves. Yet the urgency and complexity of this problem make it all the more important that Congress determine whether victims of human-rights abuses may sue foreign corporations in federal courts in the United States. Congress, not the Judiciary, is the branch with "the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *Kiobel*, 569 U. S., at 116 (internal quotation marks omitted). As noted further below, there are many delicate and important considerations that Congress is in a better position to examine in determining whether and how best to impose corporate liability. And, as the TVPA illustrates, Congress is well aware of the necessity of clarifying the proper scope of liability under the ATS in a timely way.

### C

The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable. Brief for United States as *Amicus Curiae* 7. But here, and in similar cases, the opposite is occurring.

Petitioners are foreign nationals seeking hundreds of millions of dollars in damages from a major Jordanian financial institution for injuries suffered in attacks by foreign terrorists in the Middle East. The only alleged connections to the United States are the CHIPS transactions in Arab Bank's New York branch and a brief allegation regarding a charity in Texas. The Court of Appeals did not address, and the Court need not now decide, whether these allegations are sufficient to "touch and concern" the United States under *Kiobel*. See 569 U. S., at 124–125.

At a minimum, the relatively minor connection between the terrorist attacks at issue in this case and the alleged conduct in the United States well illustrates the perils of extending the scope of ATS liability to foreign multinational corporations like Arab Bank. For 13 years, this litigation has "caused significant diplomatic tensions" with Jordan, a critical ally in one of the world's most sensitive regions. Brief for United States as *Amicus Curiae* 30. "Jordan is a key counterterrorism partner, especially in the global campaign to defeat the Islamic State in Iraq and Syria." *Id.*, at 31. The United States explains that Arab Bank itself is "a constructive partner with the United States in working to prevent terrorist financing." *Id.*, at 32 (internal quotation marks omitted). Jordan considers the instant litigation to be a "grave affront" to its sovereignty. See Brief for Hashemite Kingdom of Jordan as *Amicus Curiae* 3; see *ibid.* ("By exposing Arab Bank to massive liability, this suit thus threatens to destabilize Jordan's economy and undermine its cooperation with the United States").

This is not the first time, furthermore, that a foreign sovereign has appeared in this Court to note its objections to ATS litigation. *Sosa*, 542 U. S., at 733, n. 21 (noting objections by the European Commission and South Africa); Brief for the Federal Republic of Germany as *Amicus Curiae* in *Kiobel v. Royal Dutch Petroleum Co.*, O. T. 2012, No. 10–1491, p. 1; Brief for the Government of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as *Amici Curiae* in No. 10–1491, p. 3. These are the very foreign-relations tensions the First Congress sought to avoid.

Petitioners insist that whatever the faults of this litigation—for example, its tenuous connections to the United States and the prolonged diplomatic disruptions it has caused—the fact that Arab Bank is a foreign corporate entity, as distinct from a natural person, is not one of them. That misses the point. As demonstrated by this litigation, foreign corporate defendants create unique problems. And courts are not well suited to make the required policy judgments that are implicated by corporate liability in cases like this one.

Like the presumption against extraterritoriality, judicial caution under *Sosa* "guards against our courts triggering ...serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches." *Kiobel*, 569 U. S., at 124. If, in light of all the concerns that must be weighed before imposing liability on foreign corporations via ATS suits, the Court were to hold that it has the discretion to make that determination, then the cautionary language of *Sosa* would be little more than empty rhetoric. Accordingly, the Court holds that foreign corporations may not be defendants in suits brought under the ATS.

### III

With the ATS, the First Congress provided a federal remedy for a narrow category of international-law violations committed by individuals. Whether, more than two centuries on, a similar remedy should be available against foreign corporations is similarly a decision that Congress must make.

The political branches can determine, referring to international law to the extent they deem proper, whether to impose liability for human-rights violations upon foreign corporations in this Nation's courts, and, conversely, that courts in other countries should be able to hold United States corporations liable. Congress might determine that violations of international law do, or should, impose that liability to ensure that corporations make every effort to deter human-rights violations, and so that, even when those efforts cannot be faulted, compensation for injured persons will be a cost of doing business. If Congress and the Executive were to determine that corporations should be liable for violations of international law, that decision would have special power and force because it would be made by the branches most immediately responsive to, and accountable to, the electorate.

It is still another possibility that, in the careful exercise of its expertise in the field of foreign affairs, Congress might conclude that neutral judicial safeguards may not be ensured in every country; and so, as a reciprocal matter, it could determine that liability of foreign corporations under the ATS should be subject to some limitations or preconditions. Congress might deem this more careful course to be the best way to encourage American corporations to undertake the extensive investments and foreign operations that can be an important beginning point for creating the infrastructures that allow human rights, as well as judicial safeguards, to emerge. These delicate judgments, involving a balance that it is the prerogative of the political branches to make, especially in the field of foreign affairs, would, once again, also be entitled to special respect, especially because those careful distinctions might themselves advance the Rule of Law. All this underscores the important separation-of-powers concerns that require the Judiciary to refrain from making these kinds of decisions under the ATS. The political branches, moreover, surely are better positioned than the Judiciary to determine if corporate liability would, or would not, create special risks of disrupting good relations with foreign governments.

Finally, Congress might find that corporate liability should be limited to cases where a corporation's management was actively complicit in the crime. Cf. ALI, Model Penal Code §2.07(1)(c) (1985) (a corporation may be held criminally liable where "the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting on behalf of the corporation within the scope of his office or employment"). Again, the political branches are better equipped to make the preliminary findings and consequent conclusions that should inform this determination.

These and other considerations that must shape and instruct the formulation of principles of international and domestic law are matters that the political branches are in the better position to define and articulate. For these reasons, judicial deference requires that any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of the Government.

The judgment of the Court of Appeals is affirmed.

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**C. POLITICAL QUESTION DOCTRINE, COMITY, AND *FORUM NON CONVENIENS*****1. International Comity****a. BAE Systems v. Republic of Korea**

On January 16, 2018, the United States filed an amicus brief in the U.S. Court of Appeals for the Fourth Circuit in *BAE Systems Technology Solution & Services, Inc. v. Republic of Korea*, Nos. 17-1041, 17-1070. The U.S. brief addresses two issues, as requested by the court: U.S. national security interests and the plaintiff's argument for an anti-suit injunction. The brief is excerpted below, and available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>. The discussion of whether an anti-suit injunction is appropriate focuses on comity.

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This case involves an agreement between a defense contractor and the Republic of Korea, both of which anticipated entering into separate Foreign Military Sales (FMS) contracts with the United States. The district court ultimately found the parties' agreement unenforceable based on its understanding of U.S. national security interests. The court also concluded that those perceived interests justified enjoining Korea from maintaining a breach-of-contract action in Korea (though the court later declined to make its injunction permanent for other reasons).

In response to this Court's invitation, and without opining on any other issues, the United States is filing this amicus brief to make two points. First, U.S. national security interests do not render unenforceable the requirement in the Memorandum of Agreement (MOA) that the contractor use its "best effort" to secure a given price. Enforcing such a provision can present national security benefits by broadening the methods through which foreign governments can access FMS items sold by U.S. defense contractors, which in turn benefits the U.S. government. But enforcement of such provisions can also present national security costs because these provisions may incentivize contractors to act in ways that might be contrary to the U.S. government's interests. In the final calculus, the United States believes that U.S. national security interests do not prohibit enforcement of the provision at issue here.<sup>[SEP]</sup> Since the United States is neutral (from a national security perspective) on the agreement's enforcement, it follows that national security interests also do not justify enjoining Korea from maintaining a breach-of-contract action in Korean courts. But in addition, such an antisuit injunction, barring a foreign sovereign from invoking the jurisdiction of its own courts, would be a truly extraordinary remedy with significant consequences for international comity, and its issuance could have significant negative consequences for the U.S. government (which frequently requires its foreign contractors to litigate in the United States). Particularly in a case like this, where the contractor has expressly consented to suit in a foreign forum with significant ties to the case, the requested antisuit injunction is improper.

\* \* \* \*

## II. BAE's Requested Antisuit Injunction Is Improper

For the same reasons that national security concerns do not render the “best effort” clause unenforceable, such concerns also do not justify BAE’s requested permanent antisuit injunction. But even if the “best effort” clause was unenforceable, the United States would still view BAE’s requested antisuit injunction as inappropriate. Enjoining a foreign sovereign from bringing suit in its own country is an extraordinary remedy that would be rarely (and possibly never) justified. It is not justified here.

The legal standard to be applied in assessing a request for a foreign antisuit injunction is undecided in this Circuit. . . .

This Court need not take a position in this dispute, however, because both versions of the test appropriately give substantial weight to international comity, and here the comity impact of an antisuit injunction is so substantial that BAE’s requested injunction is improper under either standard. BAE is not merely trying to have a U.S. court control the activities in a foreign court (itself a considerable affront to foreign sovereignty that should be done sparingly). Instead, it is attempting to enjoin *a foreign sovereign itself* from maintaining a lawsuit in its own courts, and which seeks to enforce a military procurement-related contract entered into *within its own borders* pursuant to its domestic laws.

Attempting to manage a foreign state’s conduct in this manner, within its own territory, departs dramatically from ordinary sovereignty norms. *See Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 79 (3d Cir. 1994) (noting it is “widely accepted that each sovereign nation has the sole jurisdiction to prescribe and administer its own laws, in its own country, pertaining to its own citizens, in its *own* discretion,” and ultimately reversing an injunction that sought to prevent the Philippine government from taking retaliatory actions in the Philippines against witnesses in a U.S. judicial proceeding); *cf. Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918) (recognizing the basic principle that every sovereign state must respect the independence of every other sovereign state, and so the courts of one state do not sit in judgment of the acts of a second, done within its own territory); *id.* at 303-04 (explaining that this principle rests “upon the highest considerations of international comity and expediency,” and that failure to honor it could cause international conflict). The drastic nature of BAE’s requested remedy is reinforced by the absence of such a remedy in the Foreign Sovereign Immunities Act’s text. And that Act’s legislative history clarifies that injunctive relief against foreign states should only be permissible “when circumstances [a]re clearly appropriate,” H.R. Rep. No. 94-1487, at 22 (1976). There is no indication Congress would have viewed this type of extraordinary relief as appropriate.

Permitting an antisuit injunction in this context would also threaten to cause significant harms to the United States. The laws in many foreign nations do not even permit a court to enter an injunction against a foreign state, and many foreign states will expect the United States to extend them the same respect and courtesy. If U.S. courts fail to do so, this could disrupt our relations with the foreign country. *Cf. Republic of Mexico v. Hoffman*, 324 U.S. 30, 35-36 (1945) (recognizing that actions affecting foreign state property can cause international disputes). Moreover, the United States engages in extensive overseas activities and is subject to many suits in foreign courts. *See Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co.*, 137 S. Ct. 1312, 1322 (2017). Because “some foreign states” account for principles of “reciprocity” in their treatment of other sovereign litigants, *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984), there is a real risk that issuance of an antisuit injunction in cases like this could prompt reciprocal injunctions against the United States.

Finally, the United States regularly signs foreign contracts which require that contract disputes be resolved in U.S. courts. United States interests could thus be significantly hindered if courts let contractors bypass their express consent to a suit in a foreign forum with significant ties to the case. The parties here agree that, at minimum, BAE consented to suit in Korea (their textual dispute concerns whether other fora were also contemplated, *see* Korea Opening Br. 26-33; BAE Opening Br. 47). That forum choice hardly seems opportunistic since the parties' agreement was apparently signed in Korea, *see* JA85, and concerns a purchase by the Korean government. An injunction is inherently an equitable remedy, *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006), and so BAE's attempt to backtrack from its previous consent to suit in Korea makes this case a particularly poor candidate to overcome the significant international comity problems that can result from BAE's requested injunction.

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The Fourth Circuit Court of Appeals issued its decision on March 6, 2018 in *BAE Systems*. The Court affirmed the district court's declaration that BAE had not violated the "best effort" clause of the parties' agreement and also its refusal to issue a permanent antisuit injunction. Sections of the Court's opinion analyzing the forum selection clause of the parties' agreement and the propriety of an antisuit injunction are excerpted below. The Court acknowledged the concerns of international comity raised in the U.S. brief. The Court's discussion of the Foreign Sovereign Immunity Act is excerpted in Chapter 10.

\* \* \* \*

B.<sup>[SEP]</sup> A forum selection clause is permissive unless it contains "specific language of exclusion." *See Albemarle Corp.*, 628 F.3d at 651 (quoting *IntraComm, Inc. v. Bajaj*, 492 F.3d 285, 290 (4th Cir. 2007)) (internal quotation marks omitted). "[A]n agreement *conferring* jurisdiction in one forum will not be interpreted as *excluding* jurisdiction" in another unless the clause expressly sets forth "specific language of exclusion." *IntraComm*, 492 F.3d at 290 (quoting *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Imps. & Distribs., Inc.*, 22 F.3d 51, 53 (2d Cir. 1994)) (internal quotation marks omitted).

The forum selection clause at issue here does not contain any "specific language of exclusion." *Id.* Rather, it simply confers jurisdiction on a forum by stating that disputes "shall be resolved through litigation and the Seoul Central Court shall hold jurisdiction." This clause, as the district court noted, differs significantly from forum selection clauses found to be mandatory, which provide that a particular place constitutes the "sole" or "only" or "exclusive" forum.

Contrary to Korea's suggestion, the use of "shall" in the clause does not render it mandatory. As we explained in *IntraComm*, the use of "shall" in a forum selection clause is not dispositive, because, in context, the clause may still "permit[] jurisdiction in one court but ... not prohibit jurisdiction in another." *Id.* (discussing *Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 321 (10th Cir. 1997)). Nor does holding the clause permissive render it, as Korea suggests, "meaningless and redundant." Appellant's Opening Br. at 30. Korea contends this is so because the BAE-Korea agreement "could always be enforced in the Korean courts." *Id.* at 29-30. But Korea fails to explain why the Seoul Central District Court in particular would

necessarily hold jurisdiction absent this clause.

Because the clause here is permissive, the modified framework outlined in *Atlantic Marine* does not apply, there is no presumption in favor of enforceability, and we proceed with a traditional *forum non conveniens* analysis. Pursuant to that analysis, Korea bears the burden of proving, *inter alia*, that its proposed alternative forum (the Seoul Central District Court) is more convenient in light of the public and private interests involved. *See DiFederico*, 714 F.3d at 800–01. Korea does not even attempt to do this. Accordingly, we agree with the district court that the BAE-Korea agreement’s permissive forum selection clause provides no basis for dismissing this action.

\* \* \* \*

V.<sup>SEP</sup> Finally, BAE claims the district court erred by failing to impose a permanent anti-suit injunction barring the Korean government from bringing suit in Korea to enforce the BAE-Korea agreement. After the district court granted summary judgment in favor of BAE, it lifted a preliminary injunction it had previously imposed. The court concluded that if South Korea “proceed[ed] with its claims against BAE in its own courts, BAE may defend against the claims by asserting any claim or issue preclusion that this judgment may afford it under Korean law.” We review denial of the permanent anti-suit injunction for abuse of discretion. *See Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.*, 43 F.3d 922, 939 (4th Cir. 1995).

Although a district court with jurisdiction over the parties may prohibit them from proceeding with a lawsuit in a foreign country, the court should use that power “sparingly.” *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 881 (9th Cir. 2012) (internal quotation marks and citation omitted). Our sister circuits have outlined at least two approaches for determining if a foreign anti-suit injunction is warranted: the “liberal” test and the “conservative” test. Both weigh factors favoring an injunction against the effect of an injunction on international comity. The principal difference is that the liberal approach accords less weight to international comity concerns. *See Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 431 (7th Cir. 1993). But international comity remains a significant consideration, even in courts endorsing the liberal approach. *See E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 990–91, 994 (9th Cir. 2006) (under the liberal standard, a court must perform a “detailed analysis” to determine whether the impact on international comity would be “tolerable”).

In our view, no matter which approach provides the appropriate framework, the district court did not abuse its discretion in denying BAE’s petition for a permanent anti-suit injunction. BAE’s contention to the contrary rests on two rationales.

First, BAE claims the Korean litigation threatens the district court’s jurisdiction, because “the U.S. court system is the proper venue for the dispute,” and, absent an injunction, BAE “face[s] the possibility of an inconsistent judgment” in Korea, which “could be enforced in [Korea] or potentially third countries.” Appellee/Cross-Appellant’s Response/Opening Br. at 40. We agree that a district court may, in certain circumstances, impose an anti-suit injunction to protect its own jurisdiction, even where (as here) it has already rendered its judgment. In that context, the injunction serves to protect the integrity of the district court order in case the foreign forum fails to give *res judicata* effect to the district court judgment. *See Paramedics Electromedicina Comercial, Ltda v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 654 (2d Cir. 2004).

But parallel proceedings are common, and an anti-suit injunction is not appropriate every time parallel proceedings may occur and litigation in the U.S. court concludes first. *See Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 928 n.54 (D.C. Cir. 1984) (“[A] showing of harassment, bad faith, or other strong equitable circumstances should ordinarily be required” for a district court to impose an anti-suit injunction in order to protect an existing judgment). Otherwise, such injunctions would be commonplace rather than extraordinary. Here, the Korean litigation is not particularly vexatious or oppressive; indeed, the forum selection clause in the BAE-Korea agreement contemplates (but does not require) litigation in Korea. In sum, we conclude that jurisdictional grounds provide an unconvincing justification for an anti-suit injunction.

BAE also claims an injunction is necessary in order to protect U.S. national security interests. Here, BAE has more solid footing. We have concluded that enforcement of the BAE-Korea agreement runs counter to U.S. national security concerns, and we agree that enforcement by a Korean court may threaten those same concerns. But BAE goes even further, suggesting it would be inconsistent to allow the enforceability of the BAE-Korea agreement to be litigated in Korea after holding, as we do here, that enforcement runs counter to national security interests. *See Appellee/Cross-Appellant’s Response/Opening Br.* at 32–33. That line of reasoning is too simplistic, because it ignores international comity concerns that must always be considered in determining whether to issue an anti-suit injunction.

International comity counsels us to give effect, if possible, to the judgments of foreign courts in order to strengthen international cooperation. *See Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895). Here, these comity concerns are near their peak. Even courts following the liberal framework recognize that comity concerns are far greater where an injunction would bar a foreign sovereign (rather than a private party) from litigating a dispute in its own courts. *See Allendale*, 10 F.3d at 428 (suggesting an injunction barring the French government “from litigating a suit on a French insurance policy in a French court” would be “an extraordinary breach of international comity”); *see also Microsoft*, 696 F.3d at 887; *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996). Indeed, an anti-suit injunction here would impinge on the sovereignty of the Korean courts (to hear the case) and the Korean government (to litigate it). And it would do so on a permanent basis, raising even graver comity concerns. Because anti-suit injunctions against foreign sovereigns are so unusual, no circuit precedent (and little out-of-circuit precedent) exists to guide courts in analysis of this issue.

Given all of these circumstances, we can hardly conclude the district court abused its discretion by declining to impose an anti-suit injunction.

\* \* \* \*

**b. Scalin v. SNCF**

On November 13, 2018, the United States filed an amicus brief in the U.S. Court of Appeals for the Seventh Circuit in *Scalin v. SNCF*, No. 18-1887. The case involves claims by heirs of French Holocaust victims transported by French Railroad SNCF to Nazi concentration camps for SNCF’s alleged expropriation of property. The United States filed a statement of interest in the case at the district court level. *See Digest 2015* at 311-15. The statement of interest explained the U.S. policy supporting resolution of Holocaust-related claims through mechanisms established by foreign states, such as France’s “Commission for the Compensation of Victims of Acts of Despoilment

Committed Pursuant to Anti-Semitic Laws in Force during the Occupation” (“CIVS,” its French acronym). The district court dismissed the case in 2016 due to the failure to exhaust administrative remedies in France. See *Digest 2016* at 337. The district court opinion, issued in 2018, is discussed in Chapter 8. Excerpts below from the U.S. amicus brief in the Seventh Circuit make the argument in favor of affirming dismissal on the basis of international comity. Specifically, the brief argues that international comity, rather than customary international law, is the proper basis on which U.S. courts may consider prudential exhaustion—the discretionary abstention doctrine in which a court declines to exercise jurisdiction in deference to an alternative forum. The brief is available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>. See Chapter 10 for excerpts regarding consideration of international comity under the Foreign Sovereign Immunities Act (“FSIA”). Chapter 10 also includes two other cases in which international comity in the context of the FSIA was under consideration: *Simon v. Hungary* and *Philipp v. Germany*.

\* \* \* \*

### **I. Dismissal Is Appropriate as an Exercise of International Comity**

A. After evaluating the adequacy of the CIVS program for addressing plaintiffs’ claims, the district court dismissed plaintiffs’ suit for failure to exhaust remedies in France. ...[T]he district court held that exhaustion of local remedies is required by customary international law. ... In the view of the United States, the court’s reliance on customary international law was misplaced, but the result it reached was correct as a matter of international comity.

\* \* \* \*

...[C]ustomary international law governing state-to-state relations rests on different considerations and may impose different obligations than customary international law addressing the relations between states and individuals. And, as this Court recognized, the Supreme Court has not “definitively” answered the question whether customary international law requires individuals to exhaust domestic remedies before bringing suit against a sovereign in a foreign court for violations of international law. *Abelesz*, 692 F.3d at 679; see *Sosa*, 542 U.S. at 733 n.21 (“We would certainly consider this requirement in an appropriate case.”). To determine whether the exhaustion requirement applies to claims by individuals against one state in the courts of another requires a deeper investigation into customary international-law exhaustion principles, which this Court did not undertake. Accordingly, this Court’s observation that “there is no reason to think that” the exhaustion requirement applicable to diplomatic protection “is limited to foreign sovereigns” (*Fischer*, 777 F.3d at 859) (emphasis omitted), is not well-supported.

... [I]nternational comity supports dismissal of international-law claims in deference to an available alternative foreign forum. For example, the Court explained that “international comity requires that [local] courts be given the first opportunity to hear the claims.” *Fischer*, 777 F.3d at 860; see also *id.* at 854 (“This exhaustion principle [is] based on comity.”), 858-59 (same); *Abelesz*, 692 F.3d at 684 (“The requirement of domestic exhaustion is not based on the relative convenience of two nations’ courts. It is based on the power of U.S. courts to hear a

claim and the comity between sovereign nations that lies close to the heart of most international law.”); *Abelesz*, 692 F.3d at 682 (same). In the view of the United States, international comity is the proper basis for the prudential-exhaustion requirement that this Court described.

...[I]nternational comity supports the district court’s dismissal of plaintiffs’ claims for failure to exhaust administrative remedies in France. The Court should use this case as an opportunity to clarify that the prudential-exhaustion requirement—a discretionary abstention doctrine in which a court declines to exercise jurisdiction in deference to an alternative forum—is based on international comity, rather than customary international-law principles applicable to diplomatic protection. *See* 7th Cir. R. 40(e).

B. At a general level, international comity “is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.” *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). At issue here is the application of “adjudicatory comity” or the “comity of the courts,” which “may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state.” *Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014). The doctrine is well established in United States law. *See Hilton*, 159 U.S. at 164 (distinguishing between the “comity of the courts” and the “comity of the nation”). Courts apply the doctrine in considering whether to defer not only to foreign court proceedings, but also to claims resolution by foreign non-judicial fora. *See Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1230-32, 1237-40 (11th Cir. 2004) (dismissing claims on international comity grounds in favor of resolution by private foundation established by Germany to hear claims of victims of the Nazi regime).

Most courts, including this Court, have not identified specific factors to be considered in deciding whether to dismiss a suit based on international comity in favor of resolution of the claims in a foreign state’s forum. But the Ninth and Eleventh Circuits have identified as central to the inquiry: (1) the United States’ interests, including its foreign policy interests; (2) the foreign state’s interests, including its interest in addressing matters arising within its territory; and (3) the adequacy of the foreign forum. *See, e.g., Cooper v. Tokyo Electric Power Co.*, 860 F.3d 1193, 1205 (9th Cir. 2017); *Ungaro-Benages*, 379 F.3d at 1238-39; *see also In re Maxwell Commc’n Corp.*, 93 F.3d 1036, 1048 (2d Cir. 1996) (“Comity is a doctrine that takes into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law.”) (prescriptive comity). That formulation is an accurate distillation of the various factors courts of appeals have considered. *See Mujica*, 771 F.3d at 603-09 (collecting cases); *Ungaro-Benages*, 379 F.3d at 1238 (same).

If the United States’ and the foreign state’s interests support claims resolution in the foreign forum, and if the foreign state provides an adequate alternative forum, then a court may dismiss a plaintiff’s claims for failure to exhaust local remedies.

C. There is little question that the first two factors, concerning the United States’ and foreign sovereign’s respective interests, support dismissal of plaintiffs’ claims in favor of resolution in France. Plaintiffs allege that the takings occurred in France. App’x A1-A2. Two of the three plaintiffs are French nationals. Dkt. No. 1, ¶¶ 17, 18. France has a significant interest in resolving Holocaust-related claims through the procedures it has established, and it has demonstrated a willingness to do so. A21 (2014 Exec. Agm’t, Pmbl.) (noting the French Republic’s continuing “commit[ment] to providing compensation for the wrongs suffered by

Holocaust victims deported from France through [administrative] measures to individuals who are eligible under French programs”). And the United States has a longstanding policy supporting the resolution of such claims through reparation mechanisms established by the foreign states in which the claims arose, as reflected in the 2014 Executive Agreement. *See, e.g.*, A22 (2014 Exec. Agm’t, Pmbl.) (noting the parties’ shared resolve to address compensation claims of Holocaust victims and their families in “an amicable, extra-judicial and non-contentious manner); *see generally* *Mujica*, 771 F.3d at 604-07 (discussing similar considerations).

There is also little question that the CIVS program provides an adequate alternative to adjudication of plaintiffs’ claims in a U.S. court, as the district court concluded. “An alternative forum is adequate when the parties will not be deprived of all remedies or treated unfairly.” *Fischer*, 777 F.3d at 867 (quotation marks omitted) (*forum non conveniens* context); *see Cooper*, 860 F.3d at 1210 (“The analysis used in evaluating the adequacy of an alternative forum is the same under the doctrine of *forum non conveniens* as it is under the doctrine of international comity.”). CIVS procedures are informal and so do not require expert advocates, though claimants may be represented by counsel. App’x A8. CIVS personnel assist claimants by performing research on their behalf in specialized archives. App’x A7. CIVS employs relaxed evidentiary standards, and can recommend compensation even in the absence of evidence, and it can rely on good-faith estimates of value. App’x A7, A12. Hearings are sometimes held outside of France to facilitate claimants’ participation. App’x A8. Favorable decisions result in compensation. *Id.* And even “if there is no evidence of the type or amount of property confiscated[,] \* \* \* the Commission recommends a lump sum payment of 930 euros in compensation.” App’x A12. If claimants are unsatisfied with the award, they may seek review from the French courts. App’x A8. Under these procedures, plaintiffs “will not be deprived of all remedies or treated unfairly.” *Fischer*, 777 F.3d at 867.

This Court may “affirm on any ground supported by the record so long as the issue was raised and the non-moving party had a fair opportunity to contest the issue in the district court.” *Locke v. Haessig*, 788 F.3d 662, 666 (7th Cir. 2015). It would be appropriate for the Court to affirm the district court’s judgment on the basis of international comity. The district court acted well within its discretion in determining that CIVS provides an adequate alternative forum, and in concluding that the interests of the United States and France support consideration of plaintiffs’ claims by CIVS. *See Fischer*, 777 F.3d at 866 (abuse of discretion standard applies to district court’s determination of adequacy of foreign forum and *forum non conveniens* factors). But even under de novo review, it is apparent that the international comity factors support dismissal of plaintiffs’ claims in favor of resolution in France.

D. Plaintiffs do not dispute that the sovereign interests favor resolution of their claims by CIVS. Instead, their opening appellate brief is devoted to the argument that CIVS is not an adequate forum, because it lacks jurisdiction to consider claims of spoliation by SNCF (Br. 16-22) and, in any event, because CIVS procedures do not provide an effective remedy for the claims CIVS considers (Br. 22-30). Those arguments lack merit. The district court did not abuse its discretion in finding CIVS to be an adequate forum.

Plaintiffs identify no French law that clearly excludes SNCF spoliation claims from CIVS’s jurisdiction. In the absence of any such limitation, plaintiffs have given no reason to doubt the CIVS Chairman’s sworn declaration that CIVS is competent to consider plaintiffs’ claims and will do so if plaintiffs submit them. *See* App’x A17 (discussing declaration).

Plaintiffs' arguments concerning the effectiveness of CIVS's procedures are no stronger. They rely, as the district court noted (App'x A23), on anecdotal reports about perceived shortcomings, rather than on any inherent deficiencies in the program. Plaintiffs further rely (Br. 25-28) on a critical report by a French parliamentarian (which they erroneously attribute to the French Senate). But none of this is sufficient to suggest that the district court abused its discretion or otherwise erred in concluding that CIVS is an adequate forum (App'x A18-A22), especially given the endorsement of the United States (and, in addition, the endorsement of CRIF, the largest French Jewish umbrella organization, representing over sixty Jewish organizations in France). ...

\* \* \* \*

## 2. Political Question: *Al-Tamimi*

As discussed in *Digest 2017* at 155-61, the United States filed briefs in support of its motion to dismiss claims against a former U.S. government official (Elliott Abrams) for allegedly conspiring to enable unlawful actions by Israel Defense Forces against plaintiffs. The district court dismissed the claims and plaintiffs appealed. Excerpts follow from the political question section of the brief of the United States on appeal in the U.S. Court of Appeals for the D.C. Circuit. *Al-Tamimi v. Adelson*, No. 17-5207 (D.C. Cir. 2019). The section of the brief on the ATS and TVPA is excerpted *supra*.\*\* The brief is available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

\* \* \* \*

The political question doctrine reflects the principle that “courts lack jurisdiction over political decisions that are by their nature committed to the political branches to the exclusion of the judiciary.” *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005) (internal quotations omitted). It “excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.” *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 230 (1986). Cases presenting non-justiciable political questions typically include one or more of the following factors:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision

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\*\* Editor’s note: On February 19, 2019, the Court of Appeals issued its decision, reversing the district court’s dismissal for lack of subject matter jurisdiction due to the nonjusticiable political questions raised by the case.

already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker v. Carr*, 369 U.S. 186, 217 (1962)...“To find a political question, [the Court] need only conclude that one factor is present,” *Schneider*, 412 F.3d at 194, but this case involves several.

1. “There is no question that the first Baker factor is implicated in this case.” Op. 6 .... “The conduct of foreign relations of our Government is committed by the Constitution to the Executive and Legislative—‘the political’—Departments of the Government ....” *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); see also *Schneider*, 412 F.3d at 195 (“Just as Article I of the Constitution evinces a clear textual allocation to the legislative branch, Article II likewise provides allocation of foreign relations and national security powers to the President, the unitary chief executive.”).

While “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance,” *Baker*, 369 U.S. at 211 ... “[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.” *Haig v. Agee*, 453 U.S. 280, 292 (1981). Indeed, “[d]isputes involving foreign relations” present “quintessential sources of political questions.” *El-Shifa*, 607 F.3d at 841 (quotation marks omitted).

The plaintiffs here seek to hold various defendants liable for their alleged support of, or participation in, the “settlement enterprise,” meaning the establishment of “Israeli civilian communities built on lands occupied or otherwise administered by Israel” in 1967, including East Jerusalem, the West Bank, and the Gaza Strip. ... They argue that these settlements amount to theft of Palestinian land by Israeli settlers. ...

But as the Supreme Court has explained, “[q]uestions touching upon the history of the ancient city [of Jerusalem] and its present legal and international status are among the most difficult and complex in international affairs. In our constitutional system these matters are committed to the Legislature and the Executive, not the Judiciary.” *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2081 (2015). The plaintiffs’ attempt to “have this Court adjudicate the rights and liabilities of the Palestinian and Israeli people” in these areas, *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 112 (D.D.C. 2005), would thrust the judiciary into a realm textually committed to other branches of government. ...

Moreover, the political branches are actively engaging with the very questions the plaintiffs asked the district court to address. ... The plaintiffs themselves allege that Congress has been involved by holding hearings and issuing “resolutions: (a) condemning Palestinian violence; and (b) cutting off vital humanitarian aid to the Palestinians.” Am. Compl. 43. Their complaint makes clear that they intend for this lawsuit to interfere with these ongoing efforts by labeling Abrams’s communications with Israeli officials while working in the White House and his testimony before Congress as a private citizen as parts of an unlawful conspiracy, or even war crimes. ...

“[C]ourts are not a forum for reconsidering the wisdom of discretionary decisions made by the political branches in the realm of foreign policy.” *El-Shifa*, 607 F.3d at 842; see also *Oetjen*, 246 U.S. at 302 (“[T]he propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”). “Whether plaintiffs dress their claims in the garb of ... federal statutes, or the [common law of] tort,” or the law of nations, “the character of those claims is, at its core, the same: peculiarly volatile, undeniably political, and ultimately nonjusticiable.” *Doe I*, 400 F. Supp. 2d at 112.

There are also no “judicially discoverable and manageable standards for resolving” the issues raised in the plaintiffs’ complaint. *Baker*, 369 U.S. at 217. The Supreme Court recently recognized that “whether the Judiciary may decide the political status of Jerusalem, certainly raises those concerns.” *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 197 (2012). And that is precisely what the plaintiffs’ complaint called on the district court to do when it brought claims that Israeli settlers, with the assistance of the Israeli armed forces, have engaged in widespread theft of Palestinian land in “Occupied Palestinian Territories,” including East Jerusalem. ...

Equally as problematic, the plaintiffs invited the district court “to draw some big-picture conclusions” regarding “the settlement enterprise,” including whether “the root cause of violence in the Middle East” is “Palestinian farmers and homeowners” or “rabid, rampaging, out-of-control settlers.” Am. Compl. 78, 175 ... There are no judicially discoverable and manageable standards for determining whether the assertion that “Palestinian farmers are the root cause of violence in the Middle East” is “a complete fabrication,” as the plaintiffs allege. *Id.* at 20 ...

The presence of these two factors—which have been described as “the most important,” *Harbury v. Hayden*, 522 F.3d 413, 419 (D.C. Cir. 2008)—is sufficient to deprive courts of jurisdiction over the plaintiffs’ claims, see *Schneider*, 412 F.3d at 194, but several other factors are also implicated by “the centrality of the question of sovereignty over these disputed lands[,] and in particular the ongoing expansion of settlements on those lands.” Op. 7. Determining the equities between Israelis and Palestinians in the West Bank, for example, would require “an initial policy determination of a kind clearly for nonjudicial discretion.” *Baker*, 369 U.S. at 217; see Op. 8. And the possibility that a court ruling would “conflict with the other branches’ sensitive positions regarding the legality and implication of the settlements, broader questions of Israel’s sovereignty, and the right to private ownership and control over the disputed lands,” Op. 8, risks embarrassing the government through “multifarious pronouncements” on the nature and equities of the conflict. *Baker*, 369 U.S. at 217. As the district court recognized, when a “court is asked to make a determination on issues at the forefront of global relations while the United States government continues to determine how best to approach these same issues, it should decline to weigh in on such sensitive diplomatic and geopolitical matters.” Op. 8.

Several of the other *Baker* factors are also implicated by the plaintiffs’ claim that alleged actions taken by the Israeli military and Israeli settlers (allegedly supported and encouraged by Abrams) constituted genocide. ... The plaintiffs also “request damages in the sum of \$1 billion for their damages arising out of the war crimes, crimes against humanity, and genocide committed by the Israeli army and violence-prone settlers.” ... Some of these damages are specifically traced to official military actions taken by the Israeli government. ...

Resolution of these claims would implicate the fourth and sixth Baker factors. Given the level of political and military support provided Israel by the American government, a judicial finding that the Israeli armed forces had committed the alleged offenses would “implicitly condemn American foreign policy by suggesting that the [government’s] support of Israel is wrongful.” *Doe I*, 400 F. Supp. 2d at 112. Such a ruling would therefore “expres[s] lack of the respect due coordinate branches of government,” and also create “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Baker*, 369 U.S. at 217; see *Schneider*, 412 F.3d at 198 (finding the fourth factor present where the Court “could not determine Appellants’ claims without passing judgment on [a] decision of the executive branch”); see also *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 984 (9th Cir. 2007)

(finding a political question present where “[a] court could not find in favor of the plaintiffs without implicitly questioning, and even condemning, United States foreign policy toward Israel”).

2. a. The plaintiffs’ sole reason for arguing that the district court’s political question ruling was wrong is that the court “erroneously concluded that the Justice Department had itself filed a ‘Declaration of Interest’ on behalf of the State Department.” Br. 12. Their contention that “only the State Department has the right and authority to file formal Statements of Interest concerning lawsuits that may interfere with the executive’s foreign policy agenda,” *id.*, lacks any support in the law and is flatly wrong. Congress expressly assigned to the Department of Justice the responsibility to “attend to the interests of the United States in a suit pending in a court of the United States.” 28 U.S.C. § 517. When doing so, the Department of Justice regularly consults with federal agencies, including, as appropriate, the State Department. But the authority to make the filing rests with the Department of Justice. Here, the government’s interests were asserted through a motion to dismiss filed after the United States substituted itself as a defendant for Mr. Abrams. No more is required. See, *e.g.*, *El-Shifa*, 607 F.3d at 855, 856-61 (holding that the political question doctrine barred claims in a case where the government filed a motion to dismiss).

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...[T]he plaintiffs argued that the district court had misunderstood the nature of their claims because they “never referred to the sovereignty of Jerusalem as a central concern in their pleadings” and in fact no plaintiff had “claimed that his or her stolen property was located in Jerusalem.” Opp’n Summ. Affirmance 13. The fact that the plaintiffs never expressly referred to the sovereignty of Jerusalem is irrelevant; the entire premise of their lawsuit is that land in the “Occupied Palestinian Territories”—which plaintiffs define to include East Jerusalem, see Am. Compl. 11 n.2—is currently in the possession of Israeli citizens but rightly belongs to Palestinians, and they asked for damages based on that contention. See also *id.* at 26 (alleging that the defendants “are intentionally and literally cleansing East Jerusalem ... of all non-Jews” (emphasis omitted)). As the district court recognized, it would be impossible to adjudicate these claims without resolving questions of sovereignty and the rights of foreign citizens in these territories. But even if there were any question on this point, the plaintiffs do not deny that their claims would require a determination that Israeli military officials and settlers committed various war crimes and crimes against humanity. As explained above, that alone suffices to render their claims non-justiciable.

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### 3. *Forum Non Conveniens*

See discussion of *Simon v. Hungary* and *Philipp v. Germany* in Chapter 10.

## D. EXTRATERRITORIAL APPLICATION OF U.S. CONSTITUTION

### 1. *Hernandez*

On June 15, 2018, the plaintiff in the district court, Jesus Hernandez, filed a new petition for certiorari in the U.S. Supreme Court. *Hernandez v. Mesa*, No. 17-1678. *Hernandez* is a damages action against a U.S. Border Protection officer (Mesa) for the death of a Mexican national in a shooting across the U.S. border with Mexico. See *Digest 2017* at 172-77 for discussion of the U.S. brief filed in the Supreme Court in 2017 and the Supreme Court's 2017 decision ("*Hernandez I*"), remanding to the U.S. Court of Appeals for the Fifth Circuit in light of another Supreme Court decision in a *Bivens* action (*Abbasi*). See *Digest 2016* at 192 and *Digest 2015* at 163-66 for discussion of the initial decision by the Fifth Circuit, en banc, affirming the dismissal of all claims in *Hernandez v. Mesa et al.*, 785 F.3d 117 (5th Cir. 2015). On remand from the Supreme Court, the Fifth Circuit once again affirmed the district court's dismissal of all claims, focusing on the *Bivens* action. 885 F.3d 811 (5th Cir. 2018) (en banc). On October 1, 2018, the Supreme Court invited the Solicitor General to file a brief in the case expressing the views of the United States.

### 2. *Rodriguez*

*Rodriguez v. Swartz* involves issues similar to those in *Hernandez*. The U.S. Court of Appeals for the Ninth Circuit found, *inter alia*, that there was an implied remedy for damages under *Bivens* in the context of a cross-border shooting. 899 F.3d 719 (2018). See *Digest 2016* at 192, for discussion of the U.S. government's notification to the Ninth Circuit that it should use the Supreme Court's determination in *Hernandez* in deciding *Rodriguez*. See *Digest 2017* at 177-81 for discussion of the U.S. supplemental brief filed in 2017 in the Ninth Circuit supporting reversal. After the Ninth Circuit's decision in 2018, the defendant in the district court filed a petition for writ of certiorari in the U.S. Supreme Court. On October 29, 2018, the Supreme Court invited the U.S. government to file a brief expressing its views. *Swartz v. Rodriguez*, No. 18-309.

## E. AGREEMENT FOLLOWING REVIEW OF COMPACT OF FREE ASSOCIATION WITH PALAU

On September 19, 2018, the United States and Palau signed an agreement to amend the "Compact Review Agreement" (the Compact of Free Association Section 432 Review signed in 2010, or "CRA"). For background on the 2010 CRA, see *Digest 2010* at 196-97. The United States and Palau also exchanged diplomatic notes to bring the amended CRA into force on the same day. As described in a September 19, 2018 media note on the

subject, available at <https://www.state.gov/united-states-and-palau-sign-agreement-to-amend-the-compact-review-agreement/>:

The signing marks the completion of the first review and amendment process as provided for under the Compact of Free Association (the “Compact”), U.S. Public Law 99-658.

Since the implementation of the Compact in 1994, the United States has provided over \$700 million in direct assistance and investment to Palau. The U.S. investment in Palau under the Compact, and numerous other federal programs, has provided funds for essential government operations, law enforcement, infrastructure development, weather pattern monitoring, immunizations and health screenings, scholarships for higher education, and postal services.

The United States sees Palau and the Pacific Islands as an essential part of a free and open Indo-Pacific region and is committed to the Pacific Islands’ security and prosperity. The United States is actively engaged in advancing a regional order based on respect for sovereignty, the rule of law, and the principles of free, fair, and reciprocal trade.

**Cross References**

*Universal jurisdiction*, **Ch. 3.A.5.**

*Scalin v. SNCF*, **Ch. 8.A**

*BAE Systems v. Korea*, **Ch. 10.A.1**

*Simon v. Hungary*, **Ch. 10.A.2**

*Philipp v. Germany*, **Ch. 10.A.2**

*Scalin v. SNCF*, **Ch. 10.A.2**

## CHAPTER 6

### Human Rights

#### A. GENERAL

##### 1. Country Reports on Human Rights Practices

On April 20, 2018, the Department of State released the 2017 Country Reports on Human Rights Practices. The Department submits the reports to Congress annually per §§ 116(d) and 502B(b) of the Foreign Assistance Act of 1961, as amended, and § 504 of the Trade Act of 1974, as amended. These reports are often cited as a source for accounts of human rights practices in other countries. While the Country Reports describe facts relevant to human rights concerns, the reports do not reach conclusions about human rights law or legal definitions. The Country Reports are available at <https://www.state.gov/country-reports-on-human-rights-practices-for-2017/>. Michael G. Kozak, Acting Principal Deputy Assistant Secretary for Democracy, Human Rights, and Labor, presented the 2017 Country Reports in a briefing on April 20, 2018, which is transcribed at <https://www.state.gov/briefing-on-the-release-of-the-2017-country-reports-on-human-rights-practices/>. John J. Sullivan, Acting Secretary of State, also delivered remarks on the release of the 2017 Reports on April 20, 2018. Acting Secretary Sullivan's remarks are available at <https://www.state.gov/remarks-on-the-release-of-the-2017-country-reports-on-human-rights-practices/>.

##### 2. Human Rights Council

###### a. Overview

The United States participated in one regular session of the Human Rights Council in 2018 before announcing in June that it would withdraw from the HRC.

The key outcomes from the U.S. perspective for the 37th session of the HRC are described in a March 23, 2018 fact sheet, available at <https://www.state.gov/key-outcomes-of-u-s-priorities-at-the-un-human-rights-councils-37th-session/>, and include:

combatting bias against Israel; opposing a resolution China advanced demanding governments not be subject to criticism for their human rights records; resolutions renewing the mandates of special rapporteurs on Iran and North Korea; a resolution condemning violations of the ceasefire in Syria and a resolution renewing the mandate of the Commission of Inquiry on Syria; a resolution renewing the mandate of the Commission on Human Rights in South Sudan; a resolution to renew the mandate of the Special Rapporteur and support the Fact Finding Mission on the human rights situation in Burma; and drawing attention to other human rights issues around the world. Thematic issues of import to the United States at the 37<sup>th</sup> session include: resolutions on freedom of religion or belief, good governance, the prevention of genocide, the rights of minorities and of persons with disabilities, and the impact of corruption on torture, among others.

On June 19, 2018, Secretary of State Michael R. Pompeo and U.S. Permanent Representative to the UN Nikki R. Haley delivered remarks on the U.S. decision to withdraw from the HRC. Their statements are excerpted below and available at <https://www.state.gov/remarks-on-the-un-human-rights-council/>.

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**SECRETARY POMPEO:** Good afternoon. The Trump administration is committed to protecting and promoting the God-given dignity and freedom of every human being. Every individual has rights that are inherent and inviolable. They are given by God, and not by government. Because of that, no government must take them away.

For decades, the United States has led global efforts to promote human rights, often through multilateral institutions. While we have seen improvements in certain human rights situations, for far too long we have waited while that progress comes too slowly or in some cases never comes. Too many commitments have gone unfulfilled.

President Trump wants to move the ball forward. From day one, he has called out institutions or countries who say one thing and do another. And that's precisely the problem at the Human Rights Council. As President Trump said at the UN General Assembly: "It is a massive source of embarrassment to the United Nations that some governments with egregious human rights records sit on the Human Rights Council."

We have no doubt that there was once a noble vision for this council. But today, we need to be honest—the Human Rights Council is a poor defender of human rights.

Worse than that, the Human Rights Council has become an exercise in shameless hypocrisy—with many of the world's worst human rights abuses going ignored, and some of the world's most serious offenders sitting on the council itself.

The only thing worse than a council that does almost nothing to protect human rights is a council that covers for human rights abuses and is therefore an obstacle to progress and an impediment to change. The Human Rights Council enables abuses by absolving wrongdoers through silence and falsely condemning those who have committed no offense. A mere look around the world today demonstrates that the council has failed in its stated objectives.

Its membership includes authoritarian governments with unambiguous and abhorrent human rights records, such as China, Cuba, and Venezuela.

There is no fair or competitive election process, and countries have colluded with one another to undermine the current method of selecting members.

And the council's continued and well-documented bias against Israel is unconscionable. Since its creation, the council has adopted more resolutions condemning Israel than against the rest of the world combined.

The United States has no opposition in principle to multilateral bodies working to protect human rights. We desire to work with our allies and partners on this critical objective that reflects America's commitment to freedom.

But when organizations undermine our national interests and our allies, we will not be complicit. When they seek to infringe on our national sovereignty, we will not be silent.

The United States—which leads the world in humanitarian assistance, and whose service members have sacrificed life and limb to free millions from oppression and tyranny—will not take lectures from hypocritical bodies and institutions as Americans selflessly give their blood and treasure to help the defenseless.

Ambassador Haley has spent more than a year trying to reform the Human Rights Council.

She is the right leader to drive our efforts in this regard at the United Nations. Her efforts in this regard have been tireless.

She has asserted American leadership on everything from the Assad regime's chemical weapons use, to the pressure campaign against North Korea, and the Iran-backed provocations in the Middle East.

Ambassador Haley has been fearless and a consistent voice on behalf of our ally Israel. And she has a sincere passion to protect the security, dignity, and the freedom of human beings around the world—all while putting American interests first. She has been a fierce defender of human rights around the world.

I will now turn it over to Ambassador Haley for her announcement on how the United States will move forward with respect to the UN Human Rights Council.

**AMBASSADOR HALEY:** Thank you. Good afternoon. I want to thank Secretary Pompeo for his friendship and his partnership and his leadership as we move forward on these issues.

One year ago, I traveled to the United Nations Human Rights Council in Geneva. On that occasion, I outlined the U.S. priorities for advancing human rights and I declared our intent to remain a part of the Human Rights Council if essential reforms were achieved. These reforms were needed in order to make the council a serious advocate for human rights. For too long, the Human Rights Council has been a protector of human rights abusers and a cesspool of political bias.

Regrettably, it is now clear that our call for reform was not heeded. Human rights abusers continue to serve on and be elected to the council. The world's most inhumane regimes continue to escape scrutiny, and the council continues politicizing and scapegoating of countries with positive human rights records in an attempt to distract from the abusers in their ranks.

Therefore, as we said we would do a year ago if we did not see any progress, the United States is officially withdrawing from the UN Human Rights Council. In doing so, I want to make it crystal clear that this step is not a retreat from human rights commitments; on the contrary, we take this step because our commitment does not allow us to remain a part of a hypocritical and self-serving organization that makes a mockery of human rights.

We did not make this decision lightly. When this administration began 17 months ago, we were well aware of the enormous flaws in the Human Rights Council. We could have withdrawn immediately. We did not do that.

Instead, we made a good-faith effort to resolve the problems. We met with ambassadors of over a dozen countries in Geneva. Last September, in President Trump's speech before the UN General Assembly, he called for member-states to support Human Rights Council reform. During High-Level Week last year, we led a session on Human Rights Council reform cohosted by the British and Dutch foreign ministers and more than 40 other countries.

Our efforts continued all through this year in New York, where my team met with more than 125 member-states and circulated draft texts. Almost every country we met with agrees with us in principle and behind closed doors that the Human Rights Council needs major, dramatic, systemic changes, yet no other country has had the courage to join our fight.

Meanwhile, the situation on the council has gotten worse, not better. One of our central goals was to prevent the world's worst human rights abusers from gaining Human Rights Council membership. What happened? In the past year, the Democratic Republic of Congo was elected as a member. The DRC is widely known to have one of the worst human rights records in the world. Even as it was being elected to membership in the Human Rights Council, mass graves continued to be discovered in the Congo.

Another of our goals was to stop the council from protecting the world's worst human rights abusers. What happened? The council would not even have a meeting on the human rights conditions in Venezuela. Why? Because Venezuela is a member of the Human Rights Council, as is Cuba, as is China.

Similarly, the council failed to respond in December and January when the Iranian regime killed and arrested hundreds of citizens simply for expressing their views.

When a so-called Human Rights Council cannot bring itself to address the massive abuses in Venezuela and Iran, and it welcomes the Democratic Republic of Congo as a new member, the council ceases to be worthy of its name. Such a council, in fact, damages the cause of human rights.

And then, of course, there is the matter of the chronic bias against Israel. Last year, the United States made it clear that we would not accept the continued existence of agenda item seven, which singles out Israel in a way that no other country is singled out. Earlier this year, as it has in previous years, the Human Rights Council passed five resolutions against Israel—more than the number passed against North Korea, Iran, and Syria combined. This disproportionate focus and unending hostility towards Israel is clear proof that the council is motivated by political bias, not by human rights.

For all these reasons, the United States spent the past year engaged in a sincere effort to reform the Human Rights Council. It is worth examining why our efforts didn't succeed. At its core, there are two reasons. First, there are many unfree countries that simply do not want the council to be effective. A credible human rights council poses a real threat to them, so they opposed the steps that would create it.

Look at the council membership and you see an appalling disrespect for the most basic human rights. These countries strongly resist any effort to expose their abusive practices. In fact, that's why many of them run for a seat on the Human Rights Council in the first place: to protect themselves from scrutiny. When we made it clear we would strongly pursue council reform, these countries came out of the woodwork to oppose it. Russia, China, Cuba, and Egypt all attempted to undermine our reform efforts this past year.

The second reason our reforms didn't succeed is in some ways even more frustrating. There are several countries on the Human Rights Council who do share our values. Many of them strongly urged us to remain engaged in the council. They are embarrassed by the obsessive mistreatment of Israel. They share our alarm with the hypocrisy of countries like Cuba, Venezuela, Democratic Republic of Congo, and others serving on the council.

Ultimately, however, many of these likeminded countries were unwilling to seriously challenge the status quo. We gave them opportunity after opportunity and many months of consultations, and yet they would not take a stand unless it was behind closed doors. Some even admittedly were fine with the blatant flaws of the council as long as they could pursue their own narrow agenda within the current structure.

We didn't agree with such a moral compromise when the previous UN Human Rights Commission was disbanded in 2006, and we don't agree with it now. Many of these countries argued that the United States should stay on the Human Rights Council because American participation is the last shred of credibility that the council has. But that is precisely why we must leave. If the Human Rights Council is going to attack countries that uphold human rights and shield countries that abuse human rights, then America should not provide it with any credibility. Instead, we will continue to lead on human rights outside the misnamed Human Rights Council.

Last year, during the United States presidency of the Security Council, we initiated the first ever Security Council session dedicated to the connection between human rights and peace and security. Despite protests and prohibitions, we did organize an event on Venezuela outside the Human Rights Council chambers in Geneva. And this past January, we did have a Security Council session on Iranian human rights in New York.

I have traveled ...to UN refugee and internally displaced persons camps in Ethiopia, Congo, Turkey, and Jordan, and met with the victims of atrocities in those troubled regions. We have used America's voice and vote to defend human rights at the UN every day, and we will continue to do so. Even as we end our membership in the Human Rights Council, we will keep trying to strengthen the entire framework of the UN engagement on human rights issues, and we will continue to strongly advocate for reform of the Human Rights Council. Should it become reformed, we would be happy to rejoin it.

America has a proud legacy as a champion of human rights, a proud legacy as the world's largest provider of humanitarian aid, and a proud legacy of liberating oppressed people and defeating tyranny throughout the world. While we do not seek to impose the American system on anyone else, we do support the rights of all people to have freedoms bestowed on them by their creator. That is why we are withdrawing from the UN Human Rights Council, an organization that is not worthy of its name.

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**b. *General Statement at HRC 37***

On March 23, 2018, at HRC 37, the United States delivered a general statement, which is excerpted below and available at <https://geneva.usmission.gov/2018/03/23/general-statement-on-item-3/>.

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The United States wishes to clarify its position on a few issues present in several of the Item 3 resolutions, including but not limited to the Right to Work and Good Governance. As we have noted in the past, the United States understands that the Human Rights Council's resolutions do not change the current state of conventional or customary international law or impose legal obligations on States. To adhere to time limits, a full general statement on Item 3 issues will be uploaded to the extranet and on the US Mission's website.

The Universal Declaration of Human Rights does not create legal obligations. We do not read these resolutions to imply that states must join or implement obligations under international instruments to which they are not a party. We understand abbreviated references to certain human rights to be shorthand for the accurate terms used in the applicable international treaty, and we maintain our longstanding positions on those rights. The United States understands that any reaffirmation of prior documents applies only to those states that affirmed them initially, and, in the case of international treaties or conventions, to those States who are a party. Welcoming or noting a report with appreciation should not be understood as acceptance of or support for all assertions, conclusions, or recommendations contained therein, nor should welcoming the work of a Special Rapporteur be understood as support for all of the Rapporteur's projects or publications.

We reiterate our views regarding references to the International Criminal Court enumerated in our Item 4 General Statement.

As the International Covenant on Economic, Social, and Cultural Rights provides, each State Party undertakes to take the steps set out in Article 2(1) "with a view to achieving progressively the full realization of the rights." We interpret references to the obligations of States as applicable only to the extent they have assumed such obligations, and with respect to States Parties to the Covenant, in light of its Article 2(1). The United States is not Party to this Covenant and the rights contained therein are not justiciable as such in U.S. Courts. We note that countries have a wide array of policies and actions that may be appropriate in promoting the progressive realization of economic, social, and cultural rights. Therefore, we believe that these resolutions should not try to define the content of those rights, or related rights, including those derived from other instruments.

The concerns of the United States about the existence of a "right to development" and economic, social, and cultural rights are long-standing and well known. While we recognize that development facilitates the enjoyment of human rights, the "right to development" does not have an agreed international meaning. Furthermore, work is needed to make any such "right" consistent with human rights, which the international community recognizes as universal rights held and enjoyed by individuals and which every individual may demand from his or her own government.

The United States recognizes the 2030 Agenda as a non-binding global framework for sustainable development that can help countries work toward global peace and prosperity. However, each country has its own development priorities and must work towards implementation in accordance with its own national policies.

In terms of the relationship between human rights and development, we recall that, as the Vienna Declaration and Programme of Action states, "development facilitates the enjoyment of all human rights" but that "the lack of development may not be invoked to justify the abridgement of internationally recognized human rights." We recognize that development, including aspects of the 2030 Agenda, and respect for human rights and fundamental freedoms can be mutually reinforcing, but emphasize that states must respect all of their human rights

obligations, both in the context of development and beyond.

With respect to references to climate change and the Paris Agreement, we note that the United States announced that it intends to withdraw as soon as it is eligible to do so, consistent with the terms of the Agreement, unless we can identify suitable terms for re-engagement. Therefore, language on the Paris Agreement and climate change in these resolutions is adopted without prejudice to U.S. positions.

The United States is firmly committed to providing equal access to education. As educational matters in the United States are primarily determined at the state and local levels, we understand that when resolutions call on States to strengthen various aspects of education, including with respect to curriculum, this is done in terms consistent with our respective federal, state, and local authorities.

The United States would like to emphasize its continuing concerns about the growth in funding related to the Human Rights Council. UN regular budget support to OHCHR has more than tripled since the mid-2000s. In addition, significant amounts of regular budget funding support the human rights pillar via UN conference services. It is essential that we implement fiscal discipline.

This general statement applies in particular to the following resolutions: Adequate Housing as a Component of the Right to an Adequate Standard of Living and the Right to Non-discrimination in this Context; Contribution to the Implementation of the Joint Commitment to Effectively Addressing and Countering the World Drug Problem with Regard to Human Rights; Equality and non-discrimination of persons with disabilities and the right of persons with disabilities to access to justice; Human Rights and the Environment; Mandate of the Independent Expert on the Enjoyment of Human Rights of Persons with Albinism; Mandate of the Special Rapporteur in the Field of Cultural Rights; The Need for an Integrated Approach to the Implementation of the 2030 Agenda for Sustainable Development for the Full Realization of Human Rights, Focusing on all the Means of Implementation; Prevention of Genocide; Promoting Human Rights and SDGs through Transparent, Accountable and Efficient Public Services Delivery; The Promotion and Protection of Human Rights and the Implementation of the 2030 Agenda for Sustainable Development; Question of the Realization of Economic, Social and Cultural Rights; The Right to Privacy in the Digital Age; The Right to Work; Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; Rights of the Child; and Role of Good Governance.

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**c. *Special session on Gaza***

On May 18, 2018, at the HRC 28th Special Session on Gaza, Theodore Allegra, Chargé d’Affaires for the U.S. Mission to the United Nations in Geneva, delivered a statement for the United States, which is excerpted below and available at

<https://geneva.usmission.gov/2018/05/18/u-s-statement-at-the-hrc-special-session-on-gaza-2/>.

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The United States remains concerned over the recent outbreak of violence along the Gaza fence. But today's session is blatantly taking sides and ignoring the real culprit for the recent outbreak of violence, the terrorist organization Hamas. Hamas has even admitted its involvement in the violence when a Hamas official proudly announced that 50 of the 62 killed were members of Hamas.

The United States affirms Israel's right to defend itself. We also condemn in the strongest terms actions by Hamas and other militant groups.

The recent outbreak of violence is part of a broader pattern of incitement to violence perpetrated by Hamas and its partners. In recent days, multiple news organizations have documented the Hamas incitement in Gaza. They have reported that Hamas maps and social media show the fastest routes to reach Israeli communities in case demonstrators make it through the security fence. They have reported on Hamas messages over loudspeakers that urge demonstrators to burst through the fence, falsely claiming Israeli soldiers were fleeing, when in fact, they were not. The same loudspeakers are used by Hamas to urge the crowds to "Get closer! Get closer!" to the security fence.

Hamas allegedly encouraged demonstrators to attack the Kerem Shalom crossing, the biggest entry point in Gaza for fuel, food, and medical supplies. They have sent burning kites adorned with swastikas across the fence, and taken other actions that place civilians' lives in jeopardy. This is the real story of what is happening in Gaza, and it is clear that Hamas is to blame for the outbreak of violence.

The resolution being considered today establishes a Commission of Inquiry into violations of human rights and humanitarian law. While the United States rejects the assertions that human rights violations took place, it notes that the scale of violence is quite small compared to the worst human rights situations occurring across the globe. It is hypocritical for this body to spend time and money on this Commission if there are no Commissions looking into human rights and atrocities in the DPRK, Iran, Cuba, Venezuela, and the Russian occupation of Crimea.

The United States is committed to advancing a lasting and comprehensive peace between Israel and the Palestinians. We want nothing more than peace. A peace that offers a brighter future to both Israel and the Palestinians. The continued anti-Israel bias of this Council does nothing to promote that future, and the one-sided action proposed by this Council today only further shows that the Human Rights Council is a broken body.

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**d. U.S. statement on Agenda Item 7 (Israel)**

Jason Mack delivered the U.S. explanation of vote at HRC 37 on the resolutions tabled for action under Agenda Item 7 on Israel on March 23, 2018. That statement is available at [https://geneva.usmission.gov/2018/03/23/eov-on-item-7-hrc37-resolutions-l-18-46-47-48-49/?\\_ga=2.132478478.1896043368.1555947132-1581725379.1553176442](https://geneva.usmission.gov/2018/03/23/eov-on-item-7-hrc37-resolutions-l-18-46-47-48-49/?_ga=2.132478478.1896043368.1555947132-1581725379.1553176442), and excerpted below.

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The United States strongly and unequivocally opposes the existence of the Human Rights Council's biased Agenda Item Seven. The continued existence of this agenda item calls into question the credibility of this body. We are very disappointed that all resolutions regarding Israel have been tabled, yet again, for action at the Council under Item 7, rather than moving these resolutions to a general agenda item, such as Item 4, to ensure that Israel is treated like every other UN member state at the Council.

We are dismayed by the many repetitive and one-sided resolutions that run year after year. None of the world's worst human rights violators, some of whom are the subject of resolutions at this session, have their own stand-alone agenda item at this Council. Only Israel receives such treatment. All parties to the Israeli-Palestinian conflict have direct responsibilities for ending it, and we are disappointed that this Council continually singles out Israel for criticism without fully acknowledging the violent attacks directed against its people, nor the obligations and difficult steps required of both sides.

An example of this Council's complacency is the repeated introduction of a resolution focusing on the Golan Heights. To consider such a resolution aimed at Israel while the Syrian regime continues to slaughter its own citizens by the tens of thousands exemplifies the absurdity of this agenda item.

For these reasons, we call for a vote on each of the resolutions under agenda Item 7, and we strongly urge our fellow Members to join us in voting "NO" on each of them.

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### **3. OSCE Report on Serious Threats to the Fulfillment of Human Dimension Commitments in the Republic of Chechnya in the Russian Federation**

On December 20, 2018, the State Department issued a press statement welcoming the expert fact-finding report on human rights violations and abuses in the Republic of Chechnya in the Russian Federation that was presented at the Organization for Security and Cooperation in Europe ("OSCE") through the Moscow Mechanism. The press statement is excerpted below and available at <https://www.state.gov/expert-report-from-the-moscow-mechanism-for-human-rights-abuses-in-chechnya/>.

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Today the United States welcomes the expert, fact-finding report on human rights violations and abuses in the Russian Federation's Republic of Chechnya and impunity for them, which we believe to be a particularly serious threat to Russia's fulfillment of its Organization for Security and Cooperation in Europe (OSCE) human dimension commitments.

This expert report concluded that Chechen authorities committed torture and other appalling human rights violations and abuses, including extrajudicial killings of LGBTI persons and others, and describes a worsening "climate of intimidation" against journalists and civil society activists. The report observes that the Russian government "appears to support the perpetrators rather than the victims" and has "not lived up to its responsibilities" to address the "grave situation" in Chechnya.

The report, presented today at the OSCE, is the result of the invocation by the United States and 15 other countries of a rarely used diplomatic tool known as the Moscow Mechanism.

We call on the Russian Federation to protect the human rights of all within its borders, consistent with international law, OSCE commitments, and its own constitution. We support the report's recommendations that Russia conduct a new and truly independent inquiry into the violations and abuses, that human rights defenders and the media be allowed to operate in Chechnya without reprisal, and that imprisoned human rights defender Oyub Titiyev be immediately released.

The United States will continue to speak out in support of human rights for individuals everywhere, including in Chechnya, and to support international efforts to promote accountability for those responsible for human rights violations and abuses.

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## **B. DISCRIMINATION**

### **1. Race**

On December 22, 2018, the UN General Assembly adopted Resolution 73/262, "A global call for concrete action for the total elimination of racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action." U.N. Doc. No. A/RES/73/262. The United States voted against the resolution and provided the following explanation of vote.

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The United States is firmly committed to combatting racism and racial discrimination. For the United States, this commitment is rooted in the saddest chapters of our history and reflected in the most cherished values of our nation. Despite our progress, fighting racism remains an ongoing challenge. We will continue to work with civil society, international mechanisms, and all nations of goodwill to combat racism and racial discrimination.

We will also continue to implement the International Convention on the Elimination of All Forms of Racial Discrimination, which we believe provides comprehensive protections in this area and constitutes the most relevant international framework to address all forms of racial discrimination. We also will continue to raise the profile of and participate in activities in support of the International Decade for People of African Descent.

In addition, we remain deeply concerned about speech that advocates national, racial, or religious hatred, particularly when it constitutes incitement to violence, discrimination, or hostility.

From our own experience and history, the United States remains convinced that the best antidote to offensive speech is not bans and punishments but a combination of three key elements: robust legal protections against discrimination and hate crimes, proactive government

outreach to racial and religious communities, and the vigorous protection of freedom of expression, both on- and off-line.

We regret that we cannot support this resolution on such an important topic, because this text is not genuinely focused on combatting racism, racial discrimination, xenophobia and related intolerance.

Among our concerns about the resolution are its endorsements of the Durban Declaration and Program of Action (DDPA), as well as the outcome of the Durban review conference, and its endorsement of overbroad restrictions on freedom of speech and expression. We reject any efforts to advance the “full implementation” of the DDPA. We believe this resolution serves as a vehicle to prolong the divisions caused by the Durban conference and its follow-up rather than providing a comprehensive and inclusive way forward for the international community to combat the scourge of racism and racial discrimination.

In addition, the United States cannot accept the resolution’s legally incorrect implication that any and all reservations to article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination are per se contrary to the object and purpose of the treaty; we note that this resolution has no effect as a matter of international law. We also categorically reject the resolution’s call for “former colonial Powers” to provide reparations “consistent with” the DDPA.

Finally, we underscore our concerns about the additional costs this resolution will impose on the UN’s regular budget through the request for reactivation of the Independent Eminent Experts’ activities. In view of the significant constraints on the UN’s regular budget, and the limited ability of member states to provide increasing amounts of resources, we stress the need for this body to consider carefully the resource implications of such requests before making them.

For these reasons, we must vote against this resolution, and we urge other delegations to do the same.

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## **2. Gender**

### ***a. 2018 UN Commission on the Status of Women***

On March 23, 2018, U.S. Deputy Representative to ECOSOC Stefanie Amadeo delivered the U.S. statement on the Agreed Conclusions of the Commission on the Status of Women. Her remarks are excerpted below and available at

<https://usun.usmission.gov/u-s-statement-on-the-agreed-conclusions-of-the-commission-on-the-status-of-women/>.

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The United States thanks our colleagues for arriving at a strong set of Agreed Conclusions on empowering rural women. Through hard work and flexibility, we have arrived at a document that contains recommendations that can lead to tangible benefits. We offer our thoughts on various aspects of the text.

We take this opportunity to make important points of clarification regarding the reaffirmation of the Addis Ababa Action Agenda. Specifically, we note that much of the trade-related language in the Addis outcome document has been overtaken by events since July 2015 and is immaterial, and our reaffirmation of the outcome document has no standing for ongoing work and negotiations involving trade. Indeed, some of the intervening events happened just months after the release of the outcome document.

We note that within the federal structure of the United States, education is primarily a state and local responsibility. It is our understanding that these Agreed Conclusions do not expand any rights not previously agreed to. The United States will address the goals of this document on education as appropriate and consistent with U.S. law and the federal government's authority.

We also underscore our disagreement with other inaccurate language in this text. These Agreed Conclusions refer to a "world financial and economic crisis" even though we are not currently in a world financial and economic crisis. Using this term detracts attention from important and relevant challenges facing economic stability. Unfortunately, the document mentions none of these significant factors.

The United States notes that the recent increase in food insecure people globally is driven largely by an increase in conflict. Whereas poverty may cause local and regional food insecurity, it is not reflective of a global food insecurity crisis.

On illicit financial flows, we would like to point out that this term has no agreed upon international meaning. Our preference is to focus on the underlying illegal activities that constitute illicit financial flows, such as bribery, tax evasion, money laundering, and other corrupt practices. We support taking concrete actions to combat these illegal activities, and have actively participated in many multilateral processes addressing these issues, including the UN Convention Against Corruption. Discussions of these topics are best left to technical experts with the appropriate expertise and mandate to address these issues. We believe it is not appropriate to consider illicit financial flows in the CSW.

The United States would like to underscore the critical importance of the ILO's 1998 Declaration on Fundamental Principles and Rights at Work to women's economic empowerment in the changing world of work. The Declaration represents the solemn commitment of all ILO Member States to respect, promote, and realize workplace principles concerning the fundamental rights of freedom of association and the effective recognition of the right to collective bargaining; elimination of all forms of forced or compulsory labor; effective abolition of child labor; and elimination of discrimination in respect of employment and occupation.

This resolution inappropriately discusses trade-related issues, which fall outside the subject matter and expertise of this Commission. The United States would like to make clear its understanding that the language in this text related to facilitating, fostering, and improving access to markets does not imply a commitment or intention to provide new market access. As we have said on many occasions, market access is a matter for negotiation in trade forums such as the World Trade Organization. The UN does not have competence in such matters. We wish

to note that traders in many developing countries face crippling barriers in neighboring developing countries and from their own customs regimes. We are hopeful that WTO members' implementation of the Trade Facilitation Agreement will help make progress in facilitating such access to markets.

We reiterate that in all efforts to promote the empowerment of women, states should respect their human rights obligations and commitments, including with regard to freedom of expression, as well as the independence of the media.

In our view, all sources of finance should be used effectively to accelerate the achievement of gender equality and the empowerment of rural women and girls, so we take exception to singling out official development assistance.

With respect to references to the Paris Agreement, we note that the United States announced that it intends to withdraw as soon as it is eligible to do so, consistent with the terms of the Agreement, unless the President can identify suitable terms for re-engagement. Therefore, the Paris Agreement and climate change language in these resolutions is without prejudice to U.S. positions.

We note that references to "policy space" do not affect potential constraints under international law or agreements that apply to any such "policy space."

The United States understands that these Agreed Conclusions do not change the current state of conventional or customary international law, and we do not read the document to imply that states must join or implement obligations under international instruments to which they are not a party. For example, the United States is not a party to the International Covenant on Economic, Social and Cultural Rights. Accordingly, we interpret this document's references to rights under that Convention to be limited to States Parties to that Covenant, in light of its Article 2(1). Moreover, we consider the resolution's phrase "the right to food" to be synonymous with the right to food as a component of the right to an adequate standard of living, as enshrined in Article 25 of the Universal Declaration of Human Rights.

Our views about the "right to development" are long-standing and well known. The term lacks an internationally accepted definition. Further work is needed to make it consistent with human rights, which the international community recognizes as universal rights held and enjoyed by individuals, and which every individual may demand from his or her government.

Regarding the reaffirmation of the 2030 Agenda, the United States recognizes the Agenda as a global framework for sustainable development that can help countries work toward global peace and prosperity. We applaud the call for shared responsibility in the Agenda and emphasize that all countries have a role to play in achieving its vision. We also strongly support national responsibility stressed in the Agenda. However, each country has its own development priorities, and we emphasize that countries must work towards implementation in accordance with their own national policies and priorities.

We also highlight our mutual recognition, in paragraph 58 of the 2030 Agenda, that implementation of this Agenda must respect and be without prejudice to the independent mandates of other processes and institutions, including negotiations, and does not prejudice or serve as precedent for decisions and actions underway in other forums. For example, this Agenda does not represent a commitment to provide new market access for goods or services. This Agenda also does not interpret or alter any WTO agreement or decision, including the Agreement on Trade-Related Aspects of Intellectual Property.

The United States fully supports the principle of informed voluntary choice regarding maternal and child health and family planning. We have stated clearly and on many occasions,

consistent with the ICPD Program of Action, that we do not recognize abortion as a method of family planning, nor do we support abortion in our reproductive health assistance. The term “sexual and reproductive health” is open to many interpretations. The United States does not understand the term sexual and reproductive health to include the promotion of abortion and educational strategies that may increase sexual risk for youth. We strongly support health care services, which empower adolescents to avoid sexual risks, prevent early pregnancy and sexually transmitted disease, thereby improving their opportunity to thrive into adulthood.

The United States views sexual harassment as a form of employment or academic discrimination that may amount to gender-based violence in the form of sexual assault, although most sexual harassment does not rise to the level of sexual assault. U.S. law recognizes that sexual harassment is a form of gender discrimination. We recognize that sexual harassment can occur not only in the workplace, but in work-related situations and in digital and online spaces, and that women, girls, men, and boys can be targeted.

The United States cannot support language in the resolution that seeks to promote technology transfer that is not clearly indicated to be on mutually agreed terms and voluntary. For the United States, any such language will have no standing in future negotiations. The United States continues to oppose language that we believe undermines intellectual property rights.

Regarding paragraphs 46(u) and 46(aaa), the United States cannot support the language in the referenced paragraphs using the term “protecting” in connection with traditional knowledge because of uncertainty over the scope of such terms and the extent that such terms may imply the existence of legal rights not recognized, or not recognized to the same extent, in U.S. law. For the United States, such language can have no standing in future negotiations.

With respect to “temporary special measures,” the U.S. position is that each country must determine for itself whether they are appropriate. The best way to improve the situation of women and girls is often through legal and policy reforms that end discrimination against women and promote equality of opportunity.

We reiterate that protection and reintegration assistance for victims of trafficking in persons is an essential component of any comprehensive anti-trafficking strategy and, therefore, regret the only paragraph on trafficking in persons omits such language. Adopting a trauma-informed and victim-centered approach not only restores the dignity and human rights of trafficking victims, it also improves governments’ ability to identify victims and effectively prosecute trafficking cases.

We recognize the importance of unpaid care work and have released periodic time-use surveys and estimates of the monetary value of unpaid work, but do not factor the value of unpaid work into our core national accounts, including GDP.

The United States understands the intention of inclusion of “equal pay for equal work and work of equal value” to promote pay equity between men and women, and accepts the formulation on that basis. The United States implements it by observing the principle of “equal pay for equal work.”

The United States believes that each Member State has the sovereign right to determine how it conducts trade with other countries, and that this includes restricting trade in certain circumstances. Economic sanctions, whether unilateral or multilateral, can be a successful means of achieving foreign policy, national security, and other objectives. In cases where the United States has applied sanctions, they have been used with specific objectives in mind, including as a

means to promote a return to rule of law or democratic systems, to respect human rights and fundamental freedoms, or to prevent threats to international security. We are within our rights to utilize our trade and commercial policy as tools to achieve noble objectives, and U.S. sanctions are consistent with the UN Charter and international law. We disagree that U.S. sanctions adversely affect civilians or lead to humanitarian crises. We again register our concern that language in this document in effect purports to limit the international community's ability to respond effectively and by non-violent means against threats to democracy, human rights, or world security. In sum, we believe that targeted economic sanctions can be an appropriate, effective, and legitimate alternative to the use of force.

We would like to reiterate our understanding of the references to "universal health coverage." We emphasize that States do not have obligations under international law to achieve universal access to healthcare. We encourage governments and public institutions to strive to improve access to quality universal healthcare and to do so in accordance with their national contexts and policies. The United States will continue to work to improve access to quality healthcare while also recognizing the necessary role of partnerships with the private sector and other non-governmental stakeholders.

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**b. Violence Against Women**

See discussion *infra* of the U.S. statement at an IACHR hearing on violence against indigenous women.

**3. Age**

On November 15, 2018, U.S. ECOSOC Advisor Sofija Korac delivered the explanation of position on a Third Committee resolution on the Second World Assembly on Ageing. The statement is excerpted below and available at <https://usun.usmission.gov/explanation-of-position-on-a-third-committee-resolution-on-the-second-world-assembly-on-ageing/>.

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The United States thanks the G-77 for its annual resolution on the Second World Assembly on Ageing. We are pleased to join consensus on this resolution which focuses on the well-being of older persons.

The resolution calls upon member states to act to protect and assist older persons in emergency situations, in accordance with the Madrid Plan of Action and the Sendai Framework. We note that these two documents are voluntary, and that there are other documents which also figure in protecting and assisting persons, including older persons, in humanitarian crisis situations. The Guidelines to Protect Migrants Experiencing Conflict or Natural Disaster and the Guiding Principles on Internal Displacement are two prominent examples.

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## C. CHILDREN

### 1. Rights of the Child

On March 23, 2018, the United States provided an explanation of its position on the resolution on the rights of the child at HRC 37. U.N. Doc. A/HRC/37/L.33. The U.S. explanation of position is excerpted below and available at <https://geneva.usmission.gov/2018/03/23/eop-on-rights-of-the-child-hrc37-resolution-l-33/>.

\* \* \* \*

The United States joins consensus on this resolution to underscore the priority we place on our domestic and international efforts to protect and promote the well-being of children.

In joining consensus today, we must dissociate from two paragraphs, and wish to clarify our views on several provisions. Our general concerns, including language on international legal obligations, climate, and federalism will be addressed in the Item 3 General Explanation of Position. We will focus here on certain key issues.

With respect to preambular paragraph 11, the United States reiterates the understandings expressed in the United States' explanation of position on the New York Declaration, which is available as UN Document Number A/71/415. In certain instances, U.S. law requires, for safety and/or national security reasons, that migrants who enter unlawfully remain in U.S. government custody pending adjudication of their migratory status. The United States maintains its right to enforce its immigration laws, which are consistent with its sovereign right to control entry into its territory by foreign nationals, subject to international obligations. With this understanding, the United States must disassociate from preambular paragraph 11 relating to the New York Declaration. The United States remains committed to the Global Compact on Refugees.

Similarly, the United States fully supports the principle of voluntary choice regarding maternal and child health and family planning. We have stated clearly and on many occasions, consistent with the ICPD Program of Action, that we do not recognize abortion as a method of family planning, nor do we support abortion in our reproductive health assistance. The term "sexual and reproductive health" is open to many interpretations. The United States does not understand the term sexual and reproductive health to include the promotion of abortion and educational strategies that may increase sexual risk for youth. We strongly support health care services that empower adolescents to avoid sexual risks and prevent early pregnancy and sexually transmitted disease, thereby improving their opportunity to thrive into adulthood.

The United States disassociates from the language regarding the policies, systems, and procedures applicable to migrant children in operative paragraph 7. The U.S. government draws from a wide range of available resources to safely process migrant children, in accordance with applicable laws and is committed to ensuring that migrant children, including those in the custody of the U.S. government, are treated in a safe, dignified, and secure manner and with

special concern for their particular vulnerabilities. The United States believes that its current practices with respect to children are consistent with our international commitments.

Moreover, as we will underscore in our Item 3 General Statement, we do not read the resolutions adopted by the Human Rights Council, including this resolution, to imply that States must join human rights or other international instruments to which they are not a party, or that they must implement those instruments or any obligations under them. Among other things, this understanding applies to references to the principle of the best interests of the child, which is derived from the Convention on the Rights of the Child.

With respect to operative paragraph 10's call for rehabilitation and reintegration efforts for children associated with armed forces, we read this language as applying to children associated with armed forces in violation of applicable international law. We understand operative paragraph 11's reference to "illegal adoptions" to mean adoptions referred to in Article 3(1)(a)(ii) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography.

With respect to operative paragraph 21's call to "respect, protect and fulfill the right" to education and the other references to the right to education in this resolution, we recall that Article 28 of the Convention on the Rights of the Child obliges parties to that Convention to achieve this right progressively, as accurately reflected in operational paragraph 22 of this resolution.

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## 2. Children in Armed Conflict

Consistent with the Child Soldiers Prevention Act of 2008 ("CSPA"), Title IV of Public Law 110-457, as amended, the State Department's 2018 Trafficking in Persons ("TIP") report lists the foreign governments that have violated the standards under the CSPA, *i.e.* governments of countries that have been "clearly identified" during the previous year as "having governmental armed forces or government-supported armed groups, including paramilitaries, militias, or civil defense forces, that recruit and use child soldiers," as defined in the CSPA. Those so identified in the 2018 report are the governments of Burma, the Democratic Republic of the Congo, Iran, Iraq, Mali, Niger, Nigeria, Somalia, South Sudan, Sudan, Syria, and Yemen.

The full text of the TIP report is available at <https://www.state.gov/trafficking-in-persons-report-2018/>. For additional discussion of the TIP report and related issues, see Chapter 3.B.3.

Absent further action by the President, the foreign governments listed in accordance with the CSPA are subject to restrictions applicable to certain security assistance and licenses for direct commercial sales of military equipment for the subsequent fiscal year. In a memorandum for the Secretary of State dated September 28, 2018, 83 Fed. Reg. 53,363 (Oct. 23, 2018), the President determined:

It is in the national interest of the United States to waive the application of the prohibition in section 404(a) of the CSPA with respect to Iraq, Mali, Niger, and Nigeria; to waive the application of the prohibition in section 404(a) of the CSPA

with respect to Somalia to allow for the provision of International Military Education and Training assistance, Peacekeeping Operations (PKO) assistance, and support provided pursuant to 10 U.S.C. 333, to the extent the CSPA would restrict such assistance or support; to waive the application of the prohibition in section 404(a) of the CSPA with respect to South Sudan to allow for PKO assistance, to the extent the CSPA would restrict such assistance or support; and to waive the application of the prohibition in section 404(a) of the CSPA with respect to Yemen to allow for PKO assistance, to the extent the CSPA would restrict such assistance or support. Accordingly, I hereby waive such applications of section 404(a) of the CSPA.

#### **D. SELF-DETERMINATION**

See Chapter 7 for discussion of the U.S. submissions in the case before the International Court of Justice, *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965* (Request for Advisory Opinion), which address self-determination. See also Chapter 7 for discussion of the 2018 U.S. submission to the IACHR in *Igartua and Rosselló*, cases regarding the rights of residents of Puerto Rico.

On November 19, 2018, Deputy U.S. Representative to ECOSOC Courtney Nemroff delivered the U.S. explanation of position on a Third Committee resolution on the rights of peoples to self-determination. The statement follows and available at <https://usun.usmission.gov/explanation-of-position-on-a-third-committee-resolution-on-the-rights-of-peoples-to-self-determination/>.

The United States recognizes the importance of the right of self-determination of peoples and therefore joins consensus on this resolution. We note, however, as frequently stated by the United States and other delegations, that this resolution contains many misstatements of international law and is inconsistent with current state practice.

#### **E. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS**

##### **1. General**

On March 22, 2018, at the 37<sup>th</sup> session of the HRC, Jason Mack delivered the U.S. explanation of position on the resolution on economic, social and cultural rights. U.N. Doc. A/HRC/37/L.24. That statement is excerpted below and available at <https://geneva.usmission.gov/2018/03/22/eop-on-economic-social-cultural-rights-l-24/>.

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The United States is pleased to join consensus on this resolution concerning the realization of economic, social, and cultural rights, and welcome its emphasis on the links between sustainability and resilience and the enjoyment of human rights. We thank the main sponsor for the cooperative and collaborative approach to the development of this text. As a matter of public policy, the United States continues to take steps to provide for the economic, social, and cultural needs of its people.

As the International Covenant on Economic, Social, and Cultural Rights provides, each State Party undertakes the steps set out in Article 2(1) “with a view to achieving progressively the full realization of the rights.” We interpret this resolution’s references to the obligations of States as applicable only to the extent they have assumed such obligations, and with respect to States Parties to the Covenant, in light of Article 2(1). The United States is not party to that Covenant, and the rights contained therein are not justiciable as such in U.S. courts.

With respect to preambulatory paragraph 5, we are pleased to reaffirm the human rights of all, including refugees and migrants, regardless of status. However, we must dissociate from the language in this paragraph reaffirming the New York Declaration and reiterate the understandings expressed in the United States’ explanation of position on that declaration, which is available as UN Document Number A/71/415.

With respect to operative paragraph 10, we understand the reference to international obligations and commitments in that paragraph to mean that if a state carries out the stated actions related to hazards and disasters, it should do so in a manner consistent with its applicable international obligations or commitments; it should not be understood to suggest the existence of particular obligations to implement the actions described.

Other concerns regarding this resolution, such as those regarding the Sustainable Development Goals and the right to development, will be addressed in the United States’ general statement delivered at the end of Item 3.

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## 2. Food

The explanation of vote by the United States on the right to food resolution delivered on March 23, 2018 at HRC 37 is excerpted below and available at <https://geneva.usmission.gov/2018/03/23/eov-on-the-right-to-food-l-21/>.

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This Council is meeting at a time when the international community is confronting what could be the modern era’s most serious food security emergency. Over 20 million people in South Sudan, Somalia, the Lake Chad Basin, and Yemen are facing famine and starvation. The United States, working with concerned partners and relevant international institutions, is fully engaged on addressing these conflict-related crises.

This Council, and all members of the international community, should be outraged that so many people are facing food insecurity because of manmade crises caused by instability and armed conflict. The resolution before us today rightfully acknowledges the calamity facing

millions of people and importantly calls on States to support the United Nations' emergency humanitarian appeal. However, the resolution also contains many unbalanced, inaccurate, and unwise provisions that the United States cannot support. In other words, this resolution does not articulate meaningful solutions for preventing hunger and malnutrition or avoiding its devastating consequences.

As such and for the following additional reasons, we call a vote and will vote "no" on this resolution.

First, despite efforts by the sponsor to streamline this text, which are duly appreciated, this resolution continues to inappropriately discuss trade-related issues, which fall outside the subject-matter and the expertise of this Council. As we have stated on many occasions, it is not acceptable to the United States for the UN to speak to ongoing or future work of the World Trade Organization (WTO), to reinterpret WTO agreements and decisions, to seek to shape WTO negotiations and its agenda. The WTO is an independent organization with a different membership and mandate. The language in operative paragraph 24 in no way supersedes or otherwise undermines the WTO Nairobi Ministerial Declaration, which all WTO Members adopted by consensus. At the WTO Ministerial Conference in Nairobi in 2015, WTO Members could not agree to reaffirm the Doha Development Agenda (DDA). As a result, WTO Members are no longer negotiating under the DDA framework. Paragraph 24 also inaccurately links trade negotiations at the WTO to the right to food. Similarly, the United States rejects operative paragraph 25, which inaccurately suggests there is a tension between international trade agreements and a "right to food."

Second, the United States does not support the resolution's references to technology transfer that are not clearly indicated to be on mutually agreed terms and voluntary.

Finally, while we do not treat the "right to food" as an enforceable obligation, the United States supports the right of everyone to an adequate standard of living, including food, as recognized in the Universal Declaration of Human Rights. Domestically, the United States pursues policies that promote access to food, and it is our objective to achieve a world where everyone has adequate access to food. However this resolution mischaracterizes certain human rights and aspects of international human rights law, including by referring to rights that are not recognized and suggesting that there is a hierarchy of rights. Furthermore, we reiterate that States are responsible for implementing their human rights obligations regardless of external factors, including, for example, the availability of technical and other assistance. We also reject the suggestion in this resolution that States have particular extraterritorial obligations arising from any concept of a "right to food."

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The U.S. explanation of vote on a draft UN General Assembly Third Committee resolution on the right to food was delivered by Mordica Simpson, U.S. Advisor to ECOSOC, on November 15, 2018. That statement follows and is available at <https://usun.usmission.gov/explanation-of-vote-on-a-third-committee-resolution-on-a-right-to-food/>.

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This Committee is meeting at a time when the international community is confronting one of the most serious food-security emergencies in modern history. Hunger is on the rise for the third year in a row, after a decade of progress. Over 35 million people in South Sudan, Somalia, the Lake Chad Basin, and Yemen are facing severe food insecurity, and in the case of Yemen, potential famine. The United States remains fully engaged and committed on addressing these conflict related crises.

This resolution rightfully acknowledges the hardships millions of people are facing, and importantly calls on states to support the United Nations' emergency humanitarian appeal. However, the resolution also contains many unbalanced, inaccurate, and unwise provisions that the United States cannot support. This resolution does not articulate meaningful solutions for preventing hunger and malnutrition, or avoiding its devastating consequences.

Accordingly, we will call a vote and vote "no" on this resolution for the following reasons.

First, this resolution inappropriately discusses trade-related issues, which fall outside the subject matter and the expertise of this Committee. As stated on many occasions, the United States believes it is unacceptable for the UN to speak to the ongoing or future work of the World Trade Organization, to reinterpret WTO agreements and decisions, or to seek to shape WTO negotiations and its agenda. The WTO is an independent organization with a different membership, mandate, and rules of procedure. The language in this resolution in no way supersedes or otherwise undermines the WTO Nairobi Ministerial Declaration, which all WTO Members adopted by consensus and accurately reflects the current status of the issues in those negotiations. At the WTO Ministerial Conference in Nairobi in 2015, WTO Members could not agree to reaffirm the Doha Development Agenda, DDA. As a result, WTO Members are no longer negotiating under the DDA framework. The resolution also inaccurately links trade negotiations at the WTO to the concept of a "right to food."

The United States rejects the resolution's suggestion that there is a tension between international trade agreements and the right to an adequate standard of living, including food. We cannot accept the UN opining on what WTO Members should do or consider in implementing a WTO agreement; the UN has no voice on these matters.

The United States is concerned that concept of "food sovereignty" could be used to justify protectionism or other restrictive import or export policies with negative consequences for food security, sustainability, and income growth. Improved access to local, regional, and global markets helps ensure food is available to the people who need it most and smooths price volatility. Food security depends on appropriate domestic action that is consistent with international commitments.

The climate change language in this resolution is without prejudice to U.S. positions. We affirm our support for promoting economic growth and improving energy security while protecting the environment.

The United States also does not support the resolution's numerous calls for technology transfer that is not voluntary and on mutually agreed terms. Strong protection and enforcement of intellectual property rights, including through the international rules-based intellectual property system, provide critical incentives needed to generate the innovation that is crucial to addressing the development challenges of today and tomorrow.

Furthermore, we reiterate that individual states hold the primary responsibility for implementing their human rights obligations. Regardless of external conditions, such as availability of technical assistance, all states must uphold this primary responsibility. We also do not accept any reading of this resolution or related documents that would suggest that states have particular extraterritorial obligations arising from any concept of a “right to food.”

The United States supports the right of everyone to an adequate standard of living, including food, as recognized in the Universal Declaration of Human Rights.

Domestically, the United States pursues policies that aim to provide adequate food access for all persons, but we do not treat the right to food as an enforceable obligation. The United States does not recognize any change in the current state of conventional or customary international law regarding rights related to food.

Moreover, we note that as the International Covenant on Economic, Social, and Cultural Rights provides, each state party undertakes to take the steps set out in Article 2(1) “with a view to achieving progressively the full realization of the rights.”

We interpret this resolution’s reaffirmation of previous documents, resolutions, and related human rights mechanisms as applicable to the extent countries affirmed them in the first place.

As for other references to previous documents, resolutions, and related human rights mechanisms, we reiterate any views we expressed upon their adoption.

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## F. HUMAN RIGHTS AND THE ENVIRONMENT

On March 22, 2018, at HRC 37, Jason Mack delivered the U.S. explanation of position on the resolution on human rights and the environment. U.N. Doc. No. A/HRC/37/L.19.

That statement is excerpted below and available at

<https://geneva.usmission.gov/2018/03/22/eop-on-human-rights-and-the-environment-l-19/>.

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The United States concurs with other members of the Council that protection of the environment is vitally important and contributes to sustainable development, human well-being, and the enjoyment of human rights. We also recognize that respect for human rights, including the rights of freedom of expression, freedom of association, and peaceful assembly, contributes to good environmental policymaking, and in this regard, welcome this resolution’s recognition of the important role played by human rights defenders. In this spirit, we join consensus on this resolution and thank its sponsors for their constructive engagement on the text.

At the same time, we remain concerned about the general approach of placing environmental concerns in a human rights context and about addressing them in fora that do not have the necessary expertise. For related reasons, while we recognize the efforts of the Special Rapporteur and UN bodies in this area, we do not support all of their projects or publications, including several aspects of the Special Rapporteur’s Framework Principles on human rights and

the environment, and we take this opportunity to affirm that the Framework Principles themselves do not reflect or enshrine any new human rights obligations or commitments.

We note the longstanding and well known concerns of the United States regarding the “right to development,” and the progressive realization of economic, social, and cultural rights, as well as our concerns about the 2030 Agenda for Sustainable Development, which we will raise in more detail in our Explanation of Position at the end of Agenda Item 3.

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The March 23, 2018 U.S. general statement on item 3, mentioned *supra*, is available at <https://geneva.usmission.gov/2018/03/23/general-statement-on-item-3/> and follows.

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The United States wishes to clarify its position on a few issues present in several of the Item 3 resolutions, including but not limited to the Right to Work and Good Governance. As we have noted in the past, the United States understands that the Human Rights Council’s resolutions do not change the current state of conventional or customary international law or impose legal obligations on States. To adhere to time limits, a full general statement on Item 3 issues will be uploaded to the extranet and on the US Mission’s website.

The Universal Declaration of Human Rights does not create legal obligations. We do not read these resolutions to imply that states must join or implement obligations under international instruments to which they are not a party. We understand abbreviated references to certain human rights to be shorthand for the accurate terms used in the applicable international treaty, and we maintain our longstanding positions on those rights. The United States understands that any reaffirmation of prior documents applies only to those states that affirmed them initially, and, in the case of international treaties or conventions, to those States who are party. Welcoming or noting a report with appreciation should not be understood as acceptance of or support for all assertions, conclusions, or recommendations contained therein, nor should welcoming the work of a Special Rapporteur be understood as support for all of the Rapporteur’s projects or publications.

We reiterate our views regarding references to the International Criminal Court enumerated in our Item 4 General Statement.

As the International Covenant on Economic, Social, and Cultural Rights provides, each State Party undertakes to take the steps set out in Article 2(1) “with a view to achieving progressively the full realization of the rights.” We interpret references to the obligations of States as applicable only to the extent they have assumed such obligations, and with respect to States Parties to the Covenant, in light of its Article 2(1). The United States is not Party to this Covenant and the rights contained therein are not justiciable as such in U.S. Courts. We note that countries have a wide array of policies and actions that may be appropriate in promoting the progressive realization of economic, social, and cultural rights. Therefore, we believe that these

resolutions should not try to define the content of those rights, or related rights, including those derived from other instruments.

The concerns of the United States about the existence of a “right to development” and economic, social, and cultural rights are long-standing and well known. While we recognize that development facilitates the enjoyment of human rights, the “right to development” does not have an agreed international meaning. Furthermore, work is needed to make any such “right” consistent with human rights, which the international community recognizes as universal rights held and enjoyed by individuals and which every individual may demand from his or her own government.

The United States recognizes the 2030 Agenda as a non-binding global framework for sustainable development that can help countries work toward global peace and prosperity. However, each country has its own development priorities and must work towards implementation in accordance with its own national policies.

In terms of the relationship between human rights and development, we recall that, as the Vienna Declaration and Programme of Action states, “development facilitates the enjoyment of all human rights” but that “the lack of development may not be invoked to justify the abridgement of internationally recognized human rights.” We recognize that development, including aspects of the 2030 Agenda, and respect for human rights and fundamental freedoms can be mutually reinforcing, but emphasize that states must respect all of their human rights obligations, both in the context of development and beyond.

With respect to references to climate change and the Paris Agreement, we note that the United States announced that it intends to withdraw as soon as it is eligible to do so, consistent with the terms of the Agreement, unless we can identify suitable terms for re-engagement. Therefore, language on the Paris Agreement and climate change in these resolutions is adopted without prejudice to U.S. positions.

The United States is firmly committed to providing equal access to education. As educational matters in the United States are primarily determined at the state and local levels, we understand that when resolutions call on States to strengthen various aspects of education, including with respect to curriculum, this is done in terms consistent with our respective federal, state, and local authorities.

The United States would like to emphasize its continuing concerns about the growth in funding related to the Human Rights Council. UN regular budget support to OHCHR has more than tripled since the mid-2000s. In addition, significant amounts of regular budget funding support the human rights pillar via UN conference services. It is essential that we implement fiscal discipline.

This general statement applies in particular to the following resolutions: Adequate Housing as a Component of the Right to an Adequate Standard of Living and the Right to Non-discrimination in this Context; Contribution to the Implementation of the Joint Commitment to Effectively Addressing and Countering the World Drug Problem with Regard to Human Rights; Equality and non-discrimination of persons with disabilities and the right of persons with disabilities to access to justice; Human Rights and the Environment; Mandate of the Independent Expert on the Enjoyment of Human Rights of Persons with Albinism; Mandate of the Special Rapporteur in the Field of Cultural Rights; The Need for an Integrated Approach to the Implementation of the 2030 Agenda for Sustainable Development for the Full Realization of Human Rights, Focusing on all the Means of Implementation; Prevention of Genocide;

Promoting Human Rights and SDGs through Transparent, Accountable and Efficient Public Services Delivery; The Promotion and Protection of Human Rights and the Implementation of the 2030 Agenda for Sustainable Development; Question of the Realization of Economic, Social and Cultural Rights; The Right to Privacy in the Digital Age; The Right to Work; Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; Rights of the Child; and Role of Good Governance.

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On March 23, 2018, at HRC 37, the United States delivered a statement on the resolution on “the need for an integrated approach to the implementation of the 2030 Agenda for Sustainable Development for the Full Realization of Human Rights.” U.N. Doc. No. A/HRC/37/L.42. That statement follows and is available at <https://geneva.usmission.gov/2018/03/23/the-need-for-an-integrated-approach-to-the-implementation-of-the-2030-agenda-for-sustainable-development-for-the-full-realization-of-human-rights-focusing-holistically-on-means-of-implementation-hr/>.

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We would like to thank South Africa and the core-group for their cooperative spirit, which enabled us to join consensus on this resolution to underscore the priority we place on the realization of human rights and fundamental freedoms in the context of sustainable development.

However, we regret that this resolution does not address this vital issue in a more productive way. Our concerns about the right to development, cited in PP4, are well known, and will be addressed in the Item 3 General Statement.

The United States recognizes that the 2030 Agenda can help countries work toward global peace and prosperity, and that each country has its own development priorities and must work towards implementation in accordance with its own national policies and priorities. However, this single element should not be elevated above others, particularly in a Human Rights Council resolution. Similarly, it is incongruous that the resolution stresses that the Sustainable Development Goals are “universal, indivisible, and interlinked,” but implies that SDG 17, which addresses means of implementation and about which this body has no expertise, is foremost among them. Because of these misstatements of fact, we must dissociate from PP9 and OP4. We do not support such attempts to circumvent the careful balance of elements in the 2030 Agenda.

With regard to PP9, the United States further notes that several of the trade-related targets in Goal 17 have been overtaken by events since September 2015 and are irrelevant. Our reaffirmation of the 2030 Agenda has no standing for ongoing work and negotiations involving trade. Indeed, some of the intervening events happened just months after the release of the outcome document. Therefore, the text of PP9 does not serve as a basis for future negotiations in the UN, and the United States will not be able to join consensus on it in the future.

The Human Rights Council should play a vital role in focusing the world’s attention on human rights and fundamental freedoms. We are concerned that inviting the President of ECOSOC to annually brief the Council will be duplicative of the High-Level Political Forum

(HLPF), and that its focus will stray from our work here. The work of the Human Rights Council should feed into the HLPF, which has the mandate to consider the implementation of all elements of sustainable development. Introducing economic and development issues into our deliberations will not enhance our work; it will distract the Council from the key role it should play in safeguarding human rights and fundamental freedoms. For these reasons, we dissociate from OP4.

Finally, the United States recalls UN Members' mutual commitment in Paragraph 18 of the 2030 Agenda, that in implementing the 2030 Agenda, "we reaffirm our commitment to international law and emphasize that the Agenda is to be implemented in a manner that is consistent with the rights and obligations of States under international law." The United States also highlights UN Members' mutual commitment, in Paragraph 58 of the 2030 Agenda, that implementation of the Agenda must respect and be without prejudice to the independent mandates of other processes and institutions, including negotiations, and does not prejudice or serve as precedent for decisions and actions underway in other forums. For example, the United States continues to view the World Trade Organization (WTO) as the appropriate forum for the negotiation of trade issues, and the 2030 Agenda did not represent a commitment to continue to pursue the WTO Doha Development Agenda, nor did it represent a commitment to provide new market access for goods or services. The Agenda also did not interpret or alter any WTO agreement or decision, including the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement).

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## G. BUSINESS AND HUMAN RIGHTS

On June 29, 2018, the State Department Bureau of Democracy, Human Rights, and Labor released a fact sheet on business and human rights. The fact sheet is excerpted below and available at <https://www.state.gov/business-and-human-rights-2/>.

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### WHO WE ARE

The State Department's Internet Freedom and Business & Human Rights (IFBHR) Section within the Bureau of Democracy, Human Rights, and Labor leads U.S. government policy engagement on business and human rights.

The activities of businesses impact the lives of millions of people worldwide. Even small enterprises have supply chains that span continents. Consistent with the UN Guiding Principles on Business and Human Rights (Guiding Principles) and the OECD Guidelines on Multinational Enterprises, we encourage U.S. companies to uphold high standards and respect human rights in the communities where they operate.

### WHAT WE DO

We partner with companies, civil society, and like-minded governments to promote respect for human rights in business. We lead policy efforts to disseminate and implement the Guiding Principles, engage in multi-stakeholder initiatives, and work to find solutions to urgent human rights policy issues involving business.

## EXAMPLES OF OUR ENGAGEMENT

**Bilateral and Multilateral:** We collaborate with like-minded governments to advance human rights commitments at the UN, G-7, G-20 and the OECD. This includes co-sponsorship of the UN Human Rights Council’s landmark resolution endorsing the Guiding Principles—a framework that sets out state duties and business responsibilities around business and human rights.

**Multi-stakeholder:** We lead engagement in the Voluntary Principles on Security and Human Rights (VPs). The VPs guide extractive companies on providing security for their operations in a manner that respects human rights. Member companies carry out a human rights risk assessment of their engagements with public and private security providers.

We participate in The International Code of Conduct for Private Security Service Providers Association (ICoCA), an oversight and governance mechanism for private security companies promoting respect for human rights and humanitarian law in complex environments. ICoCA includes a certification, monitoring, and complaint mechanism.

We sit on the Advisory Committee of the Mega Sporting Events Platform to address human rights challenges in the life-cycle of mega sporting events, such as the World Cup and Olympic Games.

**Programming:** Our global programs support capacity building to enable civil society actors to engage more effectively with businesses and other stakeholders to address business and human rights issues in the field.

**Building awareness in the U.S. Government:** We build tools and conduct training to help our State Department and interagency colleagues in Washington and overseas become more effective envoys on business and human rights issues.

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The Department issues an additional fact sheet on business and human rights on November 19, 2018, which is available at <https://www.state.gov/remarks-and-releases-bureau-of-democracy-human-rights-and-labor/u-s-government-efforts-to-advance-business-and-human-rights-in-2018/>. The fact sheet provides examples of U.S. government efforts to support voluntary efforts of businesses to advance human rights in 2018.

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## LAWS AND POLICIES

- [U.S. government issues Advisory on sanctions risks for businesses with supply chain links to North Korea.](#) The Advisory highlights risks and tactics that could expose business to sanctions under U.S. and United Nations authorities, including the Countering America’s Adversaries Through Sanctions Act (CAATSA). It urges businesses to collaborate with stakeholders to implement human rights due diligence policies and procedures to identify/prevent the use of North Korean forced labor throughout their supply chains.

- [Department of Homeland Security issues a frequently asked questions \(FAQ\) guide to address questions under the import provisions of CAATSA Section 321\(b\).](#) CAATSA reiterates the need for comprehensive due diligence by and on behalf of U.S. companies involved in importing goods produced by North Korean nationals or citizens. The FAQ is meant to be a living document and will be updated to ensure its continued relevance and utility.
- **Department of State holds co-convenings to advance business and human rights.** These focused on: collaborating to address human rights challenges online; and the role of business in the protection of fundamental freedoms, civic space, and human rights defenders worldwide. A key takeaway was the significance of relationship building among business and human rights groups to address potential adverse impacts on human rights before issues arise.
- [Department of State contributes to U.S.-Canada-Mexico 2026 World Cup human rights strategy.](#) The strategy is: a comprehensive approach to addressing human rights risks that can raise the bar for human rights standards for future World Cups; and a commitment to transparency by publication of the strategy alongside an independent assessment. This was the first World Cup bidding cycle subject to FIFA's requirement that bidding nations disclose human rights risks and mitigation strategies.
- [US-Mexico-Canada Agreement \(USMCA\) promotes labor rights.](#) Unlike NAFTA, under the USMCA Mexico commits to legislative actions to provide for the effective recognition of the right to collective bargaining. In the Rules of Origin Chapter, parties agreed 40-45 percent of auto content be made by workers earning at least USD \$16/hour.
- [Environmental Protection Agency announces that the Federal Acquisition Regulations will require electronic procurement standards.](#) The standard includes new criteria related to labor, OHS, conflict minerals disclosure, participation in in-region programs for responsible sourcing, and smelter and refiners participation in OECD third party mechanisms.
- [U.S. government joins launch of Principles to Guide Government Action to Combat Human Trafficking in Global Supply Chains \(Principles\).](#) Launched jointly by the U.S. government, Australia, Canada, New Zealand and the United Kingdom on the margins of the UN General Assembly, the Principles provide a framework for countries to prevent human trafficking in public and private sector supply chains.
- [U.S. government joins 2018 G20 declaration on labor exploitation in global supply chains.](#) Commitments included: promoting: due diligence and transparency in global supply chains; development and implementation of responsible recruitment policies and practices; and use of public procurement to improve compliance with labor standards.
- [Department of Homeland Security's enforcement divisions increase outreach and collaboration with stakeholders on combatting forced labor.](#) Efforts include webinars, panel discussions, meetings, and briefings with an emphasis on collaboration and information sharing.
- **Department of State-leads informal interagency working group to monitor violence against environmental defenders, holding more than 15 meetings in 2018.** The group engaged stakeholders and reviewed UN, NGO, and U.S. government reporting about violence against environmental defenders to best inform U.S. policy.

## TOOLS

- [USAID launches first-ever Investor Survey and Report on Land Rights](#). The survey analyzes perceptions and practices of investors regarding land and resource tenure rights. Key findings include: land risks are the most important factor leading to the rejection of projects worth over 1.5 billion USD; all investors assess land risks, and most find community engagement works better than exclusionary tactics in risk mitigation.
- **Department of State contributes an additional \$21 million to the Global Fund to End Modern Slavery.** Funds contribute to mitigating risks of modern slavery in the construction sector (developing techniques to track migration routes, professionalizing recruitment practices, and building professional skills in India and the Philippines); and combatting forced labor in Vietnam’s apparel industry.
- **Department of State funds programs that advance business and human rights in the ICT sector.** Programs advance multi-stakeholder engagement with tech companies, NGOs, and governments; benchmarking company policies around free expression and privacy; and encouraging best practice for small-and-medium-sized enterprises.
- [Department of Labor makes the “Comply Chain” mobile app available in French and Spanish](#). The app helps companies and industry groups around the world develop robust social compliance systems to root out child labor and forced labor from global supply chains.
- [Department of State provides financial and technical support for development of OSCE Model Guidelines for Governments to Prevent Trafficking for Labour Exploitation in Supply Chains](#). Published in February 2018, the Model Guidelines provide a practical tool to assist OSCE participating States and Partners for Co-operation in implementing concrete measures to prevent trafficking in persons in public procurement and global supply chains.
- **Department of State pilots program on the use of block chain technology to address worker rights challenges.** The focus of the pilot is to deploy a block chain solution to address contract switching and related issues.
- **Department of Labor commits \$17.5 million in 2018 to fund projects to address child labor and forced labor in supply chains.** These will focus on reducing forced labor and human trafficking in the recruitment of workers; empowering girls and women; combatting child labor in cobalt mining in the Democratic Republic of Congo; and addressing child labor and forced labor in palm oil supply chains in Colombia and Ecuador.
- **Department of Labor launches projects in 2017 totaling \$13 million to address child and forced labor in five supply chains in six countries.** In December 2017, the Department of Labor awarded projects to prevent, detect, and address child labor and forced labor in the production of cocoa, coffee, dried fish, gold, and seafood in Bangladesh, Colombia, Ghana, Honduras, Indonesia, and the Philippines.
- [USAID launches guidance to address community engagement for power project developers in Kenya in the Power Africa initiative](#). The guidance helps power generation and transmission project developers plan and implement community engagement strategies.
- [USAID completes Three Responsible Land-Based Investment Pilots](#). The three pilots with Illovo Sugar Africa in Mozambique, Moringa Partnership in Kenya, and Hershey’s/ECOM Agro-industrial in Ghana demonstrate that respecting and bolstering local land rights can be good for business by reducing operational, financial, and reputational risks for companies.
- [USAID launches third Land Tenure and Property Rights public online course](#). The course includes new modules on responsible land-based investment and land tenure.

- [\*\*U.S. government Public-Private Alliance for Responsible Minerals Trade to fund projects addressing conflict minerals in the Great Lakes Region.\*\*](#) The focus will be on research on the barriers for financial institutions in promoting responsible minerals trade from conflict-affected and high-risk areas; and financing a package to support legitimate artisanal and small-scale mining of gold, tin, tungsten and tantalum and complimentary livelihoods.

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## H. INDIGENOUS ISSUES

### 1. UN General Assembly Third Committee Resolution

In November 2018, at the UN General Assembly, the U.S. delegation provided an explanation of position on a Third Committee resolution entitled “Rights of Indigenous Peoples.” The United States disassociated from one paragraph and joined consensus on the resolution as a whole. The U.S. explanation of position is excerpted below.

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The United States reaffirms its support for the UN Declaration on the Rights of Indigenous Peoples. As explained in our 2010 Statement of Support, the Declaration is an aspirational document of moral and political force and is not legally binding or a statement of current international law. The Declaration expresses aspirations that the United States seeks to achieve within the structure of the U.S. Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies.

The United States disassociates from PP 7 of the resolution on the Global Compact for Safe, Orderly and Regular Migration, and joins consensus on the resolution as a whole.

The United States does not support a compact on Safe, Orderly, and Regular Migration and objects to references in the resolution to this compact. As the United States has not participated in the UN process to negotiate the migration compact and we will not endorse this instrument, it should be clear to all nations that we are not bound by any commitments or outcomes stemming from the migration compact process or contained in the compact itself.

The United States recognizes and reaffirms its belief that decisions about whom to legally admit for residency or citizenship are among the most important sovereign decisions a country can make, and are not subject to negotiation in international instruments or fora. The United States maintains the sovereign right to facilitate or restrict access to our territory, in accordance with our national laws and policy, while providing relevant protections consistent with our international obligations.

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## 2. Thematic Hearing of the Inter-American Commission on Human Rights

On October 5, 2018, the United States participated in a thematic hearing convened by the Inter-American Commission on Human Rights (“IACHR”) on violence against indigenous women in the United States. The United States provided a statement at a previous IACHR thematic hearing on violence against indigenous women in 2011. See *Digest 2011* at 214-15. Excerpts follow from the statement of U.S. Ambassador to the Organization of American States Carlos Trujillo at the October 2018 thematic hearing.

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I ... want to thank you for the opportunity to come here today to discuss one of the most urgent problems facing American Indian and Alaska Native communities in the United States: domestic violence and sexual assault. These crimes affect every community in the United States, but, tragically, Native women face higher rates of domestic violence and sexual assault than almost any group.

A 2016 National Institute of Justice study, noted in the Joint Request for a Thematic Hearing, found that more than half of all Native women have experienced sexual violence and physical violence by an intimate partner. All too often, these instances of violence against women are part of an escalating cycle, which has resulted in alarming homicide rates among American Indian and Alaska Native women.

The United States is committed to addressing this crisis through the efforts of our Department of Justice. Our federal prosecutors are working to bring violent offenders in Indian country to justice—and to reduce and prevent future crime. Indian country is defined by statute to mean (1) all land within the limits of any Indian reservation under the jurisdiction of the U.S. Government; (2) all dependent Indian communities within the borders of the United States; and (3) all Indian allotments. Through federal grant programs for tribal communities, we are working with those communities so they become safer and can provide victims with a full range of services and support. Through federal research, we are deepening our understanding of violence and victimization in Indian country and searching for solutions. And through federally funded training and technical assistance, we are enhancing the ability of tribes to restore public safety and promote healing in their own communities.

Effective, widespread, and timely prosecutions are critical to stopping the cycle of domestic violence. Early intervention that interrupts or deters a pattern of escalating violence is the key to avoiding future, and sometimes deadly, violence.

The Department of Justice has prosecuted an increasing number of habitual offenders in Indian country under a federal statute enacted in 2005, which focuses on domestic assaults by offenders with at least two prior convictions for any domestic assault in a federal, state, or tribal court. Case management data show the number of defendants indicted under this provision grew from 12 in fiscal year 2010 to 33 in fiscal year 2016 and 41 in fiscal year 2017; 42 have been indicated thus far in fiscal year 2018 as of August 31.

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**I. FREEDOM OF PEACEFUL ASSEMBLY AND ASSOCIATION**

On November 20, 2018, U.S. Representative for Economic and Social Affairs Ambassador Kelley Currie delivered the U.S. explanation of position in the Third Committee on a resolution on freedom of peaceful assembly and association. Ambassador Currie's statement is excerpted below and available at [https://usun.usmission.gov/explanation-of-position-on-a-third-committee-resolution-on-freedom-of-peaceful-assembly-and-association/?\\_ga=2.78428436.1812141081.1563396372-737751616.1554228179](https://usun.usmission.gov/explanation-of-position-on-a-third-committee-resolution-on-freedom-of-peaceful-assembly-and-association/?_ga=2.78428436.1812141081.1563396372-737751616.1554228179). The resolution was adopted by the UN General Assembly on December 17, 2018, on the report of the Third Committee. U.N. Doc. A/RES/73/173.

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The United States is pleased to present this resolution on the promotion and protection of human rights and fundamental freedoms, including the rights to peaceful assembly and freedom of association. We decided to put forward this resolution to call attention to the threats and attacks many individuals are facing around the world for peacefully assembling, covering protests as a journalist or media worker, or serving as mediators between the government and those protesting.

This new resolution for the first time ever in Third Committee draws the international community's attention to the alarming increase in governments violating fundamental freedoms, particularly peaceful assembly and association. Peaceful protests are often met with violence from government security forces, resulting in the deaths of those who are using their voice to speak out against corruption and misrule. State and non-state actors are also violating these freedoms online increasingly through internet shutdowns and censorship of internet content, particularly during online gatherings related to upcoming elections.

This resolution urges governments and non-state actors to immediately end these attacks. The text also highlights different types of individuals who are facing these threats including civil society, human rights defenders, student protestors, journalists and media workers, among others. The resolution also reaffirms the importance of respecting and promoting fundamental freedoms including the freedoms of peaceful assembly and association in a way that the Third Committee has not done before—through a separate text versus addressing these issues in a few paragraphs in various other resolutions.

The United States and our 76 co-sponsors stand firm in our commitment to the promotion and protection of fundamental freedoms, including freedoms of expression, and peaceful assembly, association, and religion or belief, and we hope that this resolution will be adopted by consensus. We also want to thank all delegations for their constructive engagement during our informal consultations.

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**J. FREEDOM OF EXPRESSION**

On December 7, 2018, the OSCE Ministerial Council adopted a decision on the safety of journalists. OSCE MC.DEC/3/18 (available at <https://www.osce.org/chairmanship/406538>). The United States provided an interpretive statement, which follows.

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We strongly support the safety of journalists and freedom of expression. We reiterate that any restrictions on the exercise of freedom of expression, including the freedom to seek, receive, and impart information and ideas of all kinds, for members of the media and members of the public, must be consistent with States' obligations under Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which obligates States Parties to respect and ensure to all individuals within their territory and subject to their jurisdiction the right to freedom of expression. We understand any reference to 'international standards' in this regard to refer to such obligations. We understand the reaffirmation of language from the Document of the 1991 Moscow Meeting of the Conference of the Human Dimension of the CSCE to be in the context of the concerns addressed at that Meeting.

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**K. FREEDOM OF RELIGION****1. Designations under the International Religious Freedom Act**

On November 28, 2018, the Secretary of State designated Burma, China, Eritrea, Iran, North Korea, Pakistan, Sudan, Saudi Arabia, Tajikistan, and Turkmenistan as "Countries of Particular Concern" under § 402(b) of the International Religious Freedom Act of 1998 (Pub. L. No. 105–292), as amended. The "Countries of Particular Concern" were so designated for having engaged in or tolerated "systematic, ongoing, [and] egregious violations of religious freedom." 83 Fed. Reg. 65,782 (Dec. 21, 2018). The Secretary of State also placed Comoros, Russia, and Uzbekistan on a Special Watch List for having engaged in or tolerated "severe violations of religious freedom." And the Secretary designated al-Nusra Front, al-Qa'ida in the Arabian Peninsula, al-Qa'ida, al-Shabab, Boko Haram, the Houthis, ISIS, ISIS-Khorasan, and the Taliban as "Entities of Particular Concern." The "Presidential Actions" or waivers designated for each of the countries designated by the Secretary are listed in the Federal Register notice. The State Department issued a press statement on December 11, 2018, available at <https://www.state.gov/religious-freedom-designations/>, announcing the designations, and stating further:

Safeguarding religious freedom is vital to ensuring peace, stability, and prosperity. These designations are aimed at improving the lives of individuals and the broader success of their societies. I recognize that several designated countries are working to improve their respect for religious freedom; I welcome such initiatives and look forward to continuing the dialogue.

On October 26, 2018, Secretary Pompeo issued a press statement commemorating the 20<sup>th</sup> anniversary of the signing of the 1998 International Religious Freedom Act. The International Religious Freedom Day statement is available at <https://www.state.gov/international-religious-freedom-day/>, and includes the following:

In the twenty years since the IRF Act was signed, we have made significant progress. I am proud of the team we have at the State Department, led by Ambassador Brownback, who work tirelessly to advance religious freedom every day. But on this day, we are also mindful of those places around the world where so many are not free to worship or live out their faith as they choose. Today, we reaffirm the inherent worth and dignity found in every person, who are endowed by our Creator with inalienable rights to life, liberty, and the pursuit of happiness. Though the challenges to religious freedom are daunting, they are not insurmountable, and we will continue to work tirelessly to ensure that all may enjoy this universal freedom.

On March 9, 2018, the Secretary of State identified the following as “entities of particular concern” due to their severe violations of religious freedom: al-Nusra Front, al-Qa’ida in the Arabian Peninsula, al-Qa’ida, al-Shabab, Boko Haram, ISIS, ISIS-Khorasan, and the Taliban. 83 Fed. Reg. 10,545 (Mar. 9, 2018). The designations were made pursuant to Section 408(a) of the International Religious Freedom Act of 1998 (Pub. L. 105–292) (“IRFA”) and section 301 of the Frank R. Wolf International Religious Freedom Act of 2016 (Pub. L. 114–281).

## 2. U.S. Annual Report

On May 29, 2018, the U.S. Department of State submitted the 2017 International Religious Freedom Report to the United States Congress. The report is available at [state.gov/religiousfreedomreport/](http://state.gov/religiousfreedomreport/). Secretary of State Mike Pompeo delivered remarks on the release of the 2017 Report, available at <https://www.state.gov/release-of-the-2017-annual-report-on-international-religious-freedom/>, and excerpted below.

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...It is my great privilege to join you this morning and to release the 2017 International Religious Freedom Report. This report is a testament to the United States' historic role in preserving and advocating for religious freedom around the world.

Religious freedom is in the American bloodstream. It's what brought the pilgrims here from England. Our founders understood it as our first freedom. That is why they articulated it so clearly in the First Amendment. As James Madison wrote years before he was president or secretary of state, "conscience is the most sacred of all property."

Religious freedom was vital to America's beginning. Defending it is critical to our future. Religious freedom is not only ours. It is a right belonging to every individual on the globe. President Trump stands with those who yearn for religious liberty. Our Vice President stands with them, and so do I.

Advancing liberty and religious freedom advances America's interests. Where fundamental freedoms of religion, expression, press, and peaceful assembly are under attack, we find conflict, instability, and terrorism. On the other hand, governments and societies that champion these freedoms are more secure, stable, and peaceful.

So for all of these reasons, protecting and promoting global respect for religious freedom is a priority of the Trump administration. As our National Security Strategy so clearly states: "Our Founders understood religious freedom not as the state's creation, but as the gift of God to every person and a fundamental right for a flourishing society." We're committed to promoting religious freedom around the world, both now and in the future.

And Ambassador Brownback and I will talk about that today. We have underscored that commitment with his appointment. It's great to have a friend and a fellow Kansan up here with me today. International religious freedom deserves to be a front-burner issue, and Ambassador Brownback and I, with him leading the way, will ensure that it continues to be so.

The ambassador and our team in our Office of International Religious Freedom have been working tirelessly throughout the federal government and with our colleagues here at the department and in embassies overseas with NGOs, foreign partners to defend religious freedom in the farthest corners of the globe.

This report demonstrates the hard work of American diplomats to protect American and universal values. I'm proud of my team in completing this report. The release of the 2017 International Religious Freedom Report is critical to our mission to defend religious liberty. It brings to light the state of religious freedom all over the world. It documents, across 200 countries and territories, reports of violations and abuses committed by governments, terrorist groups, and individuals so that we may work together to solve them.

I have a number of examples here. For the sake of time, I'm going to pass through them. But know that we are working in countries around the world to ensure that religious freedom remains the case, and where it is not, that it becomes so.

... Ambassador Brownback will provide to you more details. But we are very excited to announce that later this year we will celebrate the 20th anniversary of the International Religious Freedom Act, a law that reinforces America's commitment to religious freedom and to helping the persecuted. It is also the 70th anniversary of the Universal Declaration of Human Rights by the UN, which proclaimed the importance of human rights, including the right for religious freedom.

The world has made important strides, but we still have a lot of work to do. In that regard, I am pleased to announce that the United States will host the first ever Ministerial to Advance Religious Freedom at the Department of State on July 25th and 26th of this year.

I look forward to hosting my counterparts from likeminded governments, as well as representatives of international organizations, religious communities, and civil society to reaffirm our commitment to religious freedom as a universal human right. This ministerial, we expect, will break new ground. It will not just be a discussion group. It will be about action. We look forward to identifying concrete ways to push back against persecution and ensure greater respect for religious freedom for all.

The ministerial will also be my first to host as a Secretary of State, and that's very intentional. Religious freedom is indeed a universal human right that I will fight for, one that our team at the department will continue to fight for, and one that I know President Trump will continue to fight for. The United States will not stand by as spectators. We will get in the ring and stand in solidarity with every individual who seeks to enjoy their most fundamental of human rights.

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Sam Brownback, Ambassador-at-Large for International Religious Freedom, provided further remarks on the release of the 2017 Report, which are available at <https://www.state.gov/briefing-on-the-release-of-the-2017-annual-report-on-international-religious-freedom/>, and excerpted below.

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...The International Religious Freedom Report is the annual assessment of the state of religious freedom in our world today. We all have a stake in this fight. One person's bondage is another person's burden to break. We're all people with beautiful and undeniable human dignity. Our lives are sacred. Our right to choose the road our conscience takes is inalienable.

We report on what has occurred and been said around the world. We don't make judgment calls in this report of what's worthy to report or not. We just report it all. There are people killed in the world today for their faith. There are people denied access to work or medicine for their beliefs. There are more subtle forms, as well, of persecution. We report it all, without comment or analysis.

Our goal is to protect the freedom of conscience for all people. That means protecting a Muslim, Buddhist, Falun Gong practitioner, or Christian in China and their ability to pray and live out their life. That means protecting a blogger in the Middle East, who doesn't believe that his government might—what his government might believe. Our desire is to protect both—to protect everyone's right to freely practice what they believe.

We've been doing that by working with other federal agencies, the NGO community, the Hill, and with other governments so that we can effectively advocate for those who need it most. My office hosts a weekly roundtable to meet with stakeholders to discuss concerns from all over the world, and I'd invite you to participate in that.

As the Secretary mentioned, we're now 20 years after the International Religious Freedom Act was originally passed. I was pleased to be an original sponsor of that in the Senate. We've seen progress, but there is much, much work to be done.

Secretary Pompeo noted some of the more troubling cases around the world, including the plight of the Rohingya and now the Kachin in Burma. I visited several of the refugee camps in Bangladesh about a month ago. The situation is dire. We must do more to help them, as they continue to be targeted for their faith.

Also was at the Andrew Brunson trial in Turkey. I'm grateful for the President and the Vice President and the Secretary's leadership on this. We will all continue to raise this case every chance we get until he is released. There are way too many Andrew Brunsons held unfairly in prisons around the world.

And unfortunately, there are plenty of other countries we could mention that are covered in the report.

For instance, Eritrea. The government reportedly killed, arrested, and tortured religious adherents and coerced individuals into renouncing their faith. And Tajikistan continues to prohibit minors from even participating in any religious activities.

Saudi Arabia does not recognize the right of non-Muslims to practice their religion in public and imprisons, lashes, and fines individuals for apostasy, blasphemy, and insulting the state's interpretation of Islam. In Turkmenistan, individuals who gather for worship without registering with the government face arrest, detention, and harassment.

All four are Countries of Particular Concern, or CPC countries, designations that are also vital tools meant to spur action.

We also remain very concerned about religious freedom or the lack thereof in Pakistan, where some 50 individuals are serving life sentences for blasphemy, according to civil society reports. Seventeen are awaiting execution. And in Russia, authorities target peaceful religious groups, including Jehovah's Witnesses, equating them with terrorists.

I'd welcome engagement with these and any governments on urgently needed reforms.

So today, 20 years after Congress passed the original International Religious Freedom Act, we've made important progress, but for far too many, the state of religious freedom is dire. We have to work together to accomplish change.

This report is a critical, important report, but strong action must follow. We must move religious freedom forward. We must defend it in every corner of the globe. And that's why the Secretary is hosting the first ever Ministerial on Advancing Religious Freedom.

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Also on May 29, 2018, the State Department issued a fact sheet entitled, "Five Things To Know About This Year's International Religious Freedom Report Release." The fact sheet is available at <https://www.state.gov/five-things-to-know-about-this-years-international-religious-freedom-report-release/>.

### **3. HRC Event on Freedom of Religion and Belief**

At a Human Rights Council side event on freedom of religion and belief on March 6, 2018, Knox Thames, U.S. Special Advisor for Religious Minorities in the Near East and South/Central Asia delivered a statement, excerpted below, and available at <https://geneva.usmission.gov/2018/03/06/u-s-statement-at-human-rights-council-side-event-on-freedom-of-religion-and-belief/>.

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I want to thank Canada and Article 19 for initiating this side-event on protecting freedom of expression and religion for all. The United States was pleased to be a cosponsor. I want to thank the panelists for their insights. I am always impressed by the courage and expertise of advocates like you working on the ground. Thank you.

Persecution, repression, and discrimination are a daily reality for members of religious minority communities in too many countries around the world. Believers and non-believers alike are targeted for violence; their human rights are limited or sometimes entirely restricted. In response, the United States is advocating for the rights of members of religious minority communities, so that they may fully enjoy religious freedom, expression and other related human rights.

The U.S. National Security Strategy, released in December 2017, emphasized the importance of promoting religious freedom and protecting religious minorities. The U.S. government is working bilaterally, and in concert with our friends and allies, to push back against persecution targeting religious minorities, to fight against discrimination, and to promote religious freedom and expression for all. Our partnership with Canada in the International Contact Group for Freedom of Religion or Belief and our work with OIC members on the Istanbul Process are but two examples. In addition, the State Department has undertaken numerous efforts to prevent persecution and to foster space for diversity of thought and belief.

And yet challenges continue to emerge against religious diversity. Groups like ISIS and al-Qa'ida continue to commit targeted acts of violence around the world. ISIS has launched genocidal attacks on Yezidis, Christians, and Shia Muslims in both Syria and Iraq. ISIS also strikes out at Sunnis brave enough to denounce its violent and intolerant ideology. In addition, terrorists have repeatedly attacked members of two seemingly unrelated minority groups—converts and atheists—for their personal decision to choose a different belief system. And with these new challenges we cannot forget how governments and authoritarian regimes continue their daily practices of egregious repression. Restrictive laws limit the freedoms of religion and expression.

In response, we must stay committed to emphasizing the universal importance of these fundamental freedoms. Based on my almost 20 years of experience, we can achieve lasting results by building and protecting environments where everyone can enjoy freedom of religion or belief and share those views peacefully. That is the surest way to secure a peaceful future where people of all faith and none can live in safety and security. Working together in joint advocacy or in joint efforts like the Istanbul Process, we can and will make progress.

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#### **4. Ministerial to Advance Religious Freedom**

On July 26, 2018, the State Department released the Potomac Declaration, an outcome of the Ministerial to Advance Religious Freedom held July 24-26, 2018. The first-ever Ministerial to Advance Religious Freedom assembled government officials, representatives of international organizations, religious leaders, rights advocates, and

members of civil society from around the world to promote greater respect for religious freedom. The Potomac Declaration follows and is available at [https://www.state.gov/potomac-declaration\\_trashed/ministerial-to-advance-religious-freedom-potomac-declaration/](https://www.state.gov/potomac-declaration_trashed/ministerial-to-advance-religious-freedom-potomac-declaration/). The Department also released at the same time the Potomac Plan of Action, available at [https://www.state.gov/potomac-declaration\\_trashed/ministerial-to-advance-religious-freedom-potomac-plan-of-action/](https://www.state.gov/potomac-declaration_trashed/ministerial-to-advance-religious-freedom-potomac-plan-of-action/), and not excerpted herein.

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Preamble:

The Universal Declaration of Human Rights proclaims in Article 18 that “everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.” The freedom to live out one’s faith is a God-given human right that belongs to everyone. The freedom to seek the divine and act accordingly—including the right of an individual to act consistently with his or her conscience—is at the heart of the human experience. Governments cannot justly take it away. Rather, every nation shares the solemn responsibility to defend and protect religious freedom.

Today, we are far from the ideal declared in the Universal Declaration of Human Rights 70 years ago—that “everyone has the right to freedom of thought, conscience, and religion.” This right is under attack all around the world. Almost 80 percent of the global population reportedly experience severe limitations on this right. Persecution, repression, and discrimination on the basis of religion, belief, or non-belief are a daily reality for too many. It is time to address these challenges directly.

Defending the freedom of religion or belief is the collective responsibility of the global community. Religious freedom is essential for achieving peace and stability within nations and among nations. Where religious freedom is protected, other freedoms—like freedom of expression, association, and peaceful assembly—also flourish. Protections for the free exercise of religion contribute directly to political freedom, economic development, and the rule of law. Where it is absent, we find conflict, instability, and terrorism.

Our world is a better place, too, when religious freedom thrives. Individual and communal religious belief and expression have been essential to the flourishing of societies throughout human history. People of faith play an invaluable role in our communities. Faith and conscience motivates people to promote peace, tolerance, and justice; to help the poor; to care for the sick; to minister to the lonely; to engage in public debates; and to serve their countries.

Religious freedom is a far-reaching, universal, and profound human right that all peoples and nations of good will must defend around the globe.

With this in mind, the Chairman of the Ministerial to Advance Religious Freedom declares:

- Every person everywhere has the right to freedom of thought, conscience, and religion. Every person has the right to hold any faith or belief, or none at all, and enjoys the freedom to change faith.

- Religious freedom is universal and inalienable, and states must respect and protect this human right.
- A person's conscience is inviolable. The right to freedom of conscience, as set out in international human rights instruments, lies at the heart of religious freedom.
- Persons are equal based on their shared humanity. There should be no discrimination on account of a person's religion or belief. Everyone is entitled to equal protection under the law regardless of religious affiliation or lack thereof. Citizenship or the exercise of human rights and fundamental freedoms should not depend on religious identification or heritage.
- Coercion aimed at forcing a person to adopt a certain religion is inconsistent with and a violation of the right to religious freedom. The threat of physical force or penal sanctions to compel believers or non-believers to adopt different beliefs, to recant their faith, or to reveal their faith is entirely at odds with freedom of religion.
- Religious freedom applies to all individuals as right-holders. Believers can exercise this right alone or in community with others, and in public or private. While religions do not have human rights themselves, religious communities and their institutions benefit through the human rights enjoyed by their individual members.
- Persons who belong to faith communities and non-believers alike have the right to participate freely in the public discourse of their respective societies. A state's establishment of an official religion or traditional faith should not impair religious freedom or foster discrimination towards adherents of other religions or non-believers.
- The active enjoyment of freedom of religion or belief encompasses many manifestations and a broad range of practices. These can include worship, observance, prayer, practice, teaching, and other activities.
- Parents and legal guardians have the liberty to ensure the religious and moral education of their children in conformity with their own convictions.
- Religion plays an important role in humanity's common history and in societies today. The cultural heritage sites and objects important for past, present, and future religious practices should be preserved and treated with respect.

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## L. PRIVACY

On November 20, 2018, Thomas Weatherall, advisor for the U.S. Mission to the UN, delivered the U.S. explanation of position on a Third Committee resolution on the right to privacy. The statement is excerpted below and available at <https://usun.usmission.gov/explanation-of-position-on-a-third-committee-resolution-on-the-right-to-privacy/>.

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The United States appreciates the efforts of Germany and Brazil on this resolution, and we join consensus today because it reaffirms privacy rights, as well as their importance for the exercise of the right to freedom of expression and holding opinions without interference, and the right of peaceful assembly and freedom of association. These rights, as set forth in the International Covenant on Civil and Political Rights and protected under the U.S. Constitution and U.S. laws, are pillars of democracy in the United States and globally.

We are pleased the resolution recognizes that the same rights that people have offline must also be protected online, including privacy rights. While the resolution expresses concern that the automatic processing of personal data in the commercial context for profiling may lead to discrimination or other negative effects on the enjoyment of human rights, it is also worth noting that data flows and data analytics can create great benefits for economies and societies when combined with appropriate data protection and privacy safeguards, including safeguards against discriminatory effects.

We believe that the portion of the resolution addressing business enterprises is too prescriptive. Further, while the resolution expresses concern about obtaining free, explicit, and informed consent to the commercial re-use of personal data, we also note that in many commercial contexts, other mechanisms for choice may be appropriate, such as opt-out agreements. In some situations, a reasonable inference of meaningful consent may be drawn from the actual behavior of consumers. For instance, many businesses use models conditioning the provision of free or low-cost goods or services to consumers in exchange for use of their personal information. We understand the reference to consent in this paragraph as emphasizing those contexts where such explicit consent is important, not to contexts where such a requirement serves little purpose.

We understand this resolution to be consistent with longstanding U.S. views regarding the ICCPR, including our position on Articles 2, 17, and 19, and interpret it accordingly. The United States further reaffirms its longstanding position that a state's obligations under the Covenant are applicable only to individuals within that state's territory and subject to its jurisdiction, and interpret the resolution, including PP20, PP22, and PP28, consistent with that view. Further, we reiterate that the appropriate standard under Article 17 of the ICCPR as to whether an interference with privacy is impermissible is whether it is unlawful or arbitrary and welcome the resolution's reference to this standard. While the resolution references a view held by some regarding what they refer to as the principles of legality, necessity, and proportionality, Article 17 does not impose such a standard and states are not obligated to take such principles into account in implementing their obligations under Article 17 of the ICCPR. For this reason, we dissociate from OP4.

We also are pleased the resolution supports the consideration of legal frameworks designed to enhance data protection and privacy safeguards, and note that legal frameworks implementing appropriate and effective controls, oversight, accountability, and remedies can effectively protect privacy rights consistent with international human rights law, whether they are in the form of legislation, regulations, or policies, and whether they are context or sector-specific or comprehensive, and whether they include a national independent authority.

Further, the United States understands that this resolution does not imply that states must join human rights instruments to which they are not parties, or that they must implement those instruments or any obligations under them. The United States understands that any reaffirmation of prior documents in these resolutions applies only to those states that affirmed them initially.

We hope that further work on this topic, including the work of the Special Rapporteur, can touch on other areas relating to privacy rights beyond the digital environment, including examination of how abuses of privacy may be implicated in broader repression of the exercise of human rights and fundamental freedoms within states.

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**Cross References**

*Asylum, Refugees, and Migrant Protection Issues*, **Ch. 1.C.**

*Trafficking in Persons*, **Ch. 3.B.3.**

*Alien Tort Statute and Torture Victims Protection Act*, **Ch. 5.B.**

*ICJ case regarding the British Indian Ocean Territory*, **Ch. 7.B.4**

*Inter-American Commission on Human Rights*, **Ch. 7.D.2**

*Corporate Responsibility Regimes*, **Ch. 11.F.5**

*Global Magnitsky Act sanctions*, **Ch. 16.A.10**

*Atrocities prevention*, **Ch. 17.C**

*International humanitarian law*, **Ch. 18.A.4**

## CHAPTER 7

### International Organizations

#### A. UNITED NATIONS

##### 1. Upholding International Law while Maintaining International Peace and Security

On May 17, 2018, U.S. Permanent Representative to the United Nations Nikki Haley addressed a UN Security Council open debate on upholding international law within the context of the maintenance of international peace and security. Her remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-security-council-open-debate-on-upholding-international-law-within-the-context-of-the-maintenance-of-international-peace-and-security/>.

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Even though this is a debate about international law, it's worth stepping back to think about what the people who wrote the UN Charter set out to create. The preamble of the Charter begins, "We the peoples of the United Nations," echoing the U.S. Constitution, which begins with "We the people of the United States."

Joining the United Nations is an act of sovereign peoples who came together to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women, and of nations large and small..." In this way, the Charter makes a clear connection between respecting human rights and upholding and promoting peace. Respect for the freedom and dignity of the individual is fundamental to international law. It is also fundamental to the founding values of the United States.

Our longstanding national commitment to human rights is why the United States made human rights a key theme of our last presidency of the Security Council. Durable peace cannot be separated from respect of human rights. In the last year, the United States has championed a number of efforts to highlight this connection. We've emphasized the connection between the

way the Iranian, Syrian, Venezuelan, and North Korean regimes treat their citizens and the threat to peace and security these governments pose internationally.

The Security Council has also recognized the connection between human rights and peace. We mandate many of the Council's peacekeeping and political missions to promote human rights and report on human rights violations and abuses. In many places, these missions are the first to know about human rights violations and abuses. We need to support these missions and ensure they fulfil their role to protect human dignity.

A related issue is the obligations of Member States under international humanitarian law. Here, too, the Security Council has never been clearer about what we expect from parties of conflict. The Council has adopted resolutions and statements on the protection of civilians, children in armed conflict, medical neutrality, and famine in armed conflict. Many of our resolutions addressing conflicts include a demand for unfettered humanitarian access. Many of our sanctions regimes allow for the listing of individuals or groups that obstruct that humanitarian aid.

The Security Council has been increasingly outspoken and demanding of respect for human rights and international humanitarian law. This is important. But the challenge that remains is a familiar one: following through.

Human rights violations and abuses and humanitarian needs have only increased on our watch. And our response has been completely inadequate.

Some argue that the Security Council has no business in a nation's domestic disputes. A nation's sovereignty, they argue, prevents any outside action, even when people are suffering and abused, and even when that nation's neighbors feel the consequences. We, too, recognize and cherish our sovereignty and the sovereignty of other nations.

But here's the thing: joining the United Nations, and pledging to abide by the words of its Charter, is the act of sovereign peoples, of sovereign nations. It is an act that is freely chosen.

Governments cannot use sovereignty as a shield when they commit mass atrocities, proliferate weapons of mass destruction, or perpetrate acts of terrorism. In these instances, the Security Council must be prepared to act. That's why we're here.

That's why the Council has such wide-ranging authority to impose sanctions, establish tribunals, or authorize the use of force. We have these tools because the people who drafted the Charter realized that there might be times when the Council needs to resort to its broad authority under Chapter VII.

And it's the inability of the Council to follow up, especially when it comes to human rights and humanitarian issues, that allows suffering to continue. And it is the inability to act that erodes our credibility and makes it more likely that more people will suffer in the future. I again thank the President of Poland for calling this critical debate. There are so many places in the world where human dignity and well-being are under assault today. There is so much more good work that we could be doing.

As I mentioned earlier, the reasons for our failures are often obvious. But the Security Council's continued paralysis in the face of so much suffering is unacceptable. It should be unacceptable to all of us. We've accepted this mandate. We have the tools necessary to follow through. The time has come to recall the fundamental purpose of the United Nations, and for the sovereign peoples who make up the United Nations to come together to take meaningful action to fulfill it.

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## 2. Rule of Law

On October 8, 2018, Julian Simcock, Deputy Legal Adviser for the U.S. Mission to the United Nations delivered remarks at a meeting of the Sixth Committee on “Agenda Item 86: Rule of Law at the National and International Levels.” His remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-86-rule-of-law-at-the-national-and-international-levels/>.

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The United States would like to thank the Secretary-General for his report on this agenda item.

We would also like to thank the Rule of Law Coordination and Resource Group and the Rule of Law Unit. The individuals who perform this work often do so under very difficult circumstances. We are deeply grateful for their efforts.

The Secretary-General’s report identifies a number of concerning trends. It says that in all parts of the world, there are significant political and security challenges, many of which have eroded progress in accountability, transparency, and the rule of law.

Among the most concerning of the Secretary-General’s findings is the global trend toward undermining the independence of judicial institutions. This is deeply unsettling. In every country, judicial institutions must be allowed to perform their work free from any form of interference. They must be allowed to apply applicable domestic legal frameworks, even when the decisions of a government are at issue. And they must be allowed to conduct their work without fear of reprisal.

Equally worrying is the Secretary-General’s reporting on corruption. Corruption is a corrosive force. It erodes trust in institutions. It increases the imbalance between those with power and those without. And it goes hand-in-hand with the defiance of international norms. For these reasons, it is only appropriate that the Security Council recently convened a meeting dedicated exclusively to this issue. In post-conflict scenarios, the United Nations and other international actors face the daunting challenge of providing assistance without inadvertently supporting the networks of corruption that may have contributed to conflict in the first place. It should come as no surprise that the first clause of the preamble to the UN Convention against Corruption draws a direct connection between corruption and the erosion of the rule of law. The preamble highlights the “seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law.”

Having spoken mostly about concerning trends, let me also acknowledge some bright spots. We welcome the report that the number of female judges in Afghanistan has doubled since 2014. We also welcome the United Nations’ efforts in El Salvador, where reports indicate that the Organization’s support to community security has contributed to a significant decline in homicides. Furthermore, in Jordan, Kyrgyzstan and Timor-Leste, the United Nations’ legal clinics have provided meaningful support to many in great need.

With respect to the work before us in the coming weeks, we hope that the Sixth Committee will be able to reach a consensus on a subtopic for next year. We think that the past practice of selecting subtopics can lead to more focused and productive debates on the rule of law in this forum.

Finally, let me say that when we gather here in the Sixth Committee, we do so on the basis of an implicit understanding. That at its best, legal discourse is a substitute for more dangerous ways to approach problems.

In our view, that same understanding is fundamental to preserving the rule of law. If the rule of law is protected, then the rules-based international legal order is also protected, and we will be better enabled, together, to address the challenges before us.

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### 3. Charter Committee

On October 12, 2018, Emily Pierce, Counselor for the U.S. Mission to the United Nations, delivered remarks at a meeting of the Sixth Committee on the report of the Special Committee on the Charter of the United Nations. Her remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-85-report-of-the-special-committee-on-the-charter-of-the-united-nations-and-on-the-strengt/>.

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We welcome this opportunity to provide a few observations on the report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization and the Committee's work in 2018. The United States first notes that there were further positive developments in the work of the Charter Committee this year, building on the positive spirit and momentum that grew out of the 2016 and 2017 meetings. For example, delegations engaged in the Special Committee's first annual debate on the means of peaceful settlement of disputes, focusing on the role of negotiations and enquiry. The debate proved a useful platform to exchange views and state practice, and the United States looks forward to the debate in 2019, which we expect will further advance and deepen the Committee's dialogue on the role of mediation.

The United States welcomes that the Special Committee's agenda was further streamlined this year after the withdrawal of a long-standing proposal to establish an open-ended working group to study the proper implementation of the Charter of the United Nations. This proposal did not generate consensus within the Committee for nearly a decade, and its withdrawal is a positive step towards the rationalization of the Committee's work. The United States encourages Committee members to continue to make further improvements in this regard, giving further scrutiny to proposals with an eye toward updating our work and making the best use of scarce Secretariat resources. This includes the proposals made to update the 1992 Handbook on the Peaceful Settlement of Disputes between States, and to establish a website also dedicated to the peaceful settlement of disputes. In addition, the Special Committee should take

additional steps to improve the efficiency and productivity of the Committee, including seriously considering biennial meetings or shortened sessions. In the current reform-minded environment in which we operate, with tighter budgets and increased focus on improving the efficiency of the United Nations, the Special Committee needs to do its job by recognizing that these steps are reasonable and long overdue.

With respect to items on the Committee's agenda regarding the maintenance of international peace and security, the United States continues to believe that the Committee should not pursue activities in this area that would be duplicative or inconsistent with the roles of the principal organs of the United Nations as set forth in the Charter. This includes consideration of a long-standing working paper that calls for, among other things, legal study of General Assembly functions and powers. This also includes a long-standing proposal regarding UN reform, as well as the question of the General Assembly requesting an advisory opinion on the use of force from the International Court of Justice, a proposal that the United States has consistently stated it does not support. As we have noted in the Sixth Committee, and the Special Committee before, if a proposal such as that of Ghana could add value by helping to fill gaps, then it should be seriously considered. We hope that Ghana will take on board suggestions from delegations to narrow the ideas presented in its revised paper in advance of the 2019 Special Committee meeting.

In the area of sanctions, the United States thanks the Department of Political Affairs for its briefing during the Committee meeting in February, which we attended... with interest. The United States emphasizes that targeted sanctions adopted by the Security Council in accordance with the Charter of the United Nations remain an important instrument for the maintenance of international peace and security.

With respect to the issue relating to assistance to third States affected by sanctions, we note once again that positive developments have occurred elsewhere in the United Nations that are designed to ensure that the UN system of targeted sanctions remains a robust tool for combating threats to international peace and security. As stated in the Secretary-General's report A/72/136, "...the need to explore practical and effective measures of assistance to third States affected by sanctions has been reduced accordingly. In fact, no official appeals by third States to monitor or evaluate unintended adverse impacts on non-targeted countries have been conveyed to the Department of Economic and Social Affairs since 2003." Such being the case, we believe that the Special Committee—with an eye both on the current reality of the situation and the need to stay current in terms of the matters it considers—should decide in the future that this issue no longer merits discussion in the Committee. The United States was instrumental in having a working group established by this Committee to examine the issue some years ago. Our position is now, despite the biennialization of the Committee's consideration of the item, that it is time for the Committee to move on.

The United States continues to be cautious about adding new items to the Committee's agenda. While the United States is not opposed in principle to exploring new items, they should be practical, non-political, not duplicate efforts elsewhere in the United Nations, as well as respect the mandates of the principal organs of the United Nations. With this in mind, the United States does not believe that the Special Committee is the appropriate forum to assess the sufficiency of Member State communications submitted pursuant to Article 51 of the Charter.

Finally, we welcome the Secretary-General's report A/73/190, regarding the Repertory of Practice of the United Nations Organs and the Repertoire of the Practice of the Security Council. We commend the Secretary-General's ongoing efforts to reduce the backlog in preparing these

works. Both publications provide a useful resource on the practice of the United Nations organs, and we much appreciate the Secretariat's hard work on them.

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## B. INTERNATIONAL COURT OF JUSTICE

### 1. Alleged Violations of the 1955 Treaty of Amity (*Iran v. United States*)

On August 27, 2018, oral proceedings commenced at the International Court of Justice ("ICJ") in The Hague in a case brought by Iran against the United States, *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights*. See August 27, 2018 Secretary of State press statement, available at <https://www.state.gov/on-u-s-appearance-before-the-international-court-of-justice-2/>.

Iran sought provisional measures to prevent the re-imposition of sanctions by the United States as a result of its withdrawal from the Joint Comprehensive Plan of Action ("JCPOA"). The United States made its oral submissions on August 28 and 30, 2018. Legal Adviser Jennifer Newstead, Professor Donald Childress, Counsel Daniel Bethlehem, and Assistant Legal Adviser Lisa Grosh presented the position of the United States. Excerpts follow (with footnotes omitted) from the presentation by Legal Adviser Newstead. The full transcript is available at <https://www.ici-cij.org/en/case/175>.

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2. Mr. President and Members of the Court: the United States is here in strong opposition to Iran's Request. Iran manifestly cannot meet the conditions required for the indication of provisional measures. My colleagues and I will address how Iran fails to carry its burden to establish the existence of prima facie jurisdiction; how the rights Iran invokes are not plausible Treaty of Amity rights; how the measures Iran seeks would irreparably prejudice the United States; how provisional measures are not required to avoid irreparable prejudice to Iran; and how, in reality, the measures Iran seeks would amount to an interim judgment on the merits.

3. First, notwithstanding what you heard from Iran's representatives yesterday, this case is *entirely* about an attempt to compel the United States, by order of this Court, to resume implementation of the Joint Comprehensive Plan of Action, or JCPOA. This is clear from the fact that Iran seeks to reinstate sanctions relief that the JCPOA provided, and to do so in circumstances that the JCPOA, by design, did not authorize: namely, an application to this Court. Iran is endeavouring to use the procedures of the Treaty of Amity to enforce rights that it claims under an entirely different instrument that specifically excludes judicial remedies.

4. Second, looking to the Treaty of Amity, Iran's attempt to engage the jurisdiction of this Court by invoking that Treaty is unsustainable. The Treaty, in Articles XX and XXI, carves out from its scope *precisely* the types of national security measures—those that are necessary to protect essential security interests and those relating to nuclear materials—which lie at the heart of this case. Iran's nuclear ambitions pose a grave threat today, as they have for decades, to the United States and the international community. Iran has proven its willingness to commit and to

support acts of terrorism and to pursue violent and destabilizing policies when it serves the régime's interests. The possibility that Iran may take such actions in the future with a nuclear weapons capability is not a risk that can be tolerated.

5. The United States' decision to cease participation in the JCPOA was made in recognition of the threat that Iran's behaviour continues to pose to the national security, foreign policy and economy of the United States, and the JCPOA's failure to address the totality of those concerns about Iran's behaviour. But the Treaty of Amity preserves the United States' sovereign right to make such decisions and to take such measures. It cannot, therefore, provide a basis for this Court's jurisdiction, nor does it provide Iran any basis to demonstrate rights that are plausible on the merits.

6. Third, the provisional measures that Iran requests would provide, in effect, the very relief that Iran seeks on the merits, which is contrary to this Court's jurisprudence. The prejudice to the United States from such an order by the Court is plain to see. Such an order would purport to prevent the United States, for years to come, from taking non-forcible, lawful measures to counter Iran's nuclear ambitions, as well as Iran's threatening conduct outside the scope of the JCPOA, including its development of ballistic missiles, its support for international terrorism and its escalating campaign of regional destabilization.

7. For this Court to accept Iran's legal manoeuvrings would have grave and sobering consequences. The United States' sovereign right to take lawful measures in defence of its essential security interests is not simply a *prima facie* right: it is more firmly rooted. And it cannot be properly constrained through a provisional measures request that does not, and cannot, engage with the substance of that U.S. right.

8. Mr. President, Iran's Request warrants another observation before I proceed. It rests on the basis of a treaty whose central purpose—friendship with the United States—Iran has expressly and repeatedly disavowed since 1979 in its words and actions, by sponsoring terrorism and other malign activity against United States citizens and interests. In other words, the situation that the Parties find themselves in today is nowhere near what was contemplated when the Treaty was concluded in 1955. In spite of this, Iran invokes the Treaty in an effort to force the United States to implement an entirely separate, non-binding arrangement—the JCPOA—which contains its own dispute resolution mechanism that purposefully excludes recourse to this Court. That cannot be an appropriate role for provisional measures.

9. Before I elaborate on these points further, I will take a moment to address what you heard yesterday. Iran sought to characterize itself as a victim, as a law-abiding State, brought to its knees by unlawful U.S. sanctions. The suggestion that Iran is a victim does not withstand scrutiny at any level. The history of Iran's destructive acts is well-documented, and I will address it in detail shortly.

10. For now, I will simply note that the United States' 8 May decision to cease participation in the JCPOA, which is at the centre of this case, was motivated by an acute, long-standing, and growing concern about the national security threat posed by Iran. The sanctions that the United States has reintroduced are lawful and appropriate in the face of Iran's activities—past, continuing, and threatened. They are the very same sanctions that were integral to a multilateral effort over years prior to the JCPOA, including with the European Union and the United Nations Security Council, to respond to the growing and well-recognized threat posed by Iran. Whether or not one agrees with the United States' decision regarding the JCPOA, there should be no misapprehension of the threat that Iran poses.

11. It also bears emphasis that the economic and social concerns that Iran's representatives raised yesterday, which Iran seeks to lay at the doorstep of the United States, find deep roots in the Iranian government's mismanagement of its own economy and repression of its own population. The Iranian government cannot succeed in shielding itself from responsibility for the consequences of its own threats to international peace and stability, as well as to its own people, by submission to this Court.

12. Mr. President, I must also be clear that the United States does intend, lawfully and for good reason, to bring heavy pressure to bear on the Iranian leadership to change their ways. We do this in the interests of U.S. national security, as well as in pursuit of a more peaceful Middle East and a more peaceful world. Contrary to what you heard yesterday, the United States takes seriously the importance of ensuring that sanctions do not apply to humanitarian activities. This is why there are humanitarian exceptions in all of the U.S. domestic sanctions statutes at issue in this case. In addition, the United States has affirmed in public guidance from the Department of the Treasury that authorizations to permit humanitarian transactions and the Statement of Licensing Policy for Safety of Flight remain in effect following the 8 May decision. Mr. Bethlehem will have more to say on this issue shortly.

13. With this introduction, let me provide a brief roadmap to my submission to come. I will provide additional background on the JCPOA and the U.S. decision of 8 May, as it is helpful in understanding the reasons why Iran's request should not be granted. Following that, I will demonstrate—by recalling for this Court Iran's support for terrorism and promotion of regional conflicts, as well as its history of repeated violations of internationally agreed restrictions on its nuclear programme—that essential national security concerns, which fall expressly outside the scope of the Treaty of Amity, are the foundation of the actions which Iran seeks to challenge. I will conclude by addressing in a summary fashion why Iran's request does not meet the requirements for the indication of provisional measures.

**I. This case is about the JCPOA, which provides no consent to jurisdiction to this Court, not the Treaty of Amity**

14. Let me now turn to expand on the point that this case is in reality about the JCPOA, not the Treaty of Amity. Yesterday, Iran sought to reassure this Court that its case was *not* founded on the JCPOA. As my colleagues and I will show, Iran's Request for provisional measures is fundamentally an effort to restore the sanctions relief that the United States had provided when implementing the JCPOA. The Treaty of Amity is therefore simply a device in Iran's search for a jurisdictional basis to this Court.

15. The JCPOA is a distinct, multilateral instrument, entered into in 2015 by the Permanent Members of the United Nations Security Council, Germany, the European Union and Iran. Its motivation was an attempt to address the international community's concerns about Iran's nuclear programme.

16. The JCPOA represents a series of "reciprocal commitments" by the participants. Iran committed to take steps—most of which were time-limited—to scale back its nuclear programme and to allow for certain verification measures. In return, the other participants lifted specific "nuclear-related" sanctions. Consistent with the participants' deliberate intent, the JCPOA was drafted to reflect the non-legally binding nature of the commitments thereunder. In this way, the JCPOA certainly did not guarantee Iran that the sanctions measures imposed by any of the participants prior to its entry would not be reimposed if a participant decided to exit. Equally, the JCPOA clearly declined to provide any recourse to this Court to adjudicate such a decision.

17. Both Iran's Application and its Request for provisional measures make clear that this is in fact a dispute about the JCPOA. On the screen in front of you, and at slide 1 in your judges' folder, is an extract from paragraph 2 of Iran's Application, which states:

“The present Application exclusively concerns the internationally wrongful acts of the USA resulting from its decision to re-impose in full effect and enforce the 8 May sanctions that the USA previously decided to lift in connection with the Joint Comprehensive Plan of Action”.

18. The *relief* that Iran requests also underscores this point. It asks the Court to order “the suspension of the implementation and enforcement of the 8 May sanctions”. This is, fundamentally, a request for the restoration of sanctions relief under the JCPOA.

## **II. The U.S. measures were taken to counter the persistent threats posted by Iran to the United States and vital U.S. national interests**

19. Mr. President, I will now turn to the context in which the United States made the decision of 8 May. As I have said, the JCPOA was an attempt to meet the threat of Iran's pursuit of nuclear capabilities. Some believed the JCPOA might also improve regional stability or moderate Iran's behaviour in other respects. But in the view of the United States, it is a flawed initiative for a number of reasons. It is time-limited. It contains insufficient inspection and verification measures, despite Iran's well-known deception about the purposes of its nuclear programme. It does not address the threat posed by Iran's ballistic missile programme. Nor does it address Iran's sponsorship of terrorism. And it provides a windfall of access to extraordinary amounts of funds that the Iranian régime has used to fuel proxy wars across the Middle East.

20. Iran's behaviour continued, and in many respects worsened, after the JCPOA was concluded. Iran provides hundreds of millions of dollars a year to Hezbollah in support of its worldwide terrorist activities, including using rockets supplied by Iran to target Israeli neighbourhoods and providing ground forces for the conflict in Syria. Recent reports have described the arrest of a Vienna-based Iranian diplomat in connection with an alleged plot to bomb an Iranian dissident rally in France. Here in The Netherlands, authorities have expelled two Iranian officials believed to be tied to the murder of an Iranian dissident, Ahmad Mola Nissi. And last week, the United States Department of Justice indicted two individuals accused of acting on behalf of the Government of Iran by conducting covert surveillance of Israeli and Jewish facilities in the United States and collecting detailed information on American members of an Iranian dissident group. The Islamic Revolutionary Guard Corps continues to send thousands of fighters into Syria to support the Assad régime, perpetuating a conflict that has displaced more than 6 million Syrians. And months after the ink was dry on the JCPOA, and repeatedly thereafter, Iran has tested ballistic missiles capable of delivering a nuclear weapon.

21. These more recent actions must be viewed against a long history of violent and destabilizing activities by the Iranian régime. The seizure of the U.S. Embassy in Tehran and the taking of U.S. personnel hostage on 4 November 1979 was just the beginning. In the decades since, Iran has sponsored international terrorism, including attacks against Americans and nationals of many other countries, and has provided material and financial support to terrorist groups and their proxies. Iran violated its obligations as a non-nuclear weapon State party to the Nuclear Nonproliferation Treaty (NPT) and under agreements with the International Atomic Energy Agency (IAEA). Among other things, it developed a covert, underground enrichment facility and engaged in weaponization activities, while denying the IAEA information and access

to address those issues. And, as is well-known, for years Iran has openly defied the binding decisions of the United Nations Security Council applicable to it, while contesting the unimpeachable lawfulness of those very measures.

22. Mr. President and Members of the Court, in the face of these actions by Iran, the United States has found it imperative to act. As outlined in the National Security Presidential Memorandum of 8 May, an extract of which is on the screen:

“[i]t is the policy of the United States that Iran be denied a nuclear weapon and intercontinental ballistic missiles; that Iran’s network and campaign of regional aggression be neutralized; to disrupt, degrade, or deny the Islamic Revolutionary Guards Corps and its surrogates access to the resources that sustain their destabilizing activities; and to counter Iran’s aggressive development of missiles and other asymmetric and conventional weapons capabilities”.

23. Mr. President, the actions of the United States taken to protect its essential national security interests over decades, using sanctions and other peaceful tools, were lawful under the Treaty. The use of these peaceful measures to counter Iran’s behaviour and protect U.S. essential security interests ha[s] directly tracked the history of Iran’s threats. They are aimed at preventing Iran from having the resources to sustain and increase these threats, and from using the United States financial system in furtherance of those threats. On the screen we have provided an overview of the critical sanctions authorities adopted over time by the United States to address these essential security concerns.

24. For example, the United States designated Iran as a State sponsor of terrorism in January 1984, a designation it retains to this day, which prevents certain exports and assistance from the United States to Iran. In 1987, President Reagan banned the importation of most Iranian goods and services due to Iran’s active support for terrorism and to prevent such imports from contributing to financial support for such acts. In 1995, President Clinton prohibited certain transactions with respect to development of petroleum resources in Iran. Following years of Iranian evasion of sanctions aimed at a range of illicit activities, President Obama imposed measures in 2012 that blocked all property subject to U.S. jurisdiction of the Government of Iran, including its Central Bank and Iranian financial institutions. Each of these measures was firmly grounded in national security considerations and the recognition that, because resources are fungible, the imposition of economic restrictions would directly contribute to combatting Iran’s actions.

25. The United States has also enacted a range of sanctions measures over time which were expressly tied to Iran’s persistent effort to expand its nuclear programme, in clear violation of multiple United Nations Security Council resolutions, Iran’s obligations under the NPT, and decisions by the IAEA Board of Governors.

26. For example, the U.S. Congress enacted the Iran Sanctions Act of 1996 after finding that Iran’s efforts to acquire weapons of mass destruction “endanger the national security and foreign policy interests of the United States” and that “additional efforts to deny Iran the financial means to sustain its nuclear, chemical, biological, and missile weapons programs” were necessary.

27. In 2010, as part of a concerted multilateral effort, President Obama signed into law the Comprehensive Iran Sanctions, Accountability, and Divestment Act, which stated that the sanctions it imposed, as well as other Iran-related sanctions, are “necessary to protect the

essential security interests of the United States” to prevent Iran from developing nuclear weapons. As noted on the screen, this Act, as well as subsequent statutes enacted in 2012, followed the adoption between 2006 and 2010 of multiple United Nations Security Council resolutions intended to constrain Iran’s nuclear programme, and was reinforced by parallel restrictive measures adopted by the European Union. These were among the measures that were lifted by the JCPOA.

28. Executive Order 13846, which the United States issued on 6 August—as Iran acknowledged yesterday, simply reimposes many of the sanctions previously relieved—and directly states its national security purpose by referring to “the goal of applying financial pressure on the Iranian regime in pursuit of a comprehensive and lasting solution to the full range of threats posed by Iran”.

29. In the interest of time, I will not specifically cite to all of the sanctions that Iran contests today, but the point is clear. Each of these measures shares a common theme—to counter the growing threat to the United States posed by Iran by cutting off the sources of funds that can be used to support its malign activities. The sanctions are designed to, and have the effect of, constraining Iran’s economic capacity to do harm.

30. Mr. President, the United States’ decision to participate in the JCPOA was a continuation of these multilateral efforts to address the threat posed by Iran’s nuclear programme. But in light of all of these facts and particularly the conduct of Iran following the JCPOA, the United States concluded that the JCPOA did not have its intended effect and decided to cease its participation.

31. This decision, which was announced on 8 May of this year, followed a full review of the United States’ policy toward Iran. The specific reasons for the decision include the following U.S. national security concerns:

- First, the nuclear issues. The JCPOA “provided [Iran] with significant benefits in exchange for [SEP] temporary commitments to constrain its uranium enrichment program and to not conduct work related to nuclear fuel reprocessing”. Its mechanisms for inspecting and verifying Iran’s compliance were insufficient. And the revelation of a large trove of Iranian documents relating to nuclear weaponization activities, which Iran was apparently preserving during the pendency of the JCPOA, called into question whether Iran could be trusted to enrich or control nuclear material. [L] [SEP]
- Second, the JCPOA did nothing to curb Iran’s continuing development of ballistic missiles and cruise missiles, which could deliver a nuclear weapon. [L] [SEP]
- Third, since the JCPOA’s inception, Iran had “only escalated its destabilizing activities in the surrounding region”, using the benefit of the JCPOA sanctions relief to “fuel[] proxy wars across the Middle East and lin[e] the pockets of the Islamic Revolutionary Guard Corps ...”. [L] [SEP]
- Fourth, despite the JCPOA, Iran remains “the world’s leading state sponsor of terrorism, and provides assistance to Hezbollah, Hamas, the Taliban, al-Qaida, and other terrorist networks”. [L] [SEP]
- And finally, Iran continues to commit “grievous human rights abuses, and arbitrarily detains foreigners, including United States citizens, on spurious charges without due process of law”.

32. Mr. President and Members of the Court: these are concerns that many of our partners have publicly affirmed that they share, even if they disagree with our calculus on the JCPOA. In a Joint Statement issued on 8 May, the Heads of Government of the United Kingdom, France and

Germany noted their agreement that “other major issues of concern need to be addressed”, including “shared concerns about Iran’s ballistic missile programme and destabilising regional activities, especially in Syria, Iraq and Yemen”.

33. Mr. President, as this history demonstrates, the basis for the sanctions measures imposed over decades by the United States toward Iran is protection of the essential security interests of the United States. As Ms. Grosh will address, the Parties excluded such measures from the Treaty of Amity to preserve their sovereign discretion to decide, and to act, in accordance with their solemn national security interest on such sensitive matters. The decision and the measures imposed are squarely within the Treaty’s exceptions for measures necessary to protect U.S. essential security and other national security interests.

### **III. Iran’s Request fails to meet the requirements for the indication of provisional measures**

34. Mr. President and Members of the Court, I have already given you the essence of our case, as it will be developed by my colleagues. Let me, in the interest of clarity, summarize our case so that you have all the elements knitted together in one place.

35. Iran has failed to show each of the four essential elements of a request for provisional measures, as well as other conditions my colleagues will address. Its request for provisional measures should therefore be rejected.

36. *First*, it must be rejected because the Court lacks prima facie jurisdiction to hear Iran’s claims. The dispute between the United States and Iran is manifestly a dispute about the implementation of the JCPOA and an effort to interfere with the sovereign rights of the United States to take lawful measures in support of its national security. This dispute is not about the interpretation or application of rights arising under the Treaty of Amity. As this Court has recognized, it “cannot decide a dispute between States without the consent of those States to its jurisdiction”. The JCPOA reflects a clear intent that such matters are to be handled through political channels. The JCPOA participants, including Iran, clearly excluded from the dispute settlement mechanism of the JCPOA any resort to this Court. Iran’s application to the Court is therefore a deliberate effort to manufacture a legal right to challenge the U.S. decision that continued participation in the JCPOA is not in its essential security interests. As a result, the Court lacks jurisdiction to address this dispute.

37. But even if the Court looks to the text of the Treaty of Amity as a potential source of jurisdiction, there is none to be found. Iran has failed to satisfy the basic preconditions of the Treaty’s compromissory clause in Article XXI, paragraph 2. Read together with Article XX, paragraph 1, of the Treaty, this excludes from the scope of application of the Treaty exactly the kinds of measures that the United States is now taking against Iran, and has taken for approaching 40 years. Ms. Grosh will develop this reasoning in greater detail.

38. *Second*, the rights Iran asserts do not plausibly arise under the Treaty of Amity. They are in actuality benefits that arose under the JCPOA that Iran is seeking to cast as rights and to have restored. In addition, because Article XX (1)’s exceptions clause applies to all the measures at issue here, Iran does not have a plausible claim on the merits with respect to any of the particular substantive provisions invoked.

39. *Third*, as Mr. Bethlehem will address more fully, Iran cannot show either irreparable prejudice or urgency. The harm of which Iran complains is economic harm. This is presumptively not amenable to interim relief, and Iran cannot rebut the presumption.

40. *Finally*, when weighing whether provisional measures are warranted, the Court must also consider the rights of the Respondent. This includes with respect to the effect of any provisional measures on those rights, as well as whether it prejudices the final decision of the Court at the merits stage. Our position is that Iran's request fails, yet again, on these grounds. A grant of provisional measures in this case would fundamentally prejudice Iran's merits claims and would cause irreparable prejudice to the rights of the United States.

\* \* \* \*

On October 3, 2018, the ICJ issued an order partially granting Iran's request for provisional measures, not entirely as requested by Iran. The court ordered the United States to

... remove, by means of its choosing, any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of Iran of goods required for humanitarian needs, such as (i) medicines and medical devices; and (ii) foodstuffs and agricultural commodities; as well as goods and services required for the safety of civil aviation, such as (iii) spare parts, equipment and associated services (including warranty, maintenance, repair services and safety-related inspections) necessary for civil aircraft. To this end, the United States must ensure that licences and necessary authorizations are granted and that payments and other transfers of funds are not subject to any restriction in so far as they relate to the goods and services referred to above.

## 2. **Certain Iranian Assets (*Iran v. United States*)**

On October 8, 2018, the United States appeared before the ICJ in another case brought by Iran, *Certain Iranian Assets*. See October 8, 2018 press statement of the Secretary of State, available at <https://www.state.gov/on-u-s-appearance-before-the-international-court-of-justice/>. In this case, Iran challenges measures adopted by the United States to deter Iran's support for terrorism by, among other things, allowing victims of terrorism to recover damages in U.S. courts. As discussed in Chapter 9, *infra*, the United States decided to terminate the 1955 U.S.-Iran Treaty of Amity, which Iran invoked in its cases against the United States before the ICJ.

Deputy Legal Adviser Richard Visek appeared as agent of the United States in the proceedings in *Certain Iranian Assets*. His statement providing an overview of the U.S. preliminary objections in the case is excerpted below (with footnotes omitted). Professor Donald Childress, Assistant Legal Adviser Lisa Grosh, Attorney-Adviser Emily Kimball, Deputy Assistant Legal Adviser John Daley, Counsel Daniel Bethlehem, and Laurence Boisson de Chazournes also presented the position of the United States. Transcripts and submissions in the case are available at <https://www.ici-cij.org/en/case/164>.

\* \* \* \*

2. Mr. President and Members of the Court, the United States is here today to present our serious objections to the application filed by Iran. At the outset, we should be clear as to what this case is about. The actions at the root of this case centre on Iran's support for international terrorism and its complaints about the U.S. legal framework that allows victims of that terrorism to hold Iran accountable through judicial proceedings and receive compensation for their tragic losses.

3. Iran's effort to secure relief from the Court in this case — to in effect deny terrorism victims justice — is wholly unfounded, and its application should be rejected in its entirety as inadmissible. First, Iran's invocation of the Treaty of Amity as a basis for challenging the U.S. measures here is an abuse of process. Iran's overarching complaint that it should not be subjected to litigation in U.S. courts relating to its sponsorship of terrorism is not something to be resolved under the Treaty of Amity. Second, the integrity of the judicial process would not be served were the Court to order relief in favour of a litigant with such unclean hands. Beyond that, Iran's case suffers from significant jurisdictional defects. Nothing in Iran's written pleading overcomes the obstacles to admissibility or cures the jurisdictional defects that the United States has identified.

4. In this introductory presentation, I will place the U.S. preliminary objections in the context of the overall case before you. First, I will provide an overview of what this case concerns and place it in its appropriate historical, legal, and factual context. Second, I will summarize the U.S. objections to admissibility and jurisdiction. Third, I will address the fact that all of the U.S. objections are exclusively preliminary in nature.

A. Iran's case must be understood in its appropriate context

5. Mr. President, Members of the Court, this case concerns measures taken by the United States progressively over a period of years to enable victims of terrorism to hold Iran accountable for acts of terrorism directed at or affecting U.S. persons. This accountability takes the form of litigation in U.S. courts pursuant to legislation that allows for States that sponsor terrorist acts to be held accountable for such acts and for victims to obtain compensation. Throughout its submissions, Iran references in particular the *Peterson* proceeding, which arose from the Iran-sponsored bombing of the U.S. marine barracks in Beirut, Lebanon in 1983, which killed 241 U.S. peacekeepers. Because Iran has made the *Peterson* proceeding the cornerstone of its case before this Court, it is fitting to begin there and consider the facts underlying that litigation.

6. As Mr. Bethlehem will explain in greater detail, military personnel of the United States had been present in Beirut since August 1982, as part of a multinational peacekeeping force to help the Lebanese armed forces restore order. An agreement between the United States and Lebanese Governments specifically provided that the U.S. forces would not engage in combat and would be equipped only with weapons consistent with that non-combat role. On the morning of 23 October 1983, a member of Hezbollah who was an Iranian citizen drove a 19-ton truck loaded with high explosives through the barriers at the U.S. Marine barracks. He crashed through a wire fence and wall of sandbags, entered the barracks, and detonated the device, destroying the four-story barracks, and killing 241 U.S. servicemen and gravely wounding many more. Shortly afterward, a similar attack on the French barracks killed 58 French peacekeepers and five Lebanese civilians.

7. Iran's most senior leaders took responsibility for this deadly attack, and even boasted about it. Here is what the Minister of the Islamic Revolutionary Guard Corps had to say: the United States "knows that both the TNT and the ideology which in one blast sent to hell 400 officers, NCOs and soldiers of the Marine Headquarters have been provided by Iran". Mr. President and Members of the Court, there is nothing equivocal about that statement. Iran took responsibility for the attack, and did so shamelessly.

8. Following this attack and other malign acts during this period, the United States designated Iran as a State sponsor of terrorism and enacted legislation allowing U.S. victims of terrorism to sue States that provide support for such acts — this is the legislation that Iran challenges in this case. The families of the deceased and surviving victims of the Beirut bombing sued Iran in federal court in the District of Columbia to seek recovery for their losses. The opinion of the U.S. District Court paints a picture of the gravity and intensity of the attack and its impact on its victims. In addition to the immediate suffering of those who experienced the attack, the opinion describes the anguish of the victims' family members who learned of the explosion, waited to learn whether their family members had survived the attack, and for those least fortunate, brought their relatives home to bury them, honour them, and grieve their loss.

9. Relying on legislation that Iran challenges in this case, the family members and surviving victims holding judgments against Iran for the bombing sought to satisfy their judgments through attachment and enforcement proceedings. The specific proceeding that Iran makes the centrepiece of its case here is a judgment enforcement proceeding against assets in which Iran's central bank, Bank Markazi, had an interest. Iran — having provided support for the deadly attack against the peacekeepers and having boasted about it — now asks this Court to find that the U.S. court-ordered turnover of Bank Markazi's assets to the victims of that attack somehow violates the Treaty of Amity. Mr. President, Members of the Court, Iran's case must be understood in this context.

10. In setting out its case, Iran ignores the Beirut barracks bombing and other terrorist acts for which Iran provided material support despite the fact that these incidents are the reason why the United States adopted the measures Iran challenges. Iran's narrative is therefore wholly incomplete and misleading. Iran would have the Court focus selectively only on two sets of facts. One, that the Parties concluded the Treaty of Amity in 1955 with the expectation of a rich and mutually beneficial commercial and consular relationship based on enduring peace and sincere friendship. And two, that in 1996, the United States began enacting measures that, by virtue of Iran's designation as a State that repeatedly sponsored acts of international terrorism, restricted Iran's sovereign immunity in U.S. courts and enabled the turnover of its assets. Iran's narrative conveniently leaves out critical pieces of the picture.

11. To place Iran's case in its appropriate historical, factual and legal context, it is necessary for the Court to consider what Iran has so conveniently omitted. The friendly bilateral relationship between Iran and the United States, on which the 1955 Treaty of Amity was based, was fundamentally ruptured on 4 November 1979, with the seizure of the U.S. embassy in Tehran and the taking of hostages, which was the subject of this Court's decision in case concerning United States Diplomatic and Consular Staff in Tehran. While the hostage crisis was ultimately resolved with the signing of the Algiers Accords on 19 January 1981, and the hostages' release, the relationship between the United States and Iran could not be salvaged, as Iran has continued to engage in violent and destabilizing acts targeted at the United States, its nationals and its interests up to the present day. Iran's bad acts include support for terrorist bombings, assassinations, kidnappings and airline hijackings, the encouragement and promotion

of terrorism and other violent acts by Iran's most senior leaders, and violation of nuclear non-proliferation, ballistic missiles and arms trafficking obligations. Iran's malicious conduct cannot be set to one side. It is the lens through which both the Treaty of Amity and U.S. measures must be viewed.

B. The U.S. measures were designed to counter Iran's sponsorship of terrorism

12. Mr. President and Members of the Court, the measures Iran challenges in this case encompass a range of legislative, executive and judicial actions that respond to Iran's misconduct. The U.S. measures seek to hold State sponsors of terrorism like Iran accountable and make State sponsorship of terrorism costly in order to deter such acts in the future. Rather than repeat all of the measures, which are detailed in our written submission, I will provide an overview of the types of measures challenged by Iran and their purpose.

13. In 1996, Congress enacted an amendment to the Foreign Sovereign Immunities Act, or "FSIA", to provide for lawsuits against State sponsors of terrorism. As one Member of Congress stated in connection with this amendment: "We must make a clear statement that support for terrorism is unacceptable in the international community. Allowing lawsuits against nations which aid terrorists will allow us to increase the pressure against these outlaw states." This and other congressional statements to which I will refer are at tab 5 of your judges' folders.

14. Subsequently, as part of the Terrorism Risk Insurance Act of 2002, or "TRIA", following the September 11, 2001 terrorist attacks, the United States adopted enforcement measures for judgments entered under the 1996 amendment. The sponsoring Senator stated that "deterrence" was a central principle motivating the legislation. The FSIA was further amended as part of the 2008 National Defense Authorization Act to provide for a terrorism exception to the jurisdictional immunity of a foreign State. A Senator sponsoring this amendment to the FSIA stated that his proposed legislation was "an important tool designed to deter future state-sponsored terrorism". Finally, in 2012, Congress enacted the Iran Threat Reduction and Syria Human Rights Act, which specifically addressed issues related to the *Peterson* enforcement proceeding. The sponsor of that legislation cited the need to hold Iran accountable for its actions. The United States has taken these measures progressively over a period of years to enable victims of Iranian-sponsored terrorism to pursue some measure of accountability and redress in U.S. courts.

15. Similarly, U.S. Executive Order 13599, which was issued by President Obama and implements the National Defense Authorization Act of 2012, responds to serious concerns about Iranian behaviour and seeks to address Iran's use of its financial resources for troubling ends. That Order blocks the property of Iran and Iranian financial institutions in the United States, and was imposed to protect U.S. essential security interests by addressing Iran's illicit activities relating to the development of ballistic missiles and its provision of arms and other support to militant and terrorist groups.

16. Iran's characterization of this case seeks to discount this critical context. Iran makes cursory efforts — both in its Application and Memorial and in its response to the United States' preliminary objections — to cast this case as an anodyne legal dispute about the interpretation and application of a commercial and consular treaty. But these efforts do not withstand scrutiny. To the contrary, Iran's grievance goes to its long-standing disapproval of the U.S. domestic legal framework for allowing victims of terrorism to seek compensation in U.S. courts from Iran and Iranian State entities for their calculated cruelties.

17. The Treaty of Amity does not address the issues Iran seeks to litigate here. This case is not about the treatment of each country's companies and individuals doing business with the other in the context of a normal commercial and economic relationship. And, how could it be? The United States and Iran have not enjoyed the type of commercial and consular relations that the Treaty was intended to govern in decades. In an attempt to overcome this fundamental flaw in its case, Iran has approached this litigation by contorting the meaning, object and purpose of the Treaty to fit otherwise unrelated claims. It has invented novel and overly expansive theories of treaty interpretation, and dodged any direct engagement with the issue of its own sponsorship of terrorism and the relationship between that support and the U.S. measures at issue. These objections advanced by the United States warrant the Court's attention and resolution at this preliminary stage and provide a clear basis for ruling that this case should not proceed to the merits.

## II. Overview of U.S. objections to jurisdiction and admissibility

18. Turning now to the specific U.S. objections, I will take the opportunity to summarize those objections in brief and highlight a few key points.

### A. Objections to admissibility

19. As Mr. Bethlehem will address, the United States raises two objections to admissibility of Iran's Application and urges the Court to decline to adjudicate this case on the basis of these objections.

#### 1. Abuse of process

20. First, the United States objects to the admissibility of Iran's case on the grounds that it constitutes an abuse of process. This is because Iran's case does not come within the scope of the Treaty of Amity, and the friendly relationship on which the Treaty was predicated no longer exists. Iran's invocation of the compromissory clause in the Treaty is accordingly a misuse of the Court's judicial function.

21. Before proceeding to the next objection, I will make one additional point regarding Iran's cynical litigation tactics. Iran's unwillingness to be forthcoming with respect to the pleadings filed in the U.S. court proceedings in *Peterson* serves as yet another example of Iran's misuse of this Court's judicial function.

22. As the United States has explained in prior communications to the Court, the *Peterson* documents were filed in the U.S. judicial proceeding that concerned assets in which Iran's Central Bank, Bank Markazi, had an interest. Those assets were sought by plaintiffs holding judgments against Iran related to the 1983 bombing of the U.S. Marine barracks in Lebanon. In the present case, Iran claims that the turnover of those assets violated various provisions of the Treaty of Amity. The *Peterson* documents are, therefore, highly relevant to the United States ability to fully appreciate the factual and legal aspects of Iran's claims in this case and to properly defend itself before the Court. Despite the fact that certain of Iran's claims are based on the treatment of Bank Markazi in that litigation, Iran attempted to deny the United States and the Court access to the complete record of that proceeding, including Bank Markazi's filings. Those filings address a range of arguments relevant to Iran's claims in this case, including representations pertaining to matters such as Bank Markazi's structure and operations, the nature of its investment and dealings in the assets in question, and its articulation of how principles of sovereign immunity and certain provisions of the Treaty of Amity applied in relation to the disputed turnover of assets. At tab 4 of your judges' folders is the plaintiffs' Second Amended Complaint, which is representative of the types of issues that were raised over the course of the proceeding.

23. Bank Markazi's filings in the *Peterson* case contain arguments that undermine the very arguments Iran has presented to this Court. Because of Iran's efforts to prevent access to the documents, the United States did not have these highly probative documents during preparation and submission of our preliminary objections filing, and was forced to submit the documents to this Court on 19 September 2017. Despite the direct relevance of these documents to this case, Iran continued to object to the U.S. submission. This lack of transparency calls into question Iran's credibility as a litigant, and further highlights the abusive nature of Iran's case.

2. Unclean hands

24. The second objection to the admissibility of Iran's application is that Iran comes to the Court with unclean hands. Indeed, it is a remarkable show of bad faith that Iran now seeks relief from this Court because of the outcome of the *Peterson* proceeding, which arose from Iran's support for a brutal and deadly terrorist attack, an act about which the Iranian leadership boasted.

25. Iran has no response to this. This is telling, and we would urge the Court to draw from this the only appropriate inference — there is no rebuttal to the facts and evidence adduced by the United States demonstrating Iran's long-standing support for international terrorism.

B. Objections to jurisdiction

26. Mr. President, Members of the Court, I will now turn to summarizing briefly the U.S. jurisdictional objections.

27. Ms Kimball will start off with submissions addressing the Court's jurisdiction and questions of applicable law. As she will explain, the Court should dismiss for lack of jurisdiction *ratione materiae*, Iran's claims that concern matters that are plainly not encompassed by the Treaty. The exclusive basis asserted for the Court's jurisdiction in this case is the compromissory clause of the Treaty which limits the Court's jurisdiction to "any dispute ... as to the interpretation or application of" the Treaty of Amity. However, Iran grounds important aspects of its claims in customary international law, or seeks redress for measures that either are not governed by the Treaty articles that Iran invokes or fall within explicit exclusions set out in the text of the Treaty. These claims therefore should be dismissed for lack of jurisdiction.

28. This brings me to the three specific U.S. objections to jurisdiction.

1. Article XX (1) (c) and (d)

29. First, Mr. Daley will present on the U.S. objection to Iran's challenge to U.S. Executive Order 13599. This measure blocks the property and interests in property of the Government of Iran and Iranian financial institutions in the United States. It is excluded from the Treaty's coverage by the exceptions in Article XX, paragraph 1 (c), which applies to measures regulating production and trafficking in arms, and paragraph 1 (d), which applies to measures necessary to protect a party's essential security interests. Measures covered by these exceptions are excluded from the Court's jurisdiction as reflected in the Treaty's compromissory clause.

2. Sovereign immunity

30. Second, Professor Boisson de Chazournes will explain that there is no jurisdiction under the Treaty to adjudicate one of Iran's core grievances, namely the claim that the U.S. measures at issue offend customary international law principles of sovereign immunity. Iran's contention that the Treaty of Amity was intended to incorporate broad rules of sovereign immunity is unsupported. The application of well-established treaty interpretation rules clearly demonstrates that the Treaty of Amity, a commercial and consular treaty designed to facilitate trade and private investment, is not an instrument that establishes any rights to sovereign immunity protections for the Government of Iran or other Iranian State entities. Thus, all of

Iran's claims that are predicated on the U.S. purported failure to accord sovereign immunity to the Government of Iran, Bank Markazi or other Iranian State-owned entities are ripe for dismissal at this stage because these claims are not grounded in the Treaty.

### 3. Bank Markazi

31. Third, Professor Childress will address the U.S. objection to Iran's claims regarding the treatment of Bank Markazi. At the same time that Iran complains that the U.S. measures do not afford sovereign immunity to Iran and Iranian government entities, including Bank Markazi, Iran also complains that its central bank was not afforded the protections owed to "companies" under certain provisions of the Treaty. These two complaints cannot be reconciled.

32. Iran's argument that Bank Markazi is owed the protections afforded to "companies" under the Treaty is plainly wrong and runs counter to the requirements of Article 31 (1) of the Vienna Convention on the Law of Treaties to read the ordinary meaning of a treaty's terms "in their context" and "in light of [the treaty's] object and purpose". A proper analysis of the relevant Treaty provisions illustrates that the Parties never intended for the Treaty to govern the treatment of a State entity exercising sovereign functions. Accordingly, the Court should dismiss Iran's claims regarding the treatment of Bank Markazi.

### III. U.S. objections are exclusively preliminary

33. Mr. President, Members of the Court, Article 79 of the Rules of the Court provides for preliminary decision with respect to "[a]ny objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits". As my colleagues will explain, all of the U.S. objections to admissibility and jurisdiction are exclusively preliminary in nature and can — and should — be decided at this preliminary stage. The Court need not venture into the merits to find in favour of the United States.

34. Iran devotes a section of its written submission to enumerating elements of its claims that the United States allegedly does not contest. I wish to comment briefly on this to ensure our position is clear. The United States has addressed only those elements of Iran's claims that are relevant to the five U.S. preliminary objections raised at this stage. The United States has certainly not consented to Iran's interpretation of the various articles of the Treaty or other aspects of its case simply because the United States has chosen not to address those issues at this preliminary stage. To the extent that the Court were to decide that certain of Iran's claims should move forward, the United States reserves the right to pursue all other arguments or objections opposing Iran's claims, as appropriate.

35. Mr. President, Members of the Court, before concluding, I would like to address a recent development. Last week, Secretary of State Pompeo announced the U.S. decision to terminate the Treaty of Amity with Iran. For the reasons I have discussed and Ms Grosh will elaborate upon, Iran and the United States have not enjoyed the normal commercial and consular relationship that was originally envisioned. Iran's malign acts in the preceding decades and up to the present day have led to a prolonged breakdown in friendly relations. As recently as last month, the United States evacuated and temporarily relocated the personnel of its consulate in Basra, Iraq because of attacks by militias supported by the Iranian government. Mindful of the absurdity of continuing to enable Iran to use a treaty predicated on friendship to bring illegitimate cases, the United States decided to terminate the Treaty of Amity with Iran.

#### IV. Conclusion

Mr. President, Members of the Court, my colleagues will proceed with the U.S. presentation from here, providing an overview of the Treaty of Amity and setting out in detail the U.S. preliminary objections. I now ask that you call on Ms Grosh to continue the United States' submissions.

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### 3. Relocation of the U.S. Embassy to Jerusalem (*Palestine v. United States*)

On September 28, 2018, the Palestinians filed an Application instituting proceedings against the United States at the ICJ under the Vienna Convention on Diplomatic Relations' ("VCDR") Optional Protocol Concerning the Compulsory Settlement of Disputes, alleging that the U.S. decision on December 6, 2017 to relocate the U.S. Embassy in Israel to Jerusalem violated U.S. obligations under the VCDR. As reflected in the Court's scheduling order of November 15, 2018, excerpted below and available at <https://www.icj-cij.org/en/case/176>, Legal Adviser Jennifer Newstead wrote to the Court on November 2, 2018 to request that the Court dismiss the case as consent to the Court's jurisdiction is manifestly lacking in the absence of treaty relations between the United States and the Palestinians. As discussed in Chapter 4, the United States gave notification of its withdrawal from the Optional Protocol to the VCDR Concerning the Compulsory Settlement of Disputes. The United States remains party to the VCDR.

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Whereas, by a letter dated 2 November 2018, Ms Jennifer G. Newstead, Legal Adviser of the United States Department of State, informed the Court that, on 13 May 2014, following the Applicant's "purported accession" to the Vienna Convention, the United States had submitted a communication to the Secretary-General of the United Nations, declaring that the United States did not consider itself to be in a treaty relationship with the Applicant under the Vienna Convention; whereas she added that, on 1 May 2018, following the Applicant's "purported accession" to the Optional Protocol, the United States had submitted a similar communication to the Secretary-General of the United Nations, declaring that the United States did not consider itself to be in a treaty relationship with the Applicant under the Optional Protocol; whereas, in her letter, Ms Newstead observed that the Applicant had been aware of these communications by the United States before it submitted its Application to the Court; and whereas she concluded that, according to the United States, "it [was] manifest that the Court ha[d] no jurisdiction in respect of the Application" and that the case ought to be removed from the list;

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#### 4. Request for Advisory Opinion on the British Indian Ocean Territory

On February 28, 2018, the United States submitted its initial written statement in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Request for Advisory Opinion) before the ICJ. See *Digest 2017* at 305-6 regarding the U.S. objection to the request for an advisory opinion. On May 15, 2018, the United States submitted written comments. On September 5, 2018, the United States made its oral submission. Legal Adviser Jennifer Newstead presented the U.S. position. The February 28, 2018 U.S. Statement, excerpted below (with footnotes omitted) includes chapters describing the context of the referral to the ICJ; identifying reasons why the Court should decline to provide an advisory opinion; identifying issues the Court would need to consider were it to examine the questions referred; and demonstrating that a proper application of the test for identifying rules of customary international law reveals the absence of any international law rule in 1965 that would have made the establishment of the British Indian Ocean Territory (“BIOT”) unlawful. Submissions and transcripts are available at <https://www.icj-cij.org/en/case/169>.

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3.1 It is well established that the Court has jurisdiction under Article 65, paragraph 1, of its Statute to render an advisory opinion at the request of the General Assembly on “any legal question.”

3.2 Even where the Court’s jurisdiction is established, its authority to issue an advisory opinion is discretionary. The Court has recognized that the “discretion whether or not to respond to a request for an advisory opinion exists so as to protect the integrity of the Court’s judicial function.” In this regard, and despite this otherwise broad grant of advisory jurisdiction, both this Court and its predecessor, the Permanent Court of International Justice (“Permanent Court”), have recognized inherent limitations stemming from the Court’s judicial character. The Court not only has the power to decline an opinion, but also “the duty to satisfy itself, each time it is seized of a request for an opinion, as to the propriety of the exercise of its judicial function.”

3.3 The United States recognizes that the Court, mindful of its responsibilities as the principal judicial organ of the United Nations, has stated that only “compelling reasons should lead the Court to refuse its opinion.” The Court has indicated that the lack of an interested State’s consent could present such compelling reasons if responding to a request for an advisory opinion would circumvent the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.

3.4 The present case falls squarely within the very circumstances envisaged by the Court, such that it is difficult to see how the Court could exercise its advisory jurisdiction without circumventing the fundamental principle of consent to judicial settlement.

3.5 This Chapter is divided into three sections. Section A explains that the Court was not provided advisory jurisdiction to adjudicate disputes between States. Section B discusses the Court’s jurisprudence, which affirms that the advisory function should not be used to adjudicate disputes between States. Section C explains that the Court should decline to respond to the

General Assembly's request in this instance, because the request calls for the adjudication of a bilateral sovereignty dispute between Mauritius and the United Kingdom, and the United Kingdom has not provided its consent.

**A. The Court was not provided advisory jurisdiction under its Statute to adjudicate disputes between States.**

3.6 The Court's advisory jurisdiction is limited to "any legal question" asked by an authorized U.N. organ or agency. This language reflects a deliberate decision by the drafters of the Statute of the Court to adopt a narrower formulation of the provision granting advisory jurisdiction as compared to that of the Permanent Court.

3.7 Article 14 of the Covenant of the League of Nations empowered the Permanent Court to give an advisory opinion on "any dispute or question referred to it by the Council or by the Assembly." As one leading commentator has noted, this formulation envisaged two distinct types of opinion, one on "disputes" and another on "questions."

3.8 The drafters of the provisions that set forth the advisory jurisdiction of this Court, however, quickly dispensed with the phrase "any dispute or question" in favor of the narrower formulation "any legal question."

3.9 The drafters also rejected several proposals that would have extended the right to request an advisory opinion to individual States, either acting alone or in concert with others. The Informal Inter-Allied Committee, a group of experts charged with making recommendations on the structure and functions of the International Court of Justice, explained the reason for not allowing an individual State to request an advisory opinion as follows:

[G]iven the authoritative nature of the Court's pronouncements, *ex parte* applications would afford a means whereby the State concerned could *indirectly impose a species of compulsory jurisdiction* on the rest of the world.

3.10 States that adhered to the U.N. Charter and the Statute of the International Court of Justice accepted the Court's authority in principle to render an advisory opinion on "any legal question" when requested by an authorized U.N. organ or agency. But they did so with the understanding that there would be a clear demarcation between the Court's advisory jurisdiction on the one hand and its contentious jurisdiction on the other.

3.11 Those States, moreover, expected that the Court would preserve and protect its judicial character, including through application of necessary judicial safeguards, such as the fundamental principle of consent to judicial settlement. States did not intend to introduce through the Court's advisory jurisdiction a nonbinding substitute for the Court's consent-based contentious jurisdiction. To do so would have meant subjecting States to dispute settlement without their consent, and without the normal procedural safeguards for adjudicating bilateral disputes.

**B. The Court's jurisprudence affirms that the advisory opinion function should not be used to adjudicate disputes between States.**

3.12 It is a fundamental principle that a State is not obliged to allow its disputes to be submitted for judicial settlement without its consent. Both this Court and its predecessor have addressed the application of this principle in the advisory opinion context. In *Eastern Carelia*, the Permanent Court found that it could not exercise its advisory jurisdiction because the question put to it "concerns directly the main point of the controversy between Finland and Russia" and because "[a]nswering the questions would be substantially equivalent to deciding the dispute between the parties." This Court has affirmed the applicability of this principle to

advisory proceedings on a number of occasions, including most recently in *Construction of a Wall*.

3.13 This Court first addressed the important issue of rendering an advisory opinion in the absence of interested States' consent in *Interpretation of Peace Treaties*, in which Bulgaria, Hungary, and Romania contested the Court's power to render a response. There, the Court affirmed the fundamental principle of consent to judicial settlement and stressed the continuing validity of the expression of that principle as set forth in *Eastern Carelia*, but distinguished the facts of that case. It stated:

In the opinion of the Court, the circumstances of the present case are profoundly different from those which were before the Permanent Court of International Justice in the Eastern Carelia case (Advisory Opinion No. 5), when the Court declined to give an Opinion because it found that the question put to it was *directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties ...*

As has been observed, the present Request for an Opinion is solely concerned with the applicability to certain disputes of the procedure for settlement instituted by the Peace Treaties, and it is justifiable to conclude that it *in no way touches the merits of those disputes ...*

*It follows that the legal position of the parties to these disputes cannot be in any way compromised by the answers that the Court may give to the Questions put to it.*

3.14 As Judge Azevedo emphasized in his separate opinion, "the compelling reason which had led to the abolition of [the 'dispute' clause in Article 14] of the Covenant—i.e. the refusal to make use of the advisory function to decide a genuine dispute at law over the heads of the parties concerned—continues to retain its force, for it is the only means of avoiding a misuse of that function."

3.15 Twenty-five years later, in *Western Sahara*, the Court again reaffirmed the fundamental principle of consent to judicial settlement as a constraint on the Court's advisory function. Citing *Interpretation of Peace Treaties*, it stressed that the lack of consent, while not a jurisdictional bar in advisory cases, "might constitute a ground for declining to give the opinion if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion." ...

3.16 The Court has reaffirmed this language on several occasions, including most recently in *Construction of a Wall*. In reaching the conclusion in that case that a response would not have the effect of circumventing the principle of consent to judicial settlement, the Court highlighted that "the opinion [was] requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute."

3.17 Importantly, however, as Judge Owada stressed, it remains the case that rendering a response to a request would be incompatible with the Court's judicial function if doing so would be "tantamount to adjudicating on the very subject-matter of the underlying concrete bilateral dispute."

**C. The Court should decline to respond to the General Assembly's request because the request calls for the adjudication of a bilateral territorial dispute between Mauritius and the United Kingdom, and the United Kingdom has not provided its consent to judicial settlement by this Court.**

3.18 Applying the Court’s jurisprudence to the facts of this request, it is difficult to see how responding to the questions that have been posed would be compatible with the judicial character of the Court.

3.19 There is undoubtedly a bilateral territorial dispute between Mauritius and the United Kingdom concerning sovereignty over the Chagos Archipelago and the questions referred—however disguised—strike at the core of that dispute.

3.20 The request does not merely touch on or relate indirectly to the merits of the bilateral territorial dispute between Mauritius and the United Kingdom—it addresses itself to the central elements of that very dispute. When viewed in light of the history of the bilateral dispute discussed in Chapter II above, it becomes clear that the questions referred reflect an attempt on the part of Mauritius to repackage its claim to sovereignty advanced in other fora. As such, the questions put to the Court are “directly related to the main point of a dispute actually pending” between Mauritius and the United Kingdom, and “answering the question[s] would be substantially equivalent to deciding the dispute between the parties.”

3.21 In addition, as the Court noted in *Western Sahara*, the “origin and scope of a dispute ... are important in appreciating, from the point of view of the exercise of the Court’s discretion, the real significance” of a State’s lack of consent. It is notable in this regard that Mauritius first asserted its sovereignty claim against the United Kingdom as a State-to-State dispute over a decade after it gained its independence from the United Kingdom.

3.22 In contrast to the requests in *Western Sahara* and *Construction of a Wall*, the dispute between Mauritius and the United Kingdom did not arise during the proceedings of the General Assembly and in relation to matters with which the General Assembly was dealing. The General Assembly did consider and adopt a resolution pertaining to the Chagos Archipelago *prior* to Mauritius’s independence. However, when Mauritius’s application for U.N. membership was presented to the U.N. Security Council and General Assembly for consideration in 1968, there was neither any debate nor even mention of the territorial scope of the newly independent State of Mauritius, nor any suggestion of Mauritius’s decolonization as being “incomplete.”

3.23 Mauritius has pursued its sovereignty claim bilaterally since 1980, twelve years after its independence, and has since raised its claim to the Chagos Archipelago before various U.N. bodies. As far as the United States is aware, however, no U.N. organ has considered Mauritius or its claim to the Chagos Archipelago as falling within the United Nations’ decolonization agenda since Mauritius gained its independence in 1968, until the request for an advisory opinion was added to the General Assembly’s agenda on September 16, 2016.

3.24 The lack of U.N. General Assembly involvement in this matter for the decades following Mauritius’s independence, and the fact that a new General Assembly agenda item needed to be created in 2016 for consideration of this referral request, belie any assertion that a response to the General Assembly’s request is “necessary for [it] in [its] actions.”

3.25 It is quite clear that Mauritius sought an advisory opinion in order to advance its sovereignty claim against the United Kingdom, after failed attempts to seek adjudication of that claim in other fora. The views expressed by many U.N. Member States during the General Assembly debate on the request for an advisory opinion indicate that they understood this as the purpose of the request.

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3.28 This inquiry is particularly appropriate when, as discussed in Chapter IV below, the questions referred are not adequately formulated and require clarification as to which legal

questions are really in issue. An understanding of the General Assembly’s purpose in making the request would help to inform that determination, and hence to discern the type of advice the General Assembly is seeking. Statements made by members of the General Assembly in the context of the adoption of the referral resolution, along with the actions of the requesting body itself, are an important source of that understanding.

3.29 Increased scrutiny is called for in the exercise of the Court’s advisory jurisdiction in this instance because the dispute involves sovereignty over territory. Indeed, the Court emphasized this consideration in *Western Sahara*, where, in discussing Spain’s lack of consent, the Court stated that “[t]he issue between Morocco and Spain regarding Western Sahara is not one as to the legal status of the territory today ...,” and noted that the questions referred did not “relate to a territorial dispute ... between the interested States.” There, before responding to the General Assembly’s request, the Court first satisfied itself that “the request for an opinion [did] not call for adjudication upon existing territorial rights or sovereignty over territory.”

3.30 In sharp contrast, the questions posed in the present case invite an examination of the validity of the United Kingdom’s exercise of sovereignty over the Chagos Archipelago today, such that it would be difficult to form a response that would not be tantamount to adjudicating on the very subject matter of the territorial sovereignty dispute between Mauritius and the United Kingdom.

3.31 Allowing the advisory opinion process to be used to address territorial disputes—fifty years after the boundaries were established, as here—could open the door to the adjudication of any number of such disputes without the consent of interested parties. This attempt to circumvent the Court’s lack of contentious jurisdiction over a bilateral matter creates a potentially dangerous precedent, and could lead to the normalization of litigating bilateral disputes through General Assembly advisory opinion requests, even when the States directly involved have not consented to judicial settlement by the Court.

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On May 15, 2018, the United States submitted written comments responding to other submissions received by the ICJ in the matter. Excerpts follow from the introductory section of the U.S. submission made in May.

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1.5 Chapter II begins by highlighting important points of agreement among the written statements, including with respect to the circumstances that would warrant the Court’s exercise of its discretion to decline to respond to the General Assembly’s request. Those very circumstances are evident in this case, since the questions referred focus on a bilateral territorial dispute between Mauritius and the United Kingdom. Unless the Court can avoid addressing that dispute—which is difficult to imagine—responding to the request would circumvent the fundamental principle that a State is not obliged to submit its disputes for adjudication without its consent.

1.6 Chapter II then explains why none of the arguments in favor of responding to the questions referred dispense with the very serious concerns regarding the propriety of utilizing the

Court's advisory jurisdiction in a case that is, at its core, about an ongoing bilateral sovereignty dispute. There does not appear to be any disagreement in the written statements that this case bears directly on such a dispute. Indeed, many of the written statements affirm this reality, some going so far as to endorse the resort to the Court's advisory jurisdiction as an effort to resolve that sovereignty dispute. The United States and a number of other States, however, have underscored that the Court must proceed with great caution in the face of such an overt effort to circumvent the fundamental principle of consent to judicial settlement. Some States, including the United States, also cautioned that doing so could have the effect of blurring the deliberate distinction that was created between the Court's consent-based contentious jurisdiction and its advisory jurisdiction.

1.7 For these reasons, as the United States observed in its Written Statement, it is incumbent upon the Court to determine whether it could answer Question (a) in a manner consistent with the principle of consent to judicial settlement.

1.8 There is no doubt that answering Question (a) would embroil the Court in a bilateral dispute and that the United Kingdom has not consented to judicial settlement of that dispute by this Court. Of particular note, a number of the written statements acknowledge that the separation of the Chagos Archipelago would not have been unlawful if it reflected the free consent of the people of the territory. For its part, Mauritius suggests that the agreement, which both parties reaffirmed after Mauritius's independence, and which an arbitral tribunal concluded gave rise to binding obligations between the two States, did not or could not reflect such consent. But, as discussed in Chapter II, it would be inappropriate for the Court to conduct, in these advisory proceedings, an assessment of the validity of a bilateral agreement.

1.9 The position of the United States thus remains that the Court should decline to respond to the questions posed. That said, should the Court choose to respond to Question (a), the answer should be that the process of decolonization of Mauritius was lawfully completed in 1968. In its Written Statement, the United States set forth its analysis as to why the historical record supports this conclusion.

1.10 In Chapter III, the United States responds to arguments made in some of the written statements about whether international law supplied a rule at the relevant time that would have prohibited the establishment of the British Indian Ocean Territory (BIOT).

1.11 Were it to answer Question (a), the Court would need to ascertain the law as it existed at the relevant time. The written statements that addressed this issue generally agree that the relevant time would have been 1965 (when the United Kingdom established the BIOT) or, at the latest, 1968 (when Mauritius gained its independence), but present a range of views as to the state of the relevant law and how the Court might determine it.

1.12 Most of those submissions either did not accurately describe how the Court would determine a relevant rule of customary international law or drew incorrect conclusions from the historical record about state practice and States' contemporaneous beliefs about the law. As such, the submissions failed to demonstrate that a specific legal obligation existed at the relevant time that would have made the establishment of the BIOT unlawful.

1.13 Implicit in the way the various written statements approach the questions referred is a common understanding that the answer to Question (b) is linked to Question (a). This understanding supports the conclusion, as the United States explained in its Written Statement, that if the Court either cannot, for reasons of propriety or otherwise, provide an answer to Question (a), or if its answers Question (a) in the affirmative (*i.e.*, that the decolonization of Mauritius was lawfully completed in 1968), there is no need to answer Question (b).

1.14 The United States therefore does not deem it necessary to address Question (b) in any detail. Instead, in Chapter IV, the United States offers several observations on others' written statements, including identifying some assumptions that present an overly simplistic or incomplete view of the complex set of issues involved.

1.15 Chapter V concludes by again urging that the Court, in order to preserve the integrity of its judicial function, decline to respond to the request for an advisory opinion. The written statements submitted to the Court differ on the appropriate response to this request. But there is no disagreement that the questions bear directly and significantly on an ongoing bilateral sovereignty dispute over territory. Attempts to present the legal questions that are at issue in this dispute as ones that might guide the General Assembly in the exercise of its decolonization mandate neither alters that reality, nor displaces the principle of consent to judicial settlement as an important constraint on the Court's advisory jurisdiction.

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Oral proceedings in the case commenced on September 3, 2018 and the United States made a statement. The statement of Legal Adviser Newstead follows. Submissions and transcripts are available at <https://www.icj-cij.org/en/case/169>.

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2. We have heard a great deal in these proceedings about the long and difficult process of decolonization, and about the struggle faced by many formerly colonized countries. We have heard about the suffering endured by the Chagossians, who now live dispersed among a number of States. And the United Kingdom has described its programmes, including its agreement with Mauritius, for compensating the Chagossians. We have also heard about extensive litigation, including proceedings by Mauritius against the United Kingdom under the Law of the Sea Convention, and contentious proceedings it sought to bring before this Court.

3. These facts provide an important backdrop for this case. The worldwide struggle for freedom and independence after World War II was hard fought and hard won. Nothing I will say today is intended to diminish this remarkable achievement, which the United States strongly supported.

4. The task before the Court, however, is to decide how to address the General Assembly's referral of two questions. Since these questions go to the heart of a bilateral sovereignty dispute over territory, answering them would pose a fundamental challenge to the integrity of the Court's advisory jurisdiction.

5. My submission today will focus on why the Court should exercise its discretion to decline to answer the questions referred. Advisory jurisdiction was not included in the Court's Statute as a way to circumvent the fundamental principle of consent to adjudication of bilateral disputes. None of the participants here has adequately addressed how the Court could provide a substantive response without transgressing this principle. Mauritius, which spearheaded the referral, has conceded that the purpose of the request was to enable it to exercise sovereignty over the Chagos Archipelago.

6. In the view of the United States, the observations provided by the participants in these proceedings make clear that the Court has been invited to give an advisory opinion that would be tantamount to adjudicating the territorial dispute between Mauritius and the United Kingdom. As such, this is demonstrably a situation in which the exercise of advisory jurisdiction would be inappropriate.

7. Mr. President, Members of the Court, after developing this point, I will turn to address Mauritius's claim that a specific rule of customary international law had emerged by 1965 that prohibited the United Kingdom from establishing the British Indian Ocean Territory. To be clear, in our view, this is not an issue that the Court should address in the absence of consent by both Parties to this dispute. But if the Court does decide to reach the merits, our submission will clarify the appropriate methodology for ascertaining the state of the law as it stood more than 50 years ago and will apply that methodology to the historical record. This is something that many of the submissions have failed to do, or have done incorrectly in our view. When judged under the rubric set out in this Court's jurisprudence, the historical record does not support Mauritius's contention that a prohibition existed under customary international law at the relevant time.

8. In addition, I note the fact that a key element of the bilateral dispute between Mauritius and the United Kingdom is their 1965 Agreement regarding the Chagos Archipelago. Mauritius has sought to challenge the validity and effect of that agreement here, as it tried to do in the Law of the Sea arbitration. But this is precisely the type of challenge that is unsuitable for resolution in advisory proceedings. The United States respectfully submits that the Court should exercise its discretion to decline to answer the questions referred, lest it be drawn into a bilateral dispute over sovereignty in the guise of an advisory proceeding.

## **II. THIS CASE PRESENTS COMPELLING REASONS FOR THE COURT TO DECLINE TO PROVIDE THE OPINION REQUESTED**

9. Mr. President, Members of the Court, I will now turn to the Court's discretion to decline to provide the opinion, which resides in Article 65, paragraph 1, of its Statute.

10. I will focus on two areas where States have disagreed in these proceedings. First, they have disagreed about the significance of the bilateral dispute to the exercise of the Court's advisory jurisdiction. In this regard, I will explain that the questions referred relate so substantially and directly to that dispute that answering them would mean the Court has effectively dispensed with the principle of consent.

11. Second, States have disagreed about the applicability of the Court's jurisprudence to the present request. Some have emphasized that the Court has not found it necessary to exercise its discretion in prior advisory opinions where lack of consent was an issue. Those prior opinions are readily distinguishable, however, and this case raises exactly the issues that the Court has identified as factors that could lead it to decline to provide an opinion.

12. Following this discussion, I will touch briefly on the importance of the distinction between the Court's advisory and contentious jurisdictions, which the current Request seeks to erode.

### **A. The relevance of the relationship between the request and the bilateral sovereignty dispute**

13. Mr. President, Members of the Court, I turn first to the significance of the bilateral dispute to the exercise of the Court's advisory jurisdiction.

#### **1. The origin and scope of the dispute**

14. In its Advisory Opinion in *Western Sahara*, the Court stated that where a request for an advisory opinion relates to a bilateral dispute, and one of the parties to that dispute has not given its consent, the origin and scope of the dispute are important for appreciating the “real significance” of a State’s lack of consent. In this regard, I recall a few points about the origin and scope of this dispute:

(a) *First*, Mauritius gained its independence in 1968 and in the same year became a Member of the United Nations. When its application for United Nations membership was presented to the Security Council and the General Assembly, no State mentioned the territorial scope of the newly independent State of Mauritius or suggested that its decolonization remained “incomplete”. It was not until more than a decade after independence that Mauritius began to challenge the 1965 Agreement and to assert a sovereignty claim over the Archipelago.

(b) *Second*, prior to this case, Mauritius pursued its sovereignty claim against the United Kingdom through other legal avenues. Mauritius attempted to bring a contentious dispute before this Court, and the United Kingdom declined to consent. Mauritius also initiated arbitral proceedings under the Law of the Sea Convention, claiming that Mauritius alone possessed sovereign rights arising from the Archipelago.

(c) *Third*, the submissions of Mauritius and the United Kingdom in these proceedings, when read in light of their very similar submissions in the arbitration, reveal a direct relationship between the request for an advisory opinion and the main points of the bilateral dispute.

## **2. The history of the request in the General Assembly**

15. A review of the proceedings in the General Assembly that led to the present Request also attest to the understanding of many States and the General Assembly that the Request was aimed at resolving a bilateral dispute. Four points are notable in this regard.

16. *First*, the matter arose in the General Assembly only after Mauritius requested in 2016 that a new item be added to the agenda.

17. *Second*, the President of the General Assembly facilitated an understanding between Mauritius and the United Kingdom that the Assembly would not consider requesting an advisory opinion until the following year. It did so to allow the parties time to negotiate a resolution to their dispute.

18. *Third*, the Assembly took the matter back up in 2017 due to lack of progress between the parties to resolve the dispute.

19. *Fourth*, many States indicated that they understood the Request as seeking the Court’s assistance in resolving the bilateral dispute — whether they voted for, against, or abstain on the resolution itself.

## **3. The wording of the two questions in the General Assembly’s request**

20. Finally, the wording of the two questions presented to the Court also confirms that they are designed to invite the Court to adjudicate the bilateral dispute.

21. The first question refers to “the separation of the Chagos Archipelago from Mauritius” in 1965. This “separation” is central to Mauritius’s sovereignty claim, as it argued in the Law of the Sea arbitration and in its submissions to this Court.

22. The second question asks about the legal consequences of the United Kingdom’s “continued administration” of the Archipelago, and references a programme by Mauritius to settle Mauritian nationals there. These matters bear directly on sovereignty over the Archipelago, and it is difficult to discern how such consequences could be addressed without adjudicating the underlying dispute.

23. Mr. President, Members of the Court, far from dispelling concerns that the Request improperly invites the Court to adjudicate a bilateral dispute, Mauritius has been clear that this is precisely what it wants the Court to do. In Mauritius's own words, "sovereignty over the Chagos Archipelago is entirely derivative of, subsumed within, and determined by" the first question referred to the Court. If that is the case, the Court could not, consistent with its own jurisprudence, provide a response.

24. In short, this Request places the Court in an untenable position. It asks the Court to opine on a sovereignty dispute in an advisory context, in circumvention of the principle of consent. However, this situation is one that the drafters of the Court's Statute had the foresight to address by giving the Court the discretion, under Article 65, to decline to provide an opinion. This discretion was provided to "protect the integrity of the Court's judicial function".

### **B. The Court's jurisprudence**

25. Mr. President, Members of the Court, several States have reminded you that this Court has never declined to give an advisory opinion. And that is true. But the Court has repeatedly recognized that it has "the duty to satisfy itself, each time it is seised of a request for an opinion, as to the propriety of the exercise of its judicial function". In addition, the Court in those prior advisory opinions has identified circumstances that readily distinguish those cases from the present case and that should lead the Court to decline to issue an opinion here.

26. Before turning to the advisory opinions most relevant to this case, I will briefly address the *Namibia* case. As counsel for Mauritius noted, the United States supported the Security Council's request for an advisory opinion in that case. However, there is no parallel to be drawn from the facts of that case to the request now pending before the Court. That request did not concern a bilateral dispute, it concerned a territory that had been under a League of Nations mandate, and it addressed the obligations of States arising from South Africa's continued presence in Namibia after the mandate had been terminated.

#### **1. Western Sahara and the Wall cases**

27. As many participants have recognized, the Court's advisory opinions in the *Western Sahara* and *Wall* cases are more instructive. There are, however, important points of distinction between those cases and the present Request. In this regard, I will make three observations:

28. *First*, in *Western Sahara*, the Court emphasized that it could respond to the General Assembly's request because the dispute between Morocco and Spain was *not* about the current legal status of the territory and an opinion would *not* affect the existing rights of Spain. The Court emphasized that the questions did *not* relate to a territorial dispute nor did they call for the adjudication of existing territorial rights or sovereignty. As a result, the Court found that its response would *not* compromise the legal positions of the parties even though Spain had refused its consent. This case presents opposite circumstances. Mauritius *does* assert a claim to sovereignty today, it *does* seek to affect the existing rights of the United Kingdom, and this dispute *is* one over territory.

29. *Second*, in concluding in the *Wall* case that an advisory opinion would not have the effect of circumventing the principle of consent, the Court did not rely only on whether the request was situated in the context of a much broader set of issues. It also took care not to address permanent status issues, which were at the core of the underlying bilateral dispute between the Israelis and the Palestinians. In contrast, the submissions in this case demonstrate that sovereignty is at the core of the dispute between Mauritius and the United Kingdom, and cannot be separated from it.

30. *Third*, unlike in prior cases, the General Assembly has not addressed the decolonization of Mauritius since its independence in 1968, and has never engaged in the sovereignty dispute that arose over a decade later. In contrast, the Court will recall that in *Western Sahara*, the General Assembly had been actively considering the situation for more than a decade when the request was made, and the Court observed that the request in that case was “the latest of a long series of General Assembly resolutions dealing with Western Sahara”. In the *Wall* case, the Court likewise emphasized the United Nations’ “acute concern” with the question referred, given the General Assembly’s historic involvement in the future of Mandate Palestine. Although it is true that Mauritius has periodically reminded the General Assembly of its sovereignty claim to the Chagos Archipelago, the General Assembly itself has not been engaged in the matter, and certainly not to a degree that is comparable to its involvement in the matters at issue in the *Western Sahara* or *Wall* cases.

## **2. The relevance of the source of law at issue**

31. Mr. President and Members of the Court, Mauritius has also suggested that the Court could respond to this Request consistent with its jurisprudence because the territorial dispute can be “fully resolved exclusively by reference to the rules of international law on decolonization and self-determination”. Mauritius contends that this renders the dispute not “purely bilateral”, particularly when coupled with the *erga omnes* character of the obligations purportedly at issue.

32. However, this argument fails to account for the Court’s emphasis in its jurisprudence on the anticipated *effect* an advisory opinion may have on the principle of consent. If, as Mauritius concedes, the advisory opinion would have the effect of disposing of the bilateral dispute, then giving the opinion would, in the words of Judge Owada in the *Wall* case, be “tantamount to adjudicating on the very subject-matter of the underlying concrete bilateral dispute”. In such circumstances, the Court has a duty to decline to provide the opinion regardless of whether the substantive principles at issue may be of broader interest or importance.

33. Nothing in the Court’s jurisprudence suggests that the application of the consent principle hinges on the source of law a State may invoke to advance its claim. In fact, the Court has reached the opposite conclusion, upholding the consent principle even when the obligations purportedly in question had an *erga omnes* character. In *East Timor*, the Court found that it could not adjudicate the validity of a bilateral agreement — even one alleged to violate obligations *erga omnes* — absent the consent of the parties to that agreement. The Court explained that “the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things”. The Court also noted that “[w]hatever the nature of the obligations invoked”, the Court could not rule in a manner that “would imply an evaluation of the lawfulness of the conduct of [a] State” that had not given its consent to adjudication.

34. To summarize, Mr. President and Members of the Court, the approach advanced by Mauritius on the question of the Court’s discretion would seriously undermine the separation between the Court’s two distinct functions: on the one hand, to resolve disputes with the consent of the parties, and on the other to render legal advice to the United Nations. If, as Mauritius suggests, the fundamental principle of consent could be avoided by simply recasting a bilateral dispute as one involving matters of general interest to the United Nations, those bodies empowered to seek an advisory opinion could effectively impose a form of dispute settlement on States, absent their consent, through a simple majority vote. But the Court’s architects drew clear lines in the Statute between the Court’s contentious and advisory jurisdictions. They rejected proposals that would have authorized the Court to provide advisory opinions on “disputes” or

which would have had the effect of extending to States the authority to impose compulsory jurisdiction on other States without their consent.

**III. NO RULE OF CUSTOMARY INTERNATIONAL LAW HAD EMERGED IN 1965 (OR 1968) THAT WOULD HAVE PROHIBITED THE UNITED KINGDOM FROM ESTABLISHING THE BRITISH INDIAN OCEAN TERRITORY**

35. Mr. President, Members of the Court, I will now offer a few observations to assist the Court should it embark on the difficult task of attempting to address the first question referred: whether the decolonization of Mauritius was lawfully completed in 1968.

36. As our written submissions explain, there are a few key points on which States agree, and a number on which they do not. I will briefly summarize the areas of agreement before focusing on the disagreements, as these bear directly on this Court's jurisprudence on the development of international law.

37. Before beginning, I note that we are discussing the views of a limited subset of States. Some States felt it inappropriate for the Court to reach the questions referred. Other States provided only cursory views on these questions. What matters, of course, is not the total number of States advocating for one position or another, but the merits of their legal position.

38. Turning to the areas of agreement: States agree that, were the Court to reach this issue, it would need to ascertain the law as it existed at the relevant time. For these purposes, the relevant time is 1965, when Mauritius and the United Kingdom concluded their agreement regarding the Chagos Archipelago or, at the latest, 1968, when Mauritius became independent. In other words, the Court is being asked how it would view the matter if it were sitting in 1968, and not in 2018 on the basis of 50 years of progress in developing self-determination as a legal concept. In addition, most States that have addressed the issue acknowledge that multilateral treaties did not supply a relevant rule at the time, and the Court would thus need to focus on whether a relevant bilateral agreement existed between the parties or a relevant rule of customary international law had emerged. Finally, whatever the contours of international law at the time, the States that addressed the issue all agree that the boundaries of a non-self-governing territory could be altered prior to independence subject to the freely expressed wishes of the people.

39. In this respect, the Court has heard from the United Kingdom and Mauritius that much of their dispute centres on the relevance of their 1965 Agreement, which the Arbitral Tribunal found to be binding. If the Court were to address the merits, questions about the 1965 Agreement would play a central role. The United States' focus on customary international law is not meant to suggest otherwise. But it is, of course, Mauritius and the United Kingdom, and not third States, that are in the best position to explain their bilateral agreement.

40. Instead, the value we can add relates to the formation and content of customary international law, since the United States has been an active participant in promoting self-determination for the past century. During the 1950s and 1960s, the United States, along with many other States, expressed strong political support for decolonization and saw it as indispensable for securing freedom for peoples across the world. At the same time, States maintained markedly different views about whether specific international legal rules governing self-determination had yet developed.

41. Turning to the points of disagreement in these proceedings: States disagree on whether a specific rule of customary international law existed at the relevant time and as to how the Court might make this determination. In particular, they disagree on four key points:

— *First*, how the Court might determine whether a specific rule of customary international law existed at the relevant time.

— *Second*, whether resolution 1514 reflected or created a rule of customary international law and, specifically, whether it created a “right to territorial integrity” for non-self-governing territories.

— *Third*, whether there was a requirement for non-self-governing territories to exercise self-determination through a plebiscite.

— *Fourth*, exactly when States reached consensus on the existence and content of a right of self-determination.

**A. A rule of customary international law requires evidence of extensive and virtually uniform State practice and *opinio juris***

42. I turn to the first area of disagreement, over the proper test for determining a rule of customary international law. A number of States in these proceedings have simply asserted, without supporting evidence, that a relevant rule of customary international law existed at the relevant time. Others have misstated the methodology for determining the existence of such a rule.

43. As the Court explained in *North Sea Continental Shelf* and many times since, the emergence of a rule of customary international law requires two elements: “extensive and virtually uniform” State practice and *opinio juris*. Only where these two elements are satisfied can the Court identify a rule of customary international law.

44. Mr. President, Members of the Court, this seems a self-evident proposition. And as shown by the evidence on State practice and *opinio juris*, which is cited extensively in our written submissions, there was no rule of customary international law that would have prohibited the establishment of the British Indian Ocean Territory.

**B. The contemporaneous statements and practice of States do not indicate resolution 1514 reflected or created customary international law**

45. The second area of disagreement concerns whether resolution 1514 reflected or created a relevant rule of customary international law. Several States have cited resolution 1514, and other decolonization resolutions, in arguing that a specific rule of customary international law existed at the relevant time that would have prohibited the establishment of the British Indian Ocean Territory. But General Assembly resolutions do not themselves create customary international law. They could only be relevant to the extent that they reflected then existing *opinio juris*. The fact that the General Assembly cited particular resolutions in the question referred to the Court does not alter their non-binding nature. As the Court explained in *Kosovo*, it is for the Court, and not the General Assembly, to determine the law applicable to answering the referral.

46. To determine whether a particular resolution provides evidence of *opinio juris*, this Court has stressed that “it is necessary to look at its content and the conditions of its adoption” and that deducing *opinio juris* from “the attitude of States towards certain General Assembly resolutions” must be done “with all due caution”. The best evidence of States’ contemporaneous attitude toward a resolution are the statements they make during negotiation and adoption. Expressions of moral and political support are not enough. Instead, the Court must be presented with evidence sufficient to establish that States at the relevant time believed that international law required the conduct in question.

47. None of the resolutions from the 1950s and 1960s cited by Mauritius and others as evidence of a rule of customary international law meets this standard, and here I will offer three observations.

48. *First*, during negotiation and adoption of these resolutions, several States emphasized that the resolutions did not create a new rule of international law or indicated that the resolutions did not reflect their views. In particular, States debated the reference to a “right” of self-determination in paragraph 2 of resolution 1514. On Monday, counsel for Mauritius invited the Court to draw significance from the fact that only two States in these proceedings indicated that the right of self-determination had not yet crystallized in the 1960s. But counsel failed to address the relevant fact that, during the 1960s, other States expressed similar views, as noted in our written submissions.

49. *Second*, the fact that several States abstained on these resolutions means that the resolutions did not reflect a consensus among States, much less *opinio juris*. Some participants in these proceedings seek to dismiss the importance of abstentions, stressing instead that no State voted against resolution 1514 and other decolonization resolutions. However, the absence of votes against a resolution in no way establishes that it reflected *opinio juris*. States are often able to support a resolution, or at least to not vote against it, even where they may not agree with all of its terms, precisely because resolutions are not binding and States can explain their understanding of the resolution on the record.

50. *Third*, some States argue that paragraph 6 of resolution 1514 reflected or established an international legal right for non-self-governing territories. However, the negotiation records of this resolution do not demonstrate a consensus among States that paragraph 6 reflected a then existing international legal right with respect to non-self-governing territories.

51. Instead, some States saw paragraph 6 as a reaffirmation of Article 2, paragraph 4, of the United Nations Charter and nothing more. Others emphasized that *newly independent States* were entitled to territorial integrity, but did not suggest that paragraph 6 applied to non-self-governing territories. Two States understood paragraph 6 as *excluding* a right of self-determination for peoples of contested territories. From this mixed record, it would be impossible to conclude that States understood paragraph 6 to reflect or establish an international right of territorial integrity for non-self-governing territories.

52. State practice at the relevant time also illustrates that there was no right to territorial integrity that would have precluded the establishment of a British Indian Ocean Territory. Several territories changed their boundaries before or upon achieving independence and were endorsed by the United Nations.

53. For example, shortly before Jamaican independence, the United Kingdom made administrative changes to the colony of Jamaica by separating it from the Cayman Islands and the Turks and Caicos Islands. Jamaica opted for independence in 1962, and the two other territories freely decided to remain UK territories. The United Nations admitted Jamaica as a Member and treated the Cayman Islands and the Turks and Caicos Islands as separate non-self-governing territories. Neither the United Nations nor Member States complained that the separation of these territories from Jamaica and their maintenance as UK territories was inconsistent with resolution 151436.

54. On Monday, counsel for Mauritius suggested that international law required the people of Mauritius to be given the option of independence for a territory that included the Chagos Archipelago. But many territories in the 1960s were presented with options that did not include independence within prior territorial boundaries, and their independence was no less valid for that. For example, in British Cameroons, the United Nations held two separate plebiscites in the North and South and gave voters in each region only two options: independence by joining the Republic of Cameroon, or independence by joining Nigeria. These

plebiscites did not include an option of independence with prior boundaries, contrary to counsel's claim that such an option was legally required.

55. These examples demonstrate that, even if resolution 1514 were interpreted to address the adjustment of territorial boundaries, States did not engage in any consistent practice on that issue before or after resolution 1514 was adopted.

**C. At the relevant time, there was no international legal requirement to hold a plebiscite prior to independence**

56. I turn to the third area of disagreement. States generally agree that territorial boundaries could be changed prior to independence based on the freely expressed wishes of the people. However, a few States have asserted in these proceedings that the wishes of the people regarding such changes could only be determined through a plebiscite. And that is simply not consistent with history.

57. As this Court has previously advised, an essential feature of self-determination decisions is that they take into account the freely expressed wishes of the peoples concerned. As a matter of State practice, general elections as well as negotiations or agreements between the administering State and representative bodies were used throughout the post-war wave of decolonization. For example, during this period the United Kingdom relied on both referenda and general elections, and the United Nations supported the United Kingdom's methods. There is no dispute that, as a general matter, self-determination may be exercised through a variety of means.

58. Despite this history, Mauritius and a few other States have argued that there is an exception to this general principle when a territory's boundaries change prior to independence. They rely primarily on examples of the trust territories where the General Assembly called for plebiscites, such as those in the British Cameroons and Ruanda-Urundi. However, these States fail to adequately explain why a plebiscite was not required for Jamaica, Turks and Caicos, and the Cayman Islands. Nor do they explain why the General Assembly never called for a plebiscite for Mauritius in any of the resolutions mentioning Mauritius between 1965 and 1967.

59. In Mauritius, independence was achieved through decisions by its elected representatives following a general election in which the parties favouring independence achieved a clear majority. After independence, Mauritius was admitted to the United Nations as a Member State without dissent. No State at the time contended that Mauritius's independence was incomplete or that its decision to become independent did not reflect the wishes of its people. There is no basis for the Court to advise now, 50 years later, that a different process should have been used.

**D. States continued to disagree about the existence and content of a right of self-determination until 1970, with the adoption of the Friendly Relations Declaration**

60. Mr. President, Members of the Court, I turn to the fourth area of disagreement, whether States reached consensus about the existence and content of a right of self-determination prior to 1970. Although many States in these proceedings have focused on resolution 1514 of 1960, it is the Friendly Relations Declaration, adopted in 1970, that marks the turning point for the emergence of a right to self-determination under customary international law. The Declaration articulated, for the first time with the consensus support of all States, the specific elements of the "principle of equal rights and self-determination of peoples".

61. The negotiating record of the Declaration, which is cited in detail in our Written Comments, undermines any argument that consensus about resolution 1514 or self-determination had been reached by 1965 or even 1968. Through the late 1960s, key aspects of self-

determination remained unsettled, such as the peoples to which the right extended, the status options available to such peoples, and whether force could be used to achieve self-determination. States also continued to disagree about whether self-determination constituted a legal right and whether resolution 1514 could be regarded as reflecting international law. In fact, most aspects of the self-determination provision of the Declaration remained unresolved until 1970.

62. In addition, the formulation of self-determination in the Declaration departed in material ways from resolution 1514, as shown by the United Kingdom on Monday. In fact, the Declaration did not even mention resolution 1514.

63. Mr. President and Members of the Court, Mauritius conspicuously made no mention of the Friendly Relations Declaration on Monday. Its written submissions likewise do not address the Declaration's negotiation history and gloss over the differences between it and resolution 1514. That is likely because the historical record simply does not support the conclusion that *opinio juris* among States was reached prior to 1970, or that States had engaged by that time in extensive and virtually uniform State practice.

64. Contrary to some States' assertions, the Court has never held otherwise in its opinions addressing self-determination. Although the Court discussed the evolution of the principle as early as 1971 and 1975 in the *Namibia* and *Western Sahara* Opinions, it did not hold that a customary international law rule crystallized before the adoption of the Declaration in 1970, much less one specific enough to have prohibited the establishment of the British Indian Ocean Territory. And nothing in the Court's treatment of self-determination in later cases — in *East Timor*, the *Wall*, and *Kosovo* — indicates that a right of self-determination had crystallized prior to 1970.

65. Mr. President, Members of the Court, Mauritius has repeatedly drawn attention to the fact that our written submissions, alongside those of the United Kingdom, are in the minority in arguing that no relevant rule of customary international law existed. However, the United States respectfully submits that our conclusions about the law are based on a rigorous assessment of the evidence of State practice and *opinio juris* in accordance with the jurisprudence of the Court.

66. Even if one could conclude that there was a growing consensus in 1965 or 1968 regarding the existence of a right of self-determination in international law, there was no consensus as to the specific rule that Mauritius asserts here: that the United Kingdom was required to hold a plebiscite prior to establishing the British Indian Ocean Territory. Further, there was no extensive and virtually uniform State practice.

#### **IV. CONCLUSION**

67. Before concluding, I would like to briefly address the assurances offered by Mauritius that it is prepared to accept the continued operation of the military facility on Diego Garcia and recognizes the facility's role in supporting international and regional security. As stated in our Written Comments, the United States has operated this facility jointly with the United Kingdom for decades, and we agree that it continues to play a critical role in the maintenance of peace and security, both in the Indian Ocean region and beyond. Mauritius neglects, however, to note how the United States has responded to those assurances. And on this issue, I refer the Court to our written submissions. In addition, I note that offering those assurances underscores the fact that Mauritius is asking the Court to adjudicate its sovereignty claim through the guise of an advisory opinion.

68. Mr. President, Members of the Court, during these proceedings we have heard a great deal about a turbulent but inspiring period in history. However, the task before the Court is clear: to decide how to address the referral by the General Assembly of two questions that go to the

heart of a bilateral sovereignty dispute over territory. There is no mistaking that these questions seek to engage the Court’s advisory jurisdiction to resolve this dispute without the consent of both Parties. Answering the questions would accordingly run counter to the Court’s mandate, its jurisprudence and the fundamental principle of consent to judicial settlement.

69. The United States thus urges the Court, in light of these compelling circumstances, to exercise its discretion to decline to issue the opinion requested.

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## C. INTERNATIONAL LAW COMMISSION

### 1. ILC Draft Conclusions on the Identification of Customary International Law

As discussed in *Digest 2016* at 278-80, the United States engaged in a detailed review of the draft conclusions and commentary adopted in 2016 by the International Law Commission (“ILC”) regarding the identification of customary international law. On January 5, 2018, the United States formally submitted its comments on the ILC’s Draft Conclusions on the Identification of Customary International Law. The U.S. comments are excerpted below (with footnotes omitted) and are available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>. See *infra* for remarks by Legal Advisor Jennifer Newstead on the report of the ILC on its 70th Session on October 31, 2018, which also touch upon the U.S. comments on the Draft Conclusions on the Identification of Customary International Law.

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The United States believes that identifying whether a rule has become customary international law requires a rigorous analysis to determine whether the strict requirements for formation—a general and consistent practice of States followed by them out of a sense of legal obligation—are met. Although there is no precise formula to indicate how widespread and consistent a practice must be, the State practice must generally be extensive and virtually uniform, including among States particularly involved in the relevant activity (*i.e.*, specially affected States). This high threshold required to establish that a particular rule is customary international law is important to all aspects of analyzing or otherwise identifying customary international law.

Against this background, we agree with many of the propositions in the Draft Conclusions and commentaries. The Commission and its Special Rapporteur have produced an impressive draft that is already contributing to a better understanding of the formation and identification of customary international law. However, the United States continues to have serious concerns regarding certain issues addressed in the Draft Conclusions and commentaries. We are particularly concerned about Draft Conclusions and commentaries that we believe go beyond the current state of international law such that the result is best understood as proposals for progressive development on those issues. Although recommendations regarding progressive development are appropriate in some Commission topics, we believe that they are not well-suited to this project, whose purpose and primary value, as we understand it, is to provide non-experts in international law, such as national court judges, with an easily understandable guide to the

established legal framework regarding the identification of customary international law. ...To the extent that the Commission wishes to include recommendations with regard to progressive development in its conclusions and commentary on this topic, we believe it is essential that such recommendations be clearly identified as such and distinguished from elements that reflect the established state of the law or that reflect existing legal methodology.

We take this opportunity to address the most significant of our concerns regarding the Draft Conclusions and commentaries. We note that our failure to comment on any particular aspect of the commentaries should not be taken as U.S. agreement with it.

### **Practice of International Organizations**

The United States believes that Draft Conclusion 4 (Requirement of practice) is an inaccurate statement of the current state of the law to the extent that it suggests that the practice of entities other than States contributes to the formation of customary international law. In particular, the statement in paragraph 1 that “it is *primarily* the practice of States that contributes to the formation, or expression, of rules of customary international law” (emphasis added) inaccurately suggests that entities other than States contribute to the formation of customary international law in the same way as States. In addition, the statement in paragraph 2 that “[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law” inaccurately suggests that international organizations may contribute to the formation of customary international law in the same way as States.

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...In this regard, we have concerns in at least five respects.

The first way in which the proposition that the practice of international organizations contributes to the formation and expression of customary international law is not adequately developed concerns when it is that such contributions occur. Draft Conclusion 4, paragraph 2, states that “[i]n certain cases” the practice of international organizations contributes to the formation, or expression, of rules of customary international law. ... Since the mandates of international organizations are generally carefully negotiated in treaties, we would be concerned by a novel interpretation of international law that would implicitly and retroactively expand the mandates of international organizations in this unclear way. ...

The second way in which the proposition is not adequately developed is that the Draft Conclusions and commentary fail to address how one would determine the *opinio juris* of an international organization. If the practice of an international organization ever directly contributed to the formation or expression of customary international law, it would only be when the international organization engages in the practice out of a sense that it has the legal obligation to do so. See Draft Conclusion 9. The question that arises is how to determine whether an international organization has the requisite *opinio juris*. Is it the *opinio juris* of the secretary general (or equivalent), the secretariat, all member States, or a subset thereof? This crucial question is not addressed in the Draft Conclusions or commentary, and as noted above, is not, in our experience, addressed expressly in the mandates of international organizations.

The third way in which the proposition is not adequately developed is the failure to articulate the types of conduct by international organizations that might constitute practice for the purpose of Draft Conclusion 4. International organizations are very different from States in that they are created by and composed of States and do not have distinct branches of

government. Therefore, the forms of State practice discussed in Draft Conclusion 6 do not all have clear analogues in the activities of international organizations.

The fourth way in which the proposition is not adequately developed concerns the consequences for a traditional analysis of saying that the practice of some or all international organizations contributes to the creation or expression of customary international law. ...

The fifth way in which the proposition is not adequately developed is the failure to consider the precise range of practice deemed relevant in conducting a customary international law analysis. The practice of *all* States is relevant to whether there is a general and consistent State practice, and the task of analyzing State practice is made easier since they number fewer than 200. By contrast, the Commission's text has paid no attention to how such an approach would operate with respect to international organizations. Indeed, we believe that the Commission's approach unnecessarily confuses matters by implying that every time one engages in an analysis of the existence of a rule of customary international law, it is necessary to analyze not just State practice, but the practice of hundreds if not thousands of international organizations with widely varying competences and mandates.

Finally, the United States believes that the discussion in paragraph (8) of the commentary demonstrates why the better approach is to recognize that it is the practice of States within international organizations that is the practice (with *opinio juris*) that contributes to the formation and expression of custom, not the practice of the international organization as such. That paragraph argues that, in weighing the practice of an international organization, one should consider the number of member States and their reaction to the practice of the international organization plus whether the organization's practice is carried out on behalf of the member States, whether the members States have endorsed the practice, and whether the practice is consonant with that of member States. In other words, one should look through the international organization to its member States to see how to value the practice of the international organization. We believe that, as the discussion in paragraph (8) suggests, what is really of relevance is the practice and *opinio juris* of the member States themselves, not the practice of the international organization.

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### ***Opinio Juris* and "Rights"**

The United States notes that the State practice that contributes to the formation of customary international law has often been referred to historically as practice that is undertaken out of "a sense of legal obligation." The Draft Conclusions and commentaries expand this language to include practice undertaken with a sense of legal right. ...

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The United States agrees, in principle, that international law recognizes that States have certain rights (such as the inherent right of self-defense, or navigational rights and coastal state entitlements under the law of the sea), and that States exercising those rights may do so with the legal view that they are legally entitled to do so. However, we believe that, in this context, expressly including the concept of a legal right in Draft Conclusion 9 is unnecessary because States have generally understood the phrase undertaken out of "a sense of legal obligation" to encompass, where appropriate, State practice undertaken out of a sense of legal right or

obligation (or, in the words of the International Court of Justice, a “recognition that a rule of law or legal obligation is involved”). For example, one State’s legal obligation can sometimes be characterized as a right of other States (*e.g.*, one State’s obligation not to commit acts of aggression is also the right of other States to be free from acts of aggression), and vice versa. Adding “right or” to the Draft Conclusion risks creating the misimpression that the concept of legal rights is not already contemplated in the phrase “a sense of legal obligation.”

Addition of the phrase “right or” is also potentially confusing by suggesting that the same inquiry into State practice and *opinio juris* to identify whether States *must* act in a certain way is also needed to ascertain whether States *may* act. The United States believes that it is important that the Draft Conclusion and commentary adhere to common, widely used language on this issue, both to avoid suggesting any conflict with existing State practice and in order to avoid being misunderstood to affect the longstanding principle that States are free to act in the absence of a legal restriction. . . .

Given the potential for misunderstanding on this issue and the longstanding use of “a sense of legal obligation,” we therefore believe the text of the Draft Conclusion should retain the common formulation and omit “right or,” which was not found in the Special Rapporteur’s initial draft of the Draft Conclusion. We believe the commentary should then explain that the widely used phrasing “a sense of legal obligation” can encompass not merely legal obligations but also, in appropriate circumstances, legal rights. The commentary should also be explicit that, where there is no legal restriction, a State need not identify a specific customary international law right to justify its action, but instead the State may rely on the general principle that States are free to act in the absence of legal restrictions.

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**Draft Conclusion 5 (Conduct of the State as State practice), Commentary paragraph (5).**

The United States has concerns with the statement in paragraph (5) of the commentary to Draft Conclusion 5, which asserts that “[p]ractice must be publicly available or at least known to other States in order to contribute to the formation and identification of rules of customary international law.” The statement does not indicate what is meant by the purported requirement that practice be “publicly available” and no authority is cited to support it. The fact that the practice might not otherwise be “publicly available” or known to some would not, in our view, preclude its relevance to the formation and identification of customary international law. For this reason, we suggest that the sentence either be deleted or revised accordingly.

**Draft Conclusions 6 (Forms of practice) and 10 (Forms of evidence of acceptance as law (*opinio juris*))—Inaction**

The United States shares the concerns reflected in the statements of many States before the General Assembly’s Sixth Committee in 2016 regarding the circumstances in which State inaction should be considered either State practice or evidence of *opinio juris* for the purpose of the identification of customary international law. We agree that great caution is appropriate because of the many different factors and motivations that may lead a State to decline to take action, particularly in the international arena.

With regard to inaction as State practice, we agree with the statement in paragraph (3) of the commentary to Draft Conclusion 6 that “only deliberate abstention from acting may serve” as State practice. Therefore, in order for a State’s inaction to “count” as State practice, it must be

shown that the State had full knowledge of the facts and deliberately declined to act.

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Situations in which a State's inaction reflects the State's *opinio juris* are even more exceptional than those situations in which the State's inaction is deliberate and thus may constitute practice. Most State behavior (both action and inaction) is not motivated by international legal considerations. Therefore, a State's failure to act rarely evidences its views on international law. For example, one could not infer from a State's decision not to exercise diplomatic protection in a given circumstance that the State had concluded a particular act (a regulation or other measure) was not wrongful under international law. ...

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#### **Draft Conclusion 7 (Assessing a State's practice)**

The United States is concerned that paragraph 2 of Draft Conclusion 7 could be misread to suggest that States with varying practice are afforded less weight relative to the practice of other States under customary international law. A State with varying practice might not support an asserted rule to the same degree as a State whose practice consistently supports the rule. However, it seems inconsistent with the principle of the sovereign equality of States to say that the former State's practice is of less weight than the latter. The former's "weight" is merely placed in support of a different legal rule, or the absence of a rule. ...

#### **Draft Conclusion 8 (The practice must be general)**

The United States continues to believe that Draft Conclusion 8 should define more clearly the quantum and quality of State practice that is required to identify a rule of customary international law. We do not believe that "sufficiently" in the first paragraph of the Draft Conclusion is adequate for this purpose—indeed, it begs the question of what degree of widespread and representative practice is "sufficient" to meet the standard. Rather, the Draft Conclusion should incorporate the "extensive and virtually uniform" standard articulated by the International Court of Justice in the *North Sea Continental Shelf* cases, as it is widely recognized by States as the threshold that generally must be met to demonstrate the existence of a customary rule.

The United States also believes that the important role of specially affected States should be addressed in the Draft Conclusion itself. A requirement that the practice of specially affected States be considered is an integral part of the *North Sea Continental Shelf* standard. Moreover, as noted in the commentary at paragraph (4), "[i]t would clearly be impractical" to determine the existence or content of a rule of customary international law without considering the practice of the States most engaged in the relevant activity. Further, although the commentary makes passing reference to specially affected States in paragraph (4) and footnote 297, we believe that the Draft Conclusions and commentary may lead to confusion by defining what it means for practice to be "general" in the Draft Conclusion with no reference to specially affected States, but then suggesting their practice is "an important factor" in paragraph (4) of the commentary and only using the term "specially affected" in a footnote.

Finally, the United States believes that Draft Conclusion 8 should explicitly acknowledge that the practice of States that does not support a purported rule is to be considered in assessing whether that rule is customary international law. It is critical that "negative practice" be given

sufficient weight. Just as seeking contrary evidence to disprove a hypothesis is a sound methodological practice that is part of the scientific method, consideration of contrary evidence should also be part of sound methodology for identifying customary international law.

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### **Draft Conclusion 10 (Forms of evidence of acceptance of law (*opinio juris*)—Other Issues**

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The United States wishes also to note with regard to paragraph (5) of the commentary to Draft Conclusion 10 that caution must be exercised in assessing what constitutes evidence of the *opinio juris* of the State. For example, official government publications frequently (if not most commonly) reflect policy and domestic legal considerations rather than, or in addition to, any international law factors. Moreover, as the United States noted in response to the ICRC's *Customary International Humanitarian Law* study, "[a]lthough [military] manuals may provide important indications of State behavior and *opinio juris*, they cannot be a replacement for a meaningful assessment of operational State practice in connection with actual military operations." Similarly, decisions of national courts are generally based on domestic law, rather than international law. Evidence must therefore be carefully assessed to determine whether it in fact reflects a State's views on the current state of customary international law.

In addition, in many instances, limited information about the full range of relevant State practice or *opinio juris* should warrant caution in reaching conclusions about whether a customary law rule has formed. Some practice of States may be known to other States but not otherwise publicly available. In addition, most legal advice that is given within the executive branches of governments is provided on a confidential basis. Care must be taken to account for all relevant practice and *opinio juris*, even such practice and *opinio juris* as may be inaccessible to the public, in reaching conclusions about whether a customary law rule exists.

#### **Draft Conclusion 11 (Treaties)**

The United States agrees with the text of Draft Conclusion 11 (Treaties) and believes it accurately reflects the ways in which a treaty provision may come to reflect a rule of customary international law.

We are, however, concerned about aspects of the commentary to the Draft Conclusion.

First, we believe that the last phrase of the first sentence of paragraph (3) of the commentary ("treaties that have obtained near-universal acceptance may be seen as particularly indicative in this respect") and accompanying footnote should be deleted. We believe that this passage is likely to be misunderstood to suggest that widely ratified treaties most likely reflect customary international law norms, when that is not the case. Similarly, we believe that the quotations included in footnote 323 may inaccurately suggest that the requirement to demonstrate both a general practice and acceptance as *customary international law* may be bypassed in the case of widely ratified treaties.

Second, the last sentence of paragraph (3) of the commentary should be edited to replace "participation" with "ratification," which would be more precise. "Participation" could be misunderstood to suggest that a treaty negotiated by only a handful of States is likely to be influential, when it is not. In addition, this paragraph should be supplemented to observe that

mere ratification by States of a treaty does not itself reflect that particular provisions of the treaty may correspond to customary international law. To the extent, for example, that particular provisions of a widely ratified treaty are not implemented in practice by States parties to the treaty, such lack of implementation would cast doubt on the conclusion that the requisite State practice existed to establish that the treaty rules in question reflected customary international law.

Third, with respect to Paragraph 2 of the Draft Conclusion on rules set forth in multiple treaties, we strongly agree with the statement in paragraph (8) of the commentary to the effect that the fact that a rule is set forth in a number of treaties does not create a presumption that the rule is reflective of customary international law. Indeed, the need to repeat the rule in many treaties may be evidence of exactly the opposite—that the rule is not customary international law. In order to determine whether an oft-repeated treaty provision is a customary rule, the same assessment of State practice and *opinio juris* is required as for any other potential customary rule. It is not sufficient to show that States have treaty obligations. States must be shown to have expressed the view that they have an obligation under customary international law as well.

**Draft Conclusion 12 (Resolutions of international organizations and intergovernmental conferences)**

The United States appreciates the care with which the Commission and Special Rapporteur have addressed the question of resolutions of international organizations and intergovernmental conferences as evidence of customary international law. The United States agrees that such resolutions may provide relevant information regarding a potential rule of customary international law, most likely regarding the *opinio juris* of States, although potentially also their practice. However, as the Draft Conclusion and commentary reflect, resolutions must be approached with a great deal of caution. The United States notes that the UN General Assembly alone adopted 329 resolutions in its 71<sup>st</sup> session. By necessity, many resolutions of international organizations and conferences are adopted with minimal debate and consideration and through procedures (such as by consensus) that provide limited insight into the views of particular States. Moreover, because of the volume of resolutions and the limited capacity of States, the choice of whether to support or oppose a resolution may be made for political or other reasons in lieu of a legal analysis of its content, or despite disagreement with the articulation or assessment of a purported rule of customary international law addressed therein. As a result, even widely supported resolutions may provide limited or ambiguous insight into the practice and *opinio juris* of the States that support them. As a result, they must be approached with a degree of skepticism when proffered as evidence of State practice or *opinio juris*. Such resolutions are certainly insufficient on their own to prove the existence of a customary law rule. It must be established that the provision corresponds to a general practice that is accepted as law (*opinio juris*) as stated in Draft Conclusion 12.

In order to reflect the caution with which resolutions should be approached when assessing a potential customary international law rule, and consistent with the language of the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion cited in paragraph (5) of the commentary, the United States believes that the words “in certain circumstances” should be added to the second paragraph of Draft Conclusion 12. ...

**Draft Conclusions 13 (Decisions of courts and tribunals) and 14 (Teachings)**

Draft Conclusions 13 and 14 address circumstances in which decisions of courts and tribunals and teachings may serve as subsidiary means for the identification of customary international law rules. The commentaries to these Draft Conclusions appropriately note the

important point that (except where national court decisions may constitute State practice) these are not themselves sources of international law, but rather are sources that may help elucidate rules of law where they accurately compile and soundly analyze evidence of State practice and *opinio juris*. In line with this point, we recommend that the Commission clarify in the commentary some of the limitations on the value of judicial opinions as subsidiary means in efforts to identify customary international law.

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**Draft Conclusion 15 (Persistent objector), Commentary paragraph (9)**

The United States agrees with the observation in paragraph (9) of the commentary to Draft Conclusion 15 that assessing whether an objection to a customary law rule has been maintained persistently must be done in a pragmatic manner, bearing in mind the circumstances of each case, and with its important affirmation that States cannot “be expected to react [restate their objection] on every occasion, especially when their position is already well known.” In this context, we are concerned that the particular example used in paragraph (9) involving “a conference attended by the objecting State at which the rule is reaffirmed” may be misleading. In our view, it would rarely, if ever, be necessary for a State to object at a particular conference to maintain its status as a persistent objector to a rule of customary international law accepted by other States. For example, a State might decline to make a statement at a diplomatic conference for a variety of political or practical reasons that do not evince a legal view, and it seems strange that a statement after the conference would not have the same effect under customary international law as a statement at the conference. More generally, the example could misleadingly suggest that there is a particular significance to international conferences as fora for practice relevant to the formation of customary international law, which we do not believe to be the case. Accordingly, we believe this example should be deleted from the commentary.

**Draft Conclusion 16 (Particular customary international law)**

Draft Conclusion 16, titled “Particular customary international law,” is also of concern for the United States for two reasons. First, we question whether paragraph 2 of the Draft Conclusion adequately defines when a rule of particular customary international law should be determined to exist. Notably, by stating only that “it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*),” the Draft Conclusion leaves open the nature of the *opinio juris* that must be held by the States concerned. As a result, it is unclear whether the *opinio juris* requirement would be met if the States concerned simply mistakenly believe the rule is a rule of general customary international law or whether they must correctly understand the rule to apply among themselves only.

Our second concern is regarding the ideas of bilateral custom and custom among groups of States other than regional groups. The commentary does not provide any evidence that State practice has generally recognized the existence of bilateral customary international law or particular customary law involving States that do not have some regional relationship. In this regard, we appreciate the language in paragraph (5) of the commentary that “there is no reason *in principle* why a rule of particular customary international law should not also develop” among States linked by something other than geography (emphasis added). However, we do not believe this language will make clear to the reader that particular customary international law among States other than those linked by geography, and bilateral customary international law generally,

are theoretical concepts only and are not yet recognized parts of international law. We believe that it is important that this fact be made clear in the commentary to avoid confusing readers.

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## 2. ILC's Work at its 70<sup>th</sup> Session

Legal Advisor Jennifer Newstead delivered remarks at a meeting of the Sixth Committee on the Report of the International Law Commission on the Work of its 70<sup>th</sup> Session on October 31, 2018. She reflected on the role of the ILC on its 70<sup>th</sup> anniversary; addressed concerns regarding the working methods of the ILC; discussed the topics on its current program of work, including identification of customary international law, subsequent agreements and subsequent practice in the interpretation of treaties, and peremptory norms of general international law; and expressed concerns about some new proposed areas of work. Her remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-82-report-of-the-international-law-commission-on-the-work-of-its-70th-session/>. See *supra* for U.S. comments on the ILC Draft Commentary on the Identification of Customary International Law and Chapter 4 of this *Digest* for the U.S. comments on the ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice.

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Before I begin, I would like to congratulate the Commission on its 70<sup>th</sup> anniversary. It was an honor to be part of the commemorative events here in New York in May. On behalf of the United States, I extend my thanks to the members of the Commission for their dedication to international law. Similarly, the United States extends its appreciation to the Office of Legal Affairs, and particularly the Codification Division, for its efforts in this regard, including through critical support for the International Law Commission. Our discussions here in this Committee offer a reminder of the vital role that the Commission can play in our collective efforts to address today's global challenges.

The celebrations this year have offered an opportunity to reflect on the Commission's contributions to the codification and development of international law. The United States has closely followed the Commission's work since its inception. In its 70 years, the Commission has addressed a broad range of issues and produced analyses that provide insights to government lawyers, private practitioners, judges, and academics. At times, the Commission's work has formed the basis for multilateral treaties that have become foundational elements of international law.

More recently, the Commission's work products have become more varied, with fewer instances of proposals for draft treaty articles that States may then decide, after formal negotiations, whether to adopt in the form of a treaty and whether to express their consent to be bound. For example, most of the projects on the Commission's current program take the form of draft guidelines or draft conclusions. While there can be benefits to these different forms of work, including shorter timeframes for completion, the absence of a clear expression of State

consent to codification can lead to confusion as to what status should be afforded to the ILC's work. The Commission is, of course, not a legislator that establishes rules of international law. Rather its contributions focus on documenting the areas in which States have established international law or proposing areas in which States might wish to consider establishing international law. In this respect, the Commission has an important role to play in ensuring its work is well supported by relevant practice and properly distinguishes between efforts to codify international law and recommendations for its progressive development. As reflected in Article 15 of the ILC Statute, "codification of international law" is appropriate for "fields where there is already has been extensive State practice, precedent and doctrine." At the very least, certainly we can agree that where there is little or no state practice identified in support of a particular principle, the Commission's work must clearly indicate that it is not purporting to reflect existing law. Unfortunately, there are several examples contained within projects discussed in the Commission's report of proposals that seem to disregard this fundamental principle.

States also have an important role to play, to ensure the Commission's work remains responsive to States and reflective of State practice. For its part, the United States has supported the work of the Commission by engaging with the full range of topics on the Commission's agenda, commenting in this Committee on the Commission's work, and nominating highly qualified candidates for election to the Commission. We also encourage active engagement with the ILC by other governments. A productive relationship between governments and the ILC is vitally important to the relevance and continuing vitality of the Commission's work. In that regard, we were pleased that the ILC held half of its session in New York this year and we hope that this practice continues in the future, as I understand that the many side events during that period enabled worthwhile and stimulating informal discussions among ILC members and Sixth Committee delegates.

Mr. Chairman, I would like [to] begin with the topic Identification of Customary International Law. The United States takes this opportunity to recognize and express its appreciation for the efforts of the Commission, and in particular its Special Rapporteur, Sir Michael Wood, on this important topic.

The United States also provided written comments earlier this year on the ILC's Draft Conclusions for this project. While we agree with many of the propositions in the Draft Conclusions and commentaries, we identified serious concerns regarding a few issues and those concerns remain. I will not reiterate each of the comments contained in the United States' prior submission, but will highlight a few issues of particular significance.

As a general matter, the United States believes that identifying whether a rule has become customary international law requires a rigorous analysis to determine whether the strict requirements for formation—a general and consistent practice of States followed by them out of a sense of legal obligation—are met. Such State practice must generally be extensive and virtually uniform, including among States particularly involved in the relevant activity. This high threshold required to establish that a particular rule is customary international law is important to all aspects of analyzing or otherwise identifying customary international law. In this regard, the statement in Draft Conclusion 8 that practice must be "sufficiently widespread and representative, as well as consistent" should not be misunderstood as suggesting that a different or lower standard applies; as any such suggestion would reflect an inaccurate view of the law. More generally, the Draft Conclusions and commentary should not be read to suggest that customary international law is easily formed. Suggesting otherwise could risk lending credence to the view, held by some, that the exercise of identifying the content of customary international

law has become too facile, with experts too readily extending international law beyond what is supported by the consistent practice of States, which risks imposing outcomes that do not reflect the policy choices of their citizens expressed through their respective State's practice.

The United States has previously noted a few areas in which the Draft Conclusions and commentaries go beyond the current state of international law such that the result is best understood as proposals for progressive development on those issues. We regret that there is not clearer distinction in those areas between the proposals for progressive development and material more clearly reflective of existing law. We believe the Commission should have made this distinction plain in this project and that it should do so in other projects. Failure to distinguish between codification and suggestions for progressive development creates risk that users of these materials will misunderstand them or afford them greater weight than is merited by the authority on which they are based. For these reasons, readers of these materials will need to review them with careful scrutiny, noting what authority and state practice have been identified in support of the proposition addressed.

One area in which the Draft Conclusions depart from existing law merits particular mention. The United States believes that Draft Conclusion 4, on "Requirement of practice", is an inaccurate statement of the current state of the law to the extent that it suggests that the practice of entities other than States contributes to the formation of customary international law. In particular, the statement in paragraph 1 that "it is primarily the practice of States that contributes to the formation, or expression, of rules of customary international law" inaccurately suggests that entities other than States contribute to the formation of customary international law in the same way as States. In addition, the statement in paragraph 2 that "[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law" inaccurately suggests that international organizations may contribute to the formation of customary international law in the same way as States.

Mr. Chairman, it is axiomatic that customary international law results from the general and consistent practice of States followed by them out of a sense of legal obligation. This basic requirement has long been reflected in the jurisprudence of the International Court of Justice. It is also reflected in the practice of States in their own statements about the elements required to establish the existence of a customary international law rule. There is no similar support for the claim in Draft Conclusion 4 that the practice of international organizations—as distinct from the practice of Member States that constitute those organizations—may, in some cases, similarly contribute to the formation of customary international law. It is noteworthy in this regard that, unlike other of the draft conclusions in this project, there is virtually no support provided in the commentary for Draft Conclusion 4. Accordingly, the claim in Draft Conclusion 4 with regard to a direct role for the practice of international organizations in the formation of customary international law can only be understood as a proposal by the Commission for the progressive development of international law. Even when appropriately understood as a proposal for progressive development, the position advanced in Draft Conclusion 4 with regard to the role of international organizations has numerous flaws. Among other things, it contains no explanation as to which international organizations might be relevant when identifying a rule of customary international law, no explanation as to how the *opinio juris* of an international organization might be identified, and no explanation as to whether a lack of support from international organizations can defeat the formation of a rule that is otherwise accepted by States. For these and other reasons, the United States cannot endorse the ILC's proposals on this issue.

Mr. Chairman, the United States also has followed with great interest the Commission's work on the topic of Subsequent Agreements and Subsequent Practice in the Interpretation of Treaties. The United States takes this opportunity to express its appreciation for the efforts of the Commission, and in particular its Special Rapporteur, Georg Nolte, on this important topic.

Earlier this year, the United States provided extensive written comments on the ILC's Draft Conclusions for this project. The text of those Draft Conclusions contained in the ILC's report has changed very little from that on which the United States commented previously. The United States takes this opportunity to reaffirm the views expressed in its prior comments.

In general, the United States agrees with most of the propositions contained in the Draft Conclusions. We have had greater difficulty, however, evaluating the voluminous commentary that accompanies the Draft Conclusions, and are unable to assess its general accuracy and reliability. As with any ILC product of this nature, the utility of the Draft Conclusions and commentaries on any particular issue should be understood to be only as great as the authority and state practice identified in support of the proposition addressed. Once again, I will not reiterate each of the comments contained in the United States' prior submission, but instead will highlight a few issues of particular significance.

Draft Conclusion 10 asserts that subsequent practice of parties to a treaty establishing their agreement with regard to the treaty's interpretation "requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept." Although this statement is correct with regard to subsequent agreements under Article 31(3)(a) of the Vienna Convention on the Law of Treaties, it is not correct with respect to subsequent practice under subparagraph Article 31(3)(b). Rather, the parties' parallel practice in implementing a treaty, even if not known to each other, may evidence a common understanding or agreement of the parties regarding the treaty's meaning and fall within the scope of Vienna Convention Article 31(3)(b). Indeed, this is one of the primary differences between a subsequent agreement and subsequent practice—that is, subsequent practice "establishes," using the term in Vienna Convention Article 31(3)(b), the agreement of the parties; the Vienna Convention does not require that the agreement exist independently.

Draft Conclusion 12 addresses subsequent agreements and subsequent practice in respect of the interpretation of the constituent instruments of international organizations. Paragraph 3 of Draft Conclusion 12 asserts that the "practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32" of the Vienna Convention. The draft commentary explains that the purpose of this provision is to address the role of the practice of an international organization "as such" in the interpretation of the instrument by which it was created. In other words, it refers, not to the practice of the States party to the international organization, but to the conduct of the international organization itself.

As the United States has previously observed, an international organization is not a party to its own constituent instrument. Accordingly, the practice of an international organization "as such" cannot constitute subsequent practice of a party to the agreement of the kind contemplated by Article 31, paragraph 1 of the Vienna Convention, and cannot contribute to establishing the agreement of the parties regarding the interpretation of the instrument. The Draft Conclusion's assertion to the contrary is incorrect.

Draft Conclusion 13 addresses the role of expert treaty bodies in connection with subsequent agreements and subsequent practice. Expert treaty bodies are not parties to treaties, and accordingly their views cannot constitute subsequent practice regarding the interpretation of

a treaty within the meaning of Vienna Convention Article 31(3)(b). The commentary to Draft Conclusion 13 appropriately emphasizes this important point, and nothing in Draft Conclusion 13 itself should be understood to the contrary. In general, the views of expert treaty bodies may be helpful to States parties to treaties to the extent that those views are well reasoned and persuasive. However, States ultimately decide whether to reflect such views in their interpretation and application of treaties, and accordingly such views are relevant to subsequent agreements and subsequent practice in the interpretation of treaties only to the extent that states have done so.

Before concluding this portion of my remarks, Mr. Chairman, I would like to address the Commission's decision to include one new topic in its current program of work and two new topics in its long-term program.

The topic to be included in the Commission's current program of work, "General principles of law," is referred to in Article 38(1)(c) of the International Court of Justice's statute as one of the sources of international law that the Court is to apply. While we agree that the nature, scope, function and manner of identification of "general principles of international law" could benefit from clarification, we are concerned that there may not be enough material in terms of State practice for the Commission to reach any helpful conclusions on this topic.

The two topics that the Commission added to its long term program of work are "universal criminal jurisdiction" and "sea-level rise in relation to international law." With respect to the topic, "universal criminal jurisdiction," we have concerns about the ILC taking up this topic while it is still under active deliberation in the Sixth Committee, including in a working group, and are concerned about the parameters of any potential study. We do not consider this topic ripe for active consideration.

With respect to the topic, "sea-level rise in relation to international law," we are concerned that the broad topic, as proposed to the ILC, does not meet two of the Commission's criteria for selection of a new topic, namely that "the topic should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification" and that "the topic should be concrete and feasible for progressive development and codification." In particular, we question whether the issues of Statehood and protection of persons as specifically related to sea level rise are at a sufficiently advanced stage of State practice. We also share the concerns others have expressed regarding the number of topics on the Commission's active agenda. However, if the Commission does move this topic to its current program of work, we would agree that a Study Group, as is currently proposed, would be the most appropriate mechanism to examine it.

Mr. Chairman, I will now turn to the topic of "Peremptory norms of general international law, *jus cogens*."

The United States takes this opportunity to recognize the efforts of the Commission, and in particular its Special Rapporteur, Professor Dire Tladi, for the work devoted to the topic on *jus cogens*. We appreciate that this topic is of considerable interest and recognize that a better understanding of the nature of *jus cogens* might contribute to our understanding of its role in the field of international law.

However, we continue to have a number of serious concerns with this topic, including with respect to working methods and analytical approach. In terms of working methods, it is incumbent upon the Commission not only to ensure that States have meaningful and sufficiently frequent opportunities to provide their views to the Commission, but also for the Commission to take those views into account. Unfortunately, the current working method for this project has not

been conducive to either pursuit. To the contrary, there appears to have been an intentional departure from standard practice that has delayed referral to the Commission's plenary of the draft conclusions and delayed the drafting of any draft commentaries, which then severely limits the ability of States to follow and engage with the Commission's work. This working method is especially problematic given that the project is not intended to result in a final outcome that will be negotiated and adopted by States.

As such, at this time the United States provides preliminary comments on only a few of the proposed draft conclusions as they were apparently adopted in the Drafting Committee, while noting our intent to provide further comments in the future once the Commission adopts the draft conclusions with commentary. Yet we urge the Commission to return to the normal working method whereby incremental parts of a topic are adopted by the Commission, as that would allow all concerned to give full and careful consideration to this important topic as it develops.

In terms of analytical approach, we have previously questioned whether there is sufficient international practice or jurisprudence on important questions, such as how a norm attains *jus cogens* status and the legal effect of such status vis-à-vis other rules of international and domestic law. These questions have already generated contentious debate even within the Commission as well as differing views among States. The Special Rapporteur has acknowledged that the relative lack of State practice in this area presents particular challenges, yet he does not appear to view that as a limiting principle with respect to several proposed draft conclusions. This is of particular concern where, as here, there has been insufficient engagement by the Commission with States on the topic to date, thereby precluding States from reacting either favorably or unfavorably to Commission-adopted text.

In short, the clear divergence of views on the sensitive questions addressed in the Third Report, an absence of widespread or consistent State practice, and the lack of any mechanism to facilitate a clear expression of State consent to codification all point to a need for a cautious approach. In this regard, the United States observes that the proposal for the Commission to conclude a first reading of the draft conclusions at its next session appears quite premature.

More generally, the absence of state practice or jurisprudence on the vast bulk of the questions being addressed in this project has clear implications for the role and function of any Draft Conclusions that are ultimately adopted. Though framed as "Draft Conclusions," the statements contained in this project are not grounded in legal authority, but rather reflect an effort to imagine through deductive reasoning ways in which certain principles could apply in hypothetical circumstances. This kind of approach neither reflects the state of the law as it exists, nor provides insight into ways in which the law is developing. Rather, it can only be understood as reflecting proposals by the Commission for possible law for consideration by States. It will be for States to assess whether they find the proposals useful, and any weight or influence the Draft Conclusions may have will depend on whether they are ultimately accepted by and reflected in the practice of States. In this regard, the Commission should consider whether the broader cause of international law, which has depended in important respects on a carefully nurtured consensus of legitimacy, would be better served by greater adherence to traditional analytical principles.

For purposes of my remarks today, I will focus primarily on one of the draft conclusions that starkly illustrates the methodological concerns I have just mentioned: draft conclusion 17.

This draft conclusion states that binding resolutions of international organizations, including those of the UN Security Council, "do not establish binding obligations if they conflict with a peremptory norm of general international law". The Special Rapporteur cites virtually no evidence of State practice to support the claim that States can disregard their obligations under

the UN Charter to carry out the binding decisions of the Security Council based on a unilateral assertion of a conflict with a norm of *jus cogens*. Yet Draft Conclusion 17 could have quite serious implications. This claim carries the risk of leading to meritless challenges to the binding nature of Security Council resolutions, thereby undermining their implementation and the effective operation of the collective security framework established under the UN Charter. This is not a theoretical concern, not least because there is no clear consensus on which norms have *jus cogens* status.

The United States also understands that two other draft conclusions proposed by the Special Rapporteur that suffered from these significant analytical concerns—draft conclusions 22 and 23—will be set aside in the Drafting Committee and replaced with a single “without prejudice” clause. This is a welcome development. For example, the idea that immunity does not apply to *jus cogens* violations is particularly problematic, given the lack of clarity on which norms have *jus cogens* status. The proposal, if adopted, would remove immunity as a result of the mere allegation of a crime, apparently without any procedural protections. Moreover, whether there are certain crimes for which immunity from national jurisdiction will not apply has already been debated in the ILC’s topic on “Immunity of State officials from foreign criminal jurisdiction.” The United States is of the view that any discussion of this issue should be confined to that project.

Finally, with respect to future work, the United States takes note of the proposal to consider “regional *jus cogens*”. We question the utility of such an effort and share the concerns expressed by others that this concept seems in tension with the view that *jus cogens* norms are “accepted and recognized by the international community as a whole.”

Mr. Chairman, with respect to the topic “Protection of the atmosphere,” we have taken note of the Draft Guidelines that have been adopted at first reading. As we have noted here on prior occasions, the United States has found many elements of this topic problematic. We intend to study the Draft Guidelines closely and submit comments and observations as requested by December 2019.

With respect to the topic “provisional application of treaties,” we thank the Special Rapporteur, Mr. Juan Manuel Gomez Robledo, for his fifth report on this topic. We take note that the ILC has completed its first reading of a draft “Guide to Provisional Application of Treaties” and commentaries thereto. We look forward to reviewing the Draft Guide in detail with a view to providing written comments by December 15, 2019. We note that the Special Rapporteur intends to continue work on this project in the next session leading to the possible adoption of model clauses, in which case we wonder whether States will be provided sufficient time to comment on those clauses prior to a second reading.

In any event, as with other projects, we will be particularly interested in the extent to which the Draft Guide and commentaries accurately reflect existing state practice in this area. While a careful, rigorous study of state practice may serve as a useful guide to promote understanding of the law, products that mix proposals for progressive development of the law with statements otherwise intended to reflect the state of the law risk creating confusion.

Mr. Chairman, I will now turn to the topic “Immunity of State Officials from Foreign Criminal Jurisdiction.”

The United States appreciates the efforts of Special Rapporteur Concepción Escobar Hernandez to develop reports regarding the important and complex topic of the immunity of State officials from foreign criminal jurisdiction. We would like to comment specifically on the

Special Rapporteur's recently published Sixth Report, while also highlighting several points the United States has made in previous years regarding the Commission's work on this topic.

At the outset, the United States would like to reiterate its general accord with the Commission's approach to immunity *ratione personae*. The United States agrees that Heads of State, Heads of Government, and Foreign Ministers are immune from foreign criminal jurisdiction while serving in office on account of their status. Similarly, where the Sixth Report addresses procedural issues with respect to those enjoying immunity *ratione personae*, the United States generally has not found the Special Rapporteur's conclusions to raise significant concerns.

In contrast, as the United States noted last year, the approach that both the Fifth and Sixth Reports have taken with respect to immunity *ratione materiae* is not reflective of any settled customary international law on the issue. It is difficult to make generalizations from State practice, in part due to the sparsity of publically available State practice and *opinio juris* on this issue, and the complexity inherent in decisions involving prosecutorial discretion. The Commission's categorical pronouncements in terms of immunity *ratione materiae* cannot, then, be said to rest upon customary international law.

Notably, we do not agree that Draft Article 7 is based on any "clear trend" in State practice. We also take note of the unusual circumstances associated with the adoption of Draft Article 7; it was, according to the Report, "adopted by a vote and not by consensus, as [is] the Commission's usual practice."

Certainly, the United States agrees that genocide, crimes against humanity, war crimes, the crime of apartheid, torture, and enforced disappearances are serious crimes that should be punished. The United States does not agree, however, that the Commission was right to adopt Draft Article 7 provisionally given the many serious concerns expressed both inside and outside the Commission. The United States reiterates that Draft Article 7 is in tension with the notion that immunity is procedural, rather than substantive, in nature, and that it operates regardless of gravity of the alleged conduct.

Draft Article 7 creates the false impression that the exceptions are sufficiently established in State practice such that they form customary international law—and in our view they simply do not.

Turning to the Sixth Report's focus upon procedural aspects of immunity, the United States would like to comment on certain of the procedural issues addressed in the Report.

First, the United States notes that, as the Sixth Report identifies, there is a range of State practice in terms of the stages that various sovereigns follow in the course of criminal proceedings. For that reason, the United States wishes to caution restraint before attempting to formulate a general rule regarding timing that would apply to States with potentially very different criminal procedures.

Second, with regard to the acts that States can take that would implicate immunity, there is an assertion that it is "impossible" to locate rules of international treaty law or customary international law regarding a number of potential acts that State officials could take. Yet, at the same time, the Report attempts to identify firm rules regarding whether immunity would be implicated by such acts. This section of the Report could benefit from further deliberation. For example, the Report cites no international legal support or State practice for its assertion that "the rules on immunity do not apply when detention is a purely executive act carried out in the context of the exercise of criminal jurisdiction by a court in the forum State." In the U.S. system, the executive branch of the government is distinct from the judicial branch, and exercises of criminal jurisdiction by a court would not be considered a "purely executive act," as described by

the Report. Again, the United States wishes to underscore that it would be imprudent to draw sweeping conclusions in an area where there is unclear State practice and a dearth of statements of *opinio juris*, and where there is a diversity of national systems of relevant criminal law.

Finally, with respect to the determination of immunity, the United States again emphasizes the riskiness of asserting generalizations from what the Special Rapporteur appears to recognize as varied State practice. Both with respect to the identity of the State entity tasked with making immunity determinations and the analytical steps that precede such a determination, State practice is inconsistent and precludes drawing conclusions of a universal nature. We would note in this regard that the Report states that, in the United States, the Executive Branch is able to make the determination of immunity though a suggestion of immunity binding on the court. We merely note that the practice cited in the Report is applicable only in civil cases and not in the criminal context. In the criminal context, determinations regarding immunity could be made by the Executive as part of the exercise of prosecutorial discretion. Moreover, it is not clear from the Report that all States analyze “official capacity” in precisely the same manner, and thus, again, it would be preferable to avoid drawing conclusions in an area that does not yet reflect a consistent pattern of state practice. Rather than focus on specific domestic procedures, which might vary significantly according to the criminal law of each State, it may be prudent to consider any relevant international standards and the need for a State to apply principles of immunity consistently across the various organs of its government.

The United States looks forward to the Special Rapporteur’s next report and its analysis of the remaining issues of procedure associated with immunity of State officials from foreign criminal jurisdiction, and we appreciate her time and efforts devoted to this difficult topic.

Mr. Chairman, with respect to the topic “Protection of the Environment in Relation to Armed Conflicts,” the United States would first like to recognize the contributions to this topic of the prior Special Rapporteur, Ms. Marie Jacobsson. We would also like to welcome the new Special Rapporteur on this topic, Ms. Marja Lehto, and express our thanks for her efforts in drafting a report that recognizes the complexity and controversial character of many of these issues.

I would like to make three points. First, it is critical that the draft principles and commentary reflect the fact that international humanitarian law, or IHL, is the *lex specialis* in situations of armed conflict. The extent to which rules contained in other bodies of law might apply during armed conflict must be considered on a case by case basis. We welcome the Special Rapporteur’s acknowledgment of this in her report, but believe that the draft principles and commentary should more clearly acknowledge the role of IHL as *lex specialis*.

Second, as stated on previous occasions, we remain concerned that the Commission is not the appropriate forum to consider whether certain provisions of international humanitarian law treaties reflect customary international law. We emphasize that such an undertaking would require an extensive and rigorous review of State practice accompanied by *opinio juris*.

Third, we are concerned that several of the draft principles are phrased in mandatory terms, purporting to dictate what States “shall” or “must” do. Such language is only appropriate with respect to well-settled rules that constitute *lex lata*. There is little doubt that several of these principles go well beyond existing legal requirements, making binding terms inappropriate. I want to highlight a few examples in this regard.

Draft principle 8 purports to introduce new substantive legal obligations in respect of peace operations.

Draft principle 16 purports to expand the obligations under the Convention on Certain Conventional Weapons to mark and clear, remove, or destroy explosive remnants of war to include “toxic or hazardous” remnants of war. The draft commentary appears to recognize that this principle exceeds existing legal requirements, noting, that “Draft principle 16 aims to strengthen the protection of the environment in a post-conflict situation.” Also, it correctly acknowledges that the term “toxic remnants of war” does not have a definition under international law.

We are likewise concerned that the draft principles applicable in situations of occupation go beyond what is required by the law of occupation.

Finally, with respect to the topic “Succession of States in Respect to State Responsibility,” we thank the Special Rapporteur, Pavel Šturma, for his efforts in producing the Second Report. That report seeks to address certain general rules, mainly the issues of transfer of the obligations arising from the internationally wrongful act of a predecessor State.

We appreciate that the Commission’s work on this topic may lead to greater clarity in this area of law. However, we are not confident that the topic will enjoy broad acceptance or interest from States, in view of the small number of States that have ratified the Vienna Convention on Succession of States in Respect of Treaties and Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts.

The issues raised by the topic of state succession in respect of state responsibility are complex, and careful and thorough consideration by governments will be required as the Special Rapporteur continues to develop the draft articles.

Thank you all very much for your attention, as I know it is not the standard course to deliver statements on all three clusters at one time. Once again, I would like to thank the members of the Commission for their work. We look forward to engaging with the Commission, the Sixth Committee, and fellow UN Member States on the Commission’s projects.

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## **D. REGIONAL ORGANIZATIONS**

### **1. Organization of American States**

#### ***a. Venezuela***

On February 23, 2018, Interim U.S. Permanent Representative to the OAS Kevin K. Sullivan addressed a special session of the OAS Permanent Council regarding a draft resolution advanced by the United States regarding Venezuela. Mr. Sullivan’s remarks are excerpted below and available at <https://usoas.usmission.gov/oas-approves-resolution-venezuela/>.

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... The United States is of course one of the member states proposing the draft resolution today, and we strongly believe that its content is timely, relevant and appropriate.

I think my distinguished colleague from Bolivia asked a valid question a few moments ago, which is—what are we accomplishing here? What are we seeking to accomplish with this resolution? And I think there is a simple answer to that.

I think our group of countries is seeking to highlight the deep concerns that we have about the course of events in Venezuela, which has continued to evolve since the last time this body engaged on the situation—and we have some urgent concerns about those events.

My Dominican colleague mentioned a few moments ago the dialogue that the Dominican government generously and ably hosted for the Venezuelan government and opposition leaders to try precisely to find an appropriate way out of the current difficulties they're encountering and put the country back on track and restore democratic order there.

The United States strongly supported that dialogue, as we have all previous efforts at dialogue, to resolve the difficulties in the Venezuelan Republic. But unfortunately, it became clear in the last round of negotiations, which was also supported by a number of other member states around this table today—both those selected by the government and several selected by the opposition—that the Venezuelan government was not prepared to show good faith and to demonstrate a willingness to agree to opposition requests in those negotiations that were nothing more than minimum guarantees necessary for free, fair and credible elections.

There is ample agreement around this table that free, fair and credible elections would be the most appropriate way to resolve the political crisis in Venezuela, and the United States continues to strongly support that idea. But unfortunately, the Maduro regime continues to deepen Venezuela's rupture from its Constitution. And most recently, the Venezuelan government, President Maduro, has suggested that not only do they intend to move up the presidential elections to April 22<sup>nd</sup> without resolving any of the serious problems that exist in the electoral environment today, but most recently it has suggested it would like to move up the elections for the National Assembly, also for the coming weeks or months, in a way that is not consistent with the Constitution and in fact is continuing evidence that they are re-writing the rules as they go along, which is truly inconsistent with the idea of democracy that this body represents and has defended for many years now.

In addition to that, I think we see increasing humanitarian suffering in Venezuela, increasing malnutrition, increasing suffering by Venezuelans looking for medical assistance that is no longer available. All of us are concerned about these things, and all of these are elements of the urgency that we see in this situation, and which I believe has inspired countries that brought forth today's draft resolution to do so, and on an urgent basis.

And so from our perspective, this is an appropriate time for the OAS to reengage on Venezuela, and in fact it is high time, past time for us to signal the grave concerns we have while at the same time leaving the door open to progress. I don't think anything in the resolution today closes any doors. In fact, the resolution—which we believe is cast in very constructive terms—simply calls on the Venezuelan government to reconsider its decision to move up presidential elections without resolving the underlying issues about fairness, about access, about free participation.

We should not forget that over the last year and a half or so the Venezuelan government has prohibited the participation of a number of parties and important political figures in the electoral process, including many that appear to have ample support in reliable polling, thus denying the Venezuelan people valid options for an electoral process. We have also seen that

hundreds of political prisoners remain detained and thus also unable to participate in a free and fair political process in addition to suffering from violations of their human rights.

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On April 15, 2018, Vice President of the United States Michael Pence addressed the Summit of the Americas in Lima, Peru. His remarks are available at <https://www.whitehouse.gov/briefings-statements/remarks-by-vice-president-pence-at-first-plenary-session-of-the-summit-of-the-americas/> and excerpts below relate to Venezuela.

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In Venezuela, as in Cuba, the tragedy of tyranny is on full display. As this body knows well, Venezuela was one of our hemisphere's richest nations once, and not too long ago. It is now among the poorest. Venezuela was also once a flourishing democracy. It has now collapsed into dictatorship and tyranny.

Now let me be clear, the responsibility for the Venezuelan people's suffering can be laid at the feet of one man — Nicolas Maduro. ...

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Last month, we also announced that we are providing, through the generosity of the American people, \$2.5 million to help meet the needs of vulnerable Venezuelans living in Colombia. And yesterday, it was my privilege to announce that we'll add nearly \$16 million more dollars of direct aid to assist Colombia's efforts to come alongside those Venezuelans.

To be clear, the United States and our allies and partners stand ready to do more, much more, to directly support the long-suffering Venezuelan people. But the world deserves to know that as the people of Venezuela suffer, lacking basic humanitarian aid, Nicolas Maduro stands in the way. Maduro stands today, refusing to allow humanitarian assistance simply because he claims there is no humanitarian crisis, as his people starve and die and flee.

\* \* \* \*

And today, we call on the Maduro regime to open up their country to life-saving aid the Venezuelan people so desperately need. Allow me to thank the many nations here who have already taken action to support the Venezuelan people with assistance and aid—nearly two million that have been displaced thus far. And the compassion and generosity of nations across this region is inspiring to see.

Let me also thank all those that have stepped forward to join us to rebuke and isolate the dictator Maduro and his brutal regime through economic and diplomatic means. Costa Rica has refused to let Venezuela's Minister of Defense land on its territory, setting a precedent for other nations to deny Venezuela official travel.

Canada has sanctioned more than 40 Venezuelan officials. Argentina and Brazil led the effort to suspend Venezuela from Mercusor.

Panama designated more than 50 Venezuelan officials as high risks for money laundering and recalled its ambassador from Caracas.

And Peru withdrew Venezuela's invitation to this summit. Mr. President, that sent a powerful message that Maduro and dictatorship and his despotism is not welcome here, and I commend you.

To all of you whose nations have taken action: Thank you for your stand. Thank you for your stand for freedom in our hemisphere.

... Every free nation gathered here must take stronger action to isolate the Maduro regime. ...

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On May 7, 2018, Vice President Pence addressed the OAS and, among other things, called for the OAS to suspend Venezuela from membership. Those remarks are excerpted below and available at <https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-protocolary-meeting-organization-american-states/>.

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As this body knows well, Venezuela was once one of our hemisphere's richest nations. It is now astoundingly one of the poorest. At this very moment, nearly 9 out of 10 Venezuelans live in crushing poverty. Opportunity has evaporated, with an economy that's already shrunk by half, and is still growing smaller with every passing day.

Venezuela's grocery stores are all but empty, with food and daily necessities nearly impossible to find. Hospitals lack the most basic medical supplies. And in the last year alone, the infant mortality rate in Venezuela jumped 30 percent, and maternal mortality rates skyrocketed by 66 percent.

And every day, some 5,000 Venezuelans flee from their homeland. It's the largest cross-border mass exodus in the history of the Western Hemisphere.

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In the last month, in Lima, I met four courageous leaders of the Venezuelan opposition—two of whom I'm told are actually here today—Julio Borges, Carlos Vecchio, David Smolansky, and Antonio Ledezma. These four men are great defenders of democracy in their homeland, and they have our respect.

Having taken a stand for freedom in their homeland, they were forced to flee the regime's wrath, but they described to me ... in painstaking detail, how Maduro has systematically corrupted the upcoming election and how he's replaced that nation's once-great democracy with dictatorship.

The truth is, the Venezuelan people would choose a better path if they could. But under Nicolás Maduro, they will never have that chance.

The so-called elections in Venezuela, scheduled for May the 20th, will be nothing more than a fraud and a sham. The Maduro regime has already stacked the Venezuelan courts and Electoral Council with its cronies. It's banned major parties. It's barred opposition leaders from standing for office, and stifled a free press, and jailed its political enemies, including more than 12,000 politically motivated detentions.

On Election Day itself, the Maduro regime has already given every indication that it will resort to its standard authoritarian playbook: manipulate voting data, change polling places at the last possible minute, and engage in widespread intimidation, and even violence.

In short, there will be no real election in Venezuela on May 20th, and the world knows it. It will be a fake election, with a fake outcome. Maduro and his acolytes have already ensured that their reign of corruption, crime, narco-trafficking, and terror will continue.

And that's why today we call on Maduro and regime: Suspend this sham election. Hold real elections. Give the people of Venezuela real choices because the Venezuelan people deserve to live in democracy once again.

With every day, Venezuela becomes even more of a failed state. And we do well to remember, failed states know no borders.

Venezuela's collapse is already affecting economies across the region. It's spreading infectious diseases that were once eradicated in our hemisphere. It's giving drug traffickers and transnational criminal organizations new opportunities to endanger our people. And as Venezuela continues to collapse, the consequences will radiate across the wider hemisphere, affecting all of our countries.

... The United States will not idly stand by as Venezuela crumbles. We have already imposed strict financial sanctions on more than 50 current and former senior Venezuelan officials, and we cut off the so-called "Petro" from the United States' financial system.

And today, I am pleased to announce that the United States is designating three Venezuelans with direct ties to the Maduro regime as narcotics "kingpins." We have frozen their assets, blocked their access to our nation, so they can no longer poison our people with their deadly drugs.

We've also been demonstrating the heart of the American people. The United States is also providing \$2.5 million to help meet the needs of vulnerable Venezuelans now living in Colombia. And last month, in Lima, it was my privilege to announce that our nation will devote nearly \$16 million across the wider region to support Venezuelans who have fled the tyranny of their homeland.

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For months, Nicolás Maduro has refused to allow humanitarian assistance into Venezuela. He actually claims that there's no humanitarian crisis, even as his country collapses into poverty all around him.

So today, we say to Nicolás Maduro and his entire regime: The time has come to open Venezuela to international aid, and do it now. Every day you don't ... is another day innocent people starve and die—men, women, and children—and millions flee your country for a better life.

Allow me to take a moment to thank the many nations here that have already taken action to shelter and assist the Venezuelan people. ...

... Last month, at the Summit of the Americas, we were pleased to see 15 nations join with the United States to declare that Venezuela’s upcoming elections lack credibility and legitimacy, and to demand that Maduro hold a real election that is free, fair, and transparent. ...

And on the world stage, just last week, the International Monetary Fund censured Venezuela for its repeated failure to meet treaty obligations and its lack of economic transparency. ...

But all these steps are not enough. We believe it is time to do more ...

Today, ... I call on all ... to take three concrete actions:

... cut off Venezuela’s corrupt leaders from laundering money through your financial systems.

... enact visa restrictions that prevent Venezuela’s leaders from entering your nations.

... hold Maduro accountable for destroying Venezuela’s democracy.

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We’ve all signed the Inter-American Democratic Charter, which declares, and I quote, “the peoples of the Americas have a right to democracy... and their governments have an obligation to promote and defend [democracy].”

Venezuela has repudiated this promise, men and women... So today, on behalf of the United States of America, we call on the members of this institution to uphold our long-standing commitment to democracy and freedom. We call on members of the OAS to suspend Venezuela from the Organization of American States. This is an institution dedicated to democracy.

... The people of Venezuela deserve democracy. They deserve this institution — all of their neighbors to live up to our word — a word we gave one another some 70 years ago. The people of Venezuela deserve to regain their libertad.

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On June 4, 2018, Secretary Pompeo addressed the OAS General Assembly and discussed Venezuela, among other topics. His remarks are excerpted below and available at <https://www.state.gov/remarks-at-the-general-assembly-of-the-organization-of-american-states-oas/>.

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Just as we did when this first body met 70 years ago, the United States continues to place a great deal of value on the OAS and its role in forging a hemisphere distinguished by democracy, peace, respect for human rights, and cooperation. We must all do our part to strengthen the OAS to deal effectively with the challenges to our values we face together today and, of course, those we will face in the future.

I would like to thank our fellow member-states for their support of a decision at last year’s General Assembly to reduce the OAS’s dependence on a single member-state: mine. This is an important step rooted in increasing buy-in and burden sharing to achieve our shared goals. This year

I hope that we can agreeably adopt a plan to implement this decision in order to put the OAS on more sustainable financing footing.

As for confronting shared challenges in the region, at the Summit of the Americas our leaders agreed upon steps to combat corruption, a cancer that eats away at the underpinnings of democracy and stifles the dreams of our citizens. We must continue to improve transparency in government and public procurement, and call out and prosecute corrupt officials.

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But there is no greater challenge today than the full-scale dismantling of democracy and the heartbreaking humanitarian disaster in Venezuela. While the United States welcomes the release of the unjustly imprisoned Holt family, our policy towards Venezuela remains unchanged. The United States stands steadfast in support of the Venezuelan people and their efforts to return to democracy. The Maduro regime's efforts ...to move towards unconstitutional government and its human rights abuses are now well known by all. All these actions have, among other ill consequences, resulted in an unconstitutional alteration of Venezuela's constitutional order.

Given these circumstances, we are all challenged to act under the Inter-American Democratic Charter, which this body has already begun to do.

On more than one occasion, Venezuela has squandered opportunities to have the kind of dialogue that the charter calls for. We seek only what all the nations of the OAS want for our people: a return to the constitutional order, free and fair elections with international observation, and the release of political prisoners. The regime's refusal to take meaningful action on these issues has demonstrated unmistakable bad faith and exhausted options for dialogue under current conditions.

Just two weeks ago, the Venezuelan Government staged sham elections that offered no real choice to Venezuelan people and its voters. Many of them responded sensibly by simply staying home.

For all of these reasons, Vice President Pence challenged member-states last month to do what the Democratic Charter asks of us when faced with an unconstitutional interruption in democratic order of a member-state: suspend Venezuela from this body.

That suspension is not a goal unto itself. But it would show that the OAS backs up its words with action. And it would send a powerful signal to the Maduro regime: Only real elections will allow your government to be included in the family of nations.

In addition to suspension, I call on fellow member-states to apply additional pressure on the Maduro regime, including sanctions and further diplomatic isolation, until such time as it undertakes the actions necessary to return genuine democracy and provide people desperately needed access to international humanitarian aid.

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**b. Nicaragua**

On July 18, 2018, Ambassador Carlos Trujillo addressed the OAS as it approved a resolution condemning government-sponsored violence in Nicaragua. The resolution was adopted by a vote of 21 in favor, including the United States, 3 against, 7 abstentions, and 3 absences (Dominica, Saint Kitts and Nevis, Bolivia). Ambassador

Trujillo's remarks are available at <https://usoas.usmission.gov/oas-condemns/> and excerpted below. See also OAS press release, available at [http://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-048/18](http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-048/18).

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The United States condemns the ongoing attacks by President Daniel Ortega's para-police forces against university students, journalists, and clergy across the country—in addition to the arbitrary detention of Civic Alliance leadership and threats against those who support them, including the arbitrary detention of Medardo Mairena and Pedro Mena.

We likewise condemn the passage on Monday of a law against “terrorism” and money laundering which we fear will be used during the current crisis to arrest and prosecute those who are expressing their legitimate desire for political change—as well as to target peaceful, non-governmental organizations engaged in valuable work. Further, this Friday, July 19, is the 39th anniversary of the Sandinista Revolution that toppled the dictator Anastasio Somoza.

We are putting the government of Nicaragua and its supporters on notice that the world will be watching their actions on that day. We will be watching those who participate in government-sponsored violence.

We will also be watching those who do not participate, and who do not allow their professional loyalty to be abused by a corrupt leadership seeking to cling to power through brutal means.

Every additional victim of this escalating violence and intimidation campaign further undermines President Ortega's legitimacy. So we call yet again on Ortega to cease immediately his repression of the people of Nicaragua. Only then can Nicaraguans begin to plan a brighter future.

While the severity of this violence has taken some in this Council by surprise, this crisis has been years in the making.

Sadly, we are now experiencing the direct product of the hollowing-out of democratic institutions and consolidation of powers under President Ortega and Vice President Murillo.

The current government has disregarded the rule of law, basic tenets of democracy, and international commitments to protect human rights and fundamental freedoms in favor of “pacts” where they allocated the political and economic spoils of dictatorship with other groups.

So we meet again today to renew our commitment to work together to assist Nicaragua overcome an increasingly dire situation.

This body has taken decisive action, Madam Chair and fellow colleagues. Now more than ever, the world's eyes are focused on how we—as the OAS—respond to the crisis in Nicaragua. Today is our moment to respond—through pragmatic and forward-leaning action.

The United States believes today's resolution represents an important step forward to strengthen democratic institutions and processes in Nicaragua.

The text reaffirms that we all are committed to working together on a grave matter of concern—as members of this Organization, as friends of the Nicaraguan people, and in solidarity with their democracy.

We strongly agree with the text's appropriate condemnation of the ongoing violence and the Nicaraguan government's intimidation campaign against its own citizens and church officials.

Despite the Nicaraguan government's cynical efforts to disguise the truth, we know that the escalating violence is being perpetrated by government forces and government supporters, who are attacking religious leaders—including those whom the government earlier invited to mediate the current conflict—as well as students and other ordinary citizens exercising their right to protest.

We know this because the Inter-American Human Rights Commission on the ground has documented this reality in great detail based on eyewitness accounts and recordings. Church leaders, independent media and other credible observers, including many of our own diplomatic missions, have also confirmed this grim reality.

We must express very clearly that violators and abusers of human rights must be held accountable. And as member states, we must reaffirm our full support for the monitoring and investigative efforts of the Inter-American Commission on Human Rights.

Madam Chair, the cessation of government-sponsored violence is a primary condition necessary to resume dialogue on democratization and a peaceful path forward for all Nicaraguans.

Despite the Nicaraguan government's disingenuous claims to this Council, so-called "terrorists" are not to blame for the over 300 deaths in Nicaragua since April. Those responsible for the violence are the very security forces who have a responsibility to protect its citizens.

The United States supports efforts at genuine and inclusive dialogue as a way of guaranteeing respect for the will of the Nicaraguan people.

Let me underscore this point. The Nicaraguan government must heed the Nicaraguan people's call for democratic reforms immediately.

Madam Chair, the United States supports the proposal for early, free, fair, and transparent elections made by Nicaragua's broad-based Civic Alliance, as part of the National Dialogue process.

Early elections represent the best path back to democracy and full respect for human rights in Nicaragua. The OAS has an important role to play in this regard if there is political will to implement the recommendations of the 2017 OAS electoral mission.

Such reform, along with credible international electoral observation, could provide the Nicaraguan people with the kind of transparent, competitive elections that they so clearly want—and deserve.

The United States will continue to work with the international community and other partners in support of the Nicaraguan people.

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On August 2, 2018, Ambassador Todd Robinson addressed the OAS Permanent Council at another special session on the situation in Nicaragua. Ambassador Robinson's remarks are excerpted below and available at <https://usoas.usmission.gov/remarks-by-ambassador-todd-robinson/>.

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Madam Chair, the situation continues to worsen by the day. This despite the growing international condemnation of the ongoing, government-sanctioned violence and intimidation campaign against the Nicaraguan people.

The United States condemns in the strongest possible terms the ongoing attacks by President Daniel Ortega's para-police forces against university students, journalists, and clergy across the country—in addition to the arbitrary detention of Civic Alliance leadership and threats against those who support them.

Vice President Mike Pence tweeted on July 24 that “State-sponsored violence in Nicaragua is undeniable.” One local human rights group last week put the number killed since the violence began just three months ago at a staggering 448. Further, the government has now begun to use the new anti-terrorism law to arrest its critics.

So we meet again today to advance our strong commitment to work together to assist Nicaragua overcome an increasingly dire situation.

This body must be ready to support effective and proactive engagement, Madam Chair and fellow colleagues. Now more than ever, the world's eyes are focused on how the OAS responds to the crisis in Nicaragua.

We took an important step forward in the resolution adopted overwhelmingly by this Council on July 18.

That resolution condemned ongoing “violence, repression and human rights violations committed by police, para-police groups and others” in Nicaragua; urged full stakeholder participation in the National Dialogue; and supported the monitoring and investigative work of the Inter-American Commission on Human Rights (IACHR) in Nicaragua.

Today, we are taking the next step by organizing more intensive oversight of multifaceted OAS efforts, to ensure that they remain responsive to the situation on the ground in Nicaragua

The text now before us reaffirms that we are committed to working together on a grave matter of concern—as members of this Organization, as friends of the Nicaraguan people, and in solidarity with their democracy

We strongly agree with the text's creation of a special committee of OAS Member States to help provide support and leadership to the ongoing and critical work of this Organization with respect to Nicaragua.

Madam Chair, only a strong, internationally-backed mechanism as envisioned here can help prevent a further escalation of violence there and create better conditions for Nicaragua-led solutions

Madam Chair, despite the Nicaraguan government's cynical efforts to disguise the truth, we know that ongoing violence and repression [are] being perpetrated by government forces and government supporters. They are attacking religious leaders, including those whom the government earlier invited to mediate the current conflict, as well as students and other ordinary citizens exercising their right to protest.

We know this because the Inter-American Human Rights Commission on the ground has documented this reality in great detail—based on eyewitness accounts and recordings.

Church leaders, independent media and other credible observers, including many of our own diplomatic missions, have also confirmed this grim reality.

Madam Chair, last week at the Ministerial to Advance International Religious Freedom here in Washington, Vice President Pence stated that the Ortega government is “virtually waging war on the Catholic Church.” As those of you who attended the Ministerial know, Father Zamora

attended and spoke about the recent armed attack on his church where more than 200 students sought shelter.

With these experiences in mind, Madam Chair, we must express quite clearly and directly that violators and abusers of human rights must be held accountable.

As member states, we must reaffirm our full support for continued engagement and monitoring on the part of the OAS and its relevant entities, including the Inter American Commission

We call on the Nicaraguan government to heed the Nicaraguan people's urgent call for democratic reforms.

The United States believes the National Dialogue, established with the mediation of the Nicaraguan Council of Bishops, offers an invaluable opportunity to agree on steps that will advance peace and respect the will of the Nicaraguan people. With this in mind, the United States continues to support the proposal for early, free, fair, and transparent elections made by Nicaragua's broad-based Civic Alliance, as part of the National Dialogue process.

Early elections represent the only viable path back to democracy and full respect for human rights in Nicaragua. The OAS has an important role to play in this regard if there is political will on the part of the Ortega government to implement the recommendations of the 2017 OAS electoral mission.

Such reform, along with credible international electoral observation, could provide the Nicaraguan people with the kind of transparent, competitive elections that they so clearly want—and deserve.

The United States will continue to work with the international community and other partners in support of the Nicaraguan people.

The Special Committee called for in our proposed resolution will offer Member States a flexible, agile mechanism that facilitates coordination with other international organizations, including the United Nations and SICA, as well as among various elements of the OAS itself.

Madam Chair, it is for this reason that we urge the Council to adopt immediately the resolution before us.

This action will ensure that we, as member states, are well placed to support inclusive dialogue and proactive OAS engagement, and do our part to prevent further violence.

Such action is fully in line with the commitments all of us have freely undertaken as OAS member states.

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Ambassador Trujillo again addressed the OAS when it adopted a further resolution on Nicaragua on September 12, 2018. The resolution was adopted by 19 votes in favor (including the United States), 4 votes against, with 9 abstentions and two countries absent. Ambassador Trujillo's remarks are excerpted below and available at <https://usoas.usmission.gov/oas-adopts-resolution-on-nicaragua/>. See also OAS press release available at [http://www.oas.org/en/media\\_center/photonews.asp?sCodigo=FNE-94950](http://www.oas.org/en/media_center/photonews.asp?sCodigo=FNE-94950).

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The efforts of our Council's new Working Group on Nicaragua, led by Canada and Chile, are essential for supporting a coordinated and efficient response on the part of the OAS.

With this in mind, the United States welcome today's timely report on the Working Group's efforts, and are proud to be an active member of the Group.

Unfortunately, Madam Chair, the situation continues to worsen in Nicaragua. This, despite the growing international condemnation of the ongoing, government-sanctioned violence and intimidation campaign against the Nicaraguan people.

The United States condemns in the strongest possible terms the ongoing attacks and arbitrary detentions by President Daniel Ortega's para-police forces against university students, journalists, and clergy across the country, and threats against those who support them.

We also condemn the Ortega government's recent arbitrary detention of six prominent student members of the National Dialogue. These students are the latest example of the thousands of citizens who are peacefully and democratically protesting government actions, only to be harassed, detained, disappeared, or even killed. These actions represent the Ortega government's aims to criminalize all forms of dissent.

Five of these students have been released. We call for the release of all arbitrarily detained persons, Madam Chair. We also call on the Ortega government to ensure the safety of all who choose to exercise their universal rights to freedom of speech and freedom of assembly.

It is therefore within this context that we meet again today to raise our concerns, and reaffirm our shared commitment to work together to assist Nicaragua overcome an increasingly dire situation.

The world's eyes remain focused on how the international community—including through the UN and the OAS—is responding to the crisis in Nicaragua.

We took an important step forward in the resolution adopted by this Council last month by establishing a Working Group on Nicaragua. That Working Group is now actively engaged in assessing developments in Nicaragua.

As we noted when this group was established, only a strong, internationally-backed mechanism can help prevent a further escalation of violence there and create better conditions for Nicaragua-led solutions.

Madam Chair, despite the Nicaraguan government's cynical efforts to disguise the truth, ongoing violence and repression continues from government forces and government supporters. They are attacking religious leaders, including those whom the government earlier invited to mediate the current conflict, as well as students and other ordinary citizens exercising their right to protest.

We know this because the UN Office of the High Commissioner for Human Rights, which the Nicaraguan government has now expelled from the country, and the Inter-American Human Rights Commission have documented this reality in great detail, based on eyewitness accounts and recordings.

Church leaders, independent media and other credible observers, including many of our own diplomatic missions, have also confirmed this grim reality.

With these experiences in mind, Madam Chair, we as member states must reaffirm clearly and unequivocally that violators and abusers of human rights must be held accountable.

We must also underscore continued support for engagement and monitoring on the part of the OAS and its relevant entities. To this end, we call on the Nicaraguan government to heed the Nicaraguan people's urgent call for democratic reforms.

In this context, the United States believes the National Dialogue, established with the mediation of the Nicaraguan Council of Bishops, offers an invaluable opportunity to agree on steps that will advance peace and respect the will of the Nicaraguan people.

The United States therefore continues to support the proposal for early, free, fair, and transparent elections made by Nicaragua's broad-based Civic Alliance, as part of the National Dialogue process.

Let me be quite clear—early elections represent the only viable path back to democracy and full respect for human rights in Nicaragua. The OAS has an important role to play in this regard if there is any political will on the part of the Ortega government to implement the recommendations of the 2017 OAS electoral mission.

Such reform, along with credible international electoral observation, could provide the Nicaraguan people with the kind of transparent, competitive elections that they so clearly want—and deserve.

Let me close Madam Chair by noting that all governments should promote democracy, good governance, and human rights for the greater welfare of their citizens. The United States will continue to stand by the people of Nicaragua and hold the Ortega government to account for its repression and violence.

It is for all of these reasons that we urge the Council to adopt the resolution before us today. This text reaffirms our collective concern over the deteriorating state of democratic practice in Nicaragua.

It also makes clear that we—as member states of the OAS and also of the UN—seek a peaceful return to inclusive dialogue and proactive OAS engagement, in order to prevent further violence and promote a peaceful solution to this ongoing crisis.

Such action is fully in line with the commitments all of us have freely undertaken as OAS member states.

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### **c. Migration**

On June 29, 2018, Ambassador Trujillo addressed the Regular Meeting of the OAS Permanent Council regarding discussions on migration. His remarks are excerpted below.

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\* \* \* \*

[W]e welcome discussions on migration as part of ongoing efforts to engage with governments around the world to find collective solutions to ongoing migration challenges, including enhancing border security, combatting human smuggling and trafficking, and addressing the underlying conditions driving migration in the region.

This is reflected by our ongoing engagement here at the OAS in matters before the Inter-American Commission on Human Rights and the OAS Committee on Migratory Affairs (CAM).

We have welcomed various site visits by the Inter-American Commission to the United States in the past, including to the U.S. Southern border regarding migrant detention and are open to discussing with the Commission a potential visit on these matters in the current context.

Mr. Chairman, the United States is a welcoming home for immigrants. In the last year alone, our country welcomed more than 1.1 million legal immigrants to our country and our communities. The United States is proud of this legacy. We are proud to be a nation of laws and a nation with recognized and respected borders, as well.

This reflects the reality that it is the sovereign right of states to control their borders, and set migration policies in accordance with their domestic laws and policies, consistent with their international obligations.

Whether to expand migration pathways, detain migrants who seek illegal entry into the United States, impose criminal penalties for illegal immigration, or adjust the status of migrants—such issues lie solely at the discretion of states. With this in mind, the United States will continue to exercise its own sovereign authority over its immigration policy.

As Vice President Michael Pence noted in Brazil on Tuesday: *“To all the nations of the region, let me say with great respect, that just as the United States respects your borders and your sovereignty, we insist that you respect ours ... We want the people of our Hemisphere to have the chance to build a better life for themselves in the land of their birth, rather than leaving for ours.”*

In turn, Mr. Chairman, the United States seeks well-managed and legal migration, while reducing displacement and irregular migration, which present complex challenges for all countries—including significantly putting vulnerable migrants at greater risk of harm.

We also believe that states share a responsibility in managing migration flows such as protecting refugees, asylum seekers, and migrants; enforcing border controls; combatting human smuggling and trafficking; implementing public messaging campaigns; facilitating the return of their citizens; and enhancing law enforcement cooperation.

With these points in mind let me be quite clear, Mr. Chairman: every state has the sovereign right to regulate the entry, screening, and stay of foreign nationals in its territory, subject to its international obligations—and every state also has a responsibility under international law to accept the return of its citizens that another state seeks to expel, remove or deport.

These are essential elements to reducing irregular migration, fighting migrant smuggling and human trafficking, and countering terrorism.

We also want citizens of our hemisphere to have a chance to build a better life for themselves in the land of their birth. That is why the United States is renewing our commitment to address the root causes behind the crisis that we face.

In Central America, the United States is providing more than \$2.6 billion in foreign assistance in fiscal years 2015 to 2018 to address the security, governance, and economic challenges in the region.

\* \* \* \*

Let me now comment on issues pertaining to child migrants,...

Within our hemisphere, the United States is assisting governments in Central America and Mexico to strengthen migration management policies and implementation.

Through our partner the International Organization for Migration (IOM), we have long-standing cooperation with governments that focuses on identifying migrants in situations of

vulnerability, including unaccompanied children, and providing them with information and assistance.

We also provide support for governments and civil society to disseminate information to migrants so they understand the dangers that await them on the route to entering the United States illegally.

As to cases involving family separation during detention, on June 20, 2018, President Trump signed an Executive Order that directs the Administration to continue to protect the border, while simultaneously avoiding the separation of families to the extent we can legally do so.

It is the policy of the United States Government to maintain family unity, including by detaining alien families together where appropriate and consistent with the law and available resources.

The U.S. Departments of Homeland Security (DHS) and Health and Human Services (HHS) are working to reunify parents with their children.

In closing, Mr. Chairman, the United States will continue to engage in a respectful manner on migration matters here at the OAS – emphasizing the need for all states to:

- address the distinct protection needs of refugees and victims of human trafficking;
- assist migrants *as appropriate* to return home safely; and
- to address the underlying conditions that drive migrants to seek irregular channels to access opportunities beyond their borders.

\* \* \* \*

## 2. OAS: Inter-American Commission on Human Rights (“IACHR”)

The Charter of the OAS authorizes the Inter-American Commission on Human Rights (“IACHR” or “Commission”) to “promote the observance and protection of human rights” in the Hemisphere. The Commission hears individual petitions and provides recommendations principally on the basis of two international human rights instruments, the American Declaration of the Rights and Duties of Man (“American Declaration”) and the American Convention on Human Rights (“American Convention”). The American Declaration is a nonbinding statement of principles adopted by the countries of the Americas in a 1948 resolution. The American Convention is an international treaty that sets forth binding obligations for States parties. The United States has signed but not ratified the American Convention. As such, the IACHR’s review of petitions with respect to the United States takes place under the substantive rubric of the American Declaration and the procedural rubric of the Commission’s Statute (adopted by OAS States via a nonbinding resolution) and the Commission’s Rules of Procedure (“Rules”) (drafted and adopted by the Commissioners themselves).

In 2018, the United States continued its active participation before the IACHR through written submissions and participation in a number of hearings.

Significant U.S. activity in matters, cases, and other proceedings before the IACHR in 2018 is discussed below. The United States also corresponded in other matters and cases not discussed herein. The 2018 U.S. briefs and letters discussed below, along with several of the other briefs and letters filed in 2018 that are not discussed herein,

are posted in full (without their annexes) at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

**a. Case No. 10.573 (Salas)**

The Commission issued a preliminary merits report in *Salas et al.*, Case No. 10.573, on December 6, 2017. The United States complied with a request from the Office of the Executive Secretary of the IACHR for a report on measures taken to comply with the Commission's recommendations by submitting the letter excerpted below, dated March 1, 2018.

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\* \* \* \*

We have read the report and have taken under advisement the nonbinding recommendations set forth therein. The United States takes this opportunity to reiterate its objection to the way the Commission sought to interpret and apply the law of armed conflict in the draft report. As explained in detail in our previous written submissions and hearings in this and several other cases, OAS Member States have not granted the Commission the competence or authority to interpret and apply the law of armed conflict in Commission proceedings. The only international instrument relevant for the United States in IACHR petitions is the American Declaration of the Rights and Duties of Man ("American Declaration"), the terms of which do not embrace the customary or conventional law of armed conflict.

Furthermore, the United States objects to the suggestion that it establish a special mechanism that would permit recovery for death, injury, or property damage experienced by civilians in conjunction with combat operations during Operation Just Cause. Neither the American Declaration nor customary international law establishes a private right of compensation for individuals who suffer death or injury during the course of lawful international armed conflict.

We also take this opportunity to recall that the United States provided substantial financial assistance to the Government of Panama in the form of reconstruction and other recovery assistance in the years following Operation Just Cause, as explained in detail in our previous written submissions and during the several hearings in this case. In addition, the United States has met with the December 20 Commission, established by the Government of Panama to investigate the events surrounding Operation Just Cause, to identify areas in which the United States can cooperate with the December 20 Commission. As we urged at the December 2016 hearing, the Commission should have waited for the December 20 Commission to finish its important work instead of issuing a series of recommendations to the United States that are infeasible for implementation.

Finally, we take this opportunity to reiterate and incorporate by reference the additional jurisdictional, admissibility, and substantive arguments we have made numerous times over the history of this nearly 30-year-old case.

The United States requests that when the Commission issues a final, public version of the merits report, it note and take account of the additional U.S. views set forth in the present letter, in line with past practice.

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**b. Igartua et al. (Four Million American Citizen Residents of Puerto Rico), Case No. 13.154 and Rosselló et al., Case No. 13.326**

On June 28, 2018, the United States submitted its consolidated response to the merits submissions filed by the petitioners in *Igartua* and *Rosselló*. The United States requested that the Commission join the petitions, which raise similar issues regarding the rights of residents of Puerto Rico to vote in U.S. elections. Excerpts follow (with footnotes omitted) from the U.S. response.

\* \* \* \*

The Petitioners in *Four Million American Citizen Residents of Puerto Rico*, which we refer to under the name of the lead Petitioner, Gregorio Igartua, claimed that their right to vote in U.S. Presidential elections is denied on a discriminatory basis. The Petitioners in *Rosselló* claimed that their right to vote in U.S. presidential and congressional elections is denied on a discriminatory basis. The United States responded to Petitioners' assertions on June 25, 2010 and argued that the claims in both Petitions were inadmissible for failure to state facts which, if true, would tend to establish a "violation" of the American Declaration of the Rights and Duties of Man ("American Declaration"), the instrument over which this Commission has competence with respect to the United States and that also identifies U.S. human rights commitments in the Inter-American System.

On January 27, 2017, the Commission decided that the *Rosselló* Petitioners' claims were admissible under Articles II, XVII, and XX of the American Declaration. On May 25, 2017, the Commission decided that the *Igartua* Petitioners' claims were admissible under Articles II, XVII, XVIII, and XX of the American Declaration. Both sets of Petitioners subsequently provided submissions on the merits.

***Argument***

\* \* \* \*

... [T]he United States submits that its constitutional structure, under which citizens who reside in Puerto Rico do not have the same voting rights in Presidential and Congressional elections as citizens who reside in the 50 states, is not inconsistent with the rights expressed in Articles II, XVII, XVIII, and XX of the American Declaration. Puerto Rico is a self-governing territory of the United States and Petitioners may exercise their democratic rights in Puerto Rico elections under Puerto Rico law and the Commonwealth's Constitution.

With respect to federal elections, it is important to clarify that Puerto Rico residents are not banned from voting in presidential elections. Puerto Rico residents can, and do, vote in the presidential primaries that occur in the spring every four years for the purpose of choosing the party candidates for President. Puerto Rico may also, if it wishes, organize a ballot for the general U.S. presidential election in November every four years. But as repeatedly reaffirmed by

the U.S. Court of Appeals for the First Circuit, the U.S. Constitution does not allocate electoral votes to Puerto Rico, and so Puerto Rico's preference would not be added to the electoral vote tally in the general election.

Puerto Rico residents vote in congressional elections, both in party primaries and in the general election. Specifically, the residents of Puerto Rico vote for Puerto Rico's delegate to the U.S. House of Representatives, known as the Resident Commissioner. Furthermore, if they wish, Puerto Rico residents, almost all of whom are U.S. citizens, are also free to move to any state of the United States, where they can take up residence and exercise their voting rights in local, state, and federal elections. The U.S. Constitution applies in a fair and nondiscriminatory manner to all U.S. citizens.

Nothing in the American Declaration suggests that Organization of American States Member States may not maintain federal systems in which their citizens' participation in local and federal elections is determined by their residence or the status of the federal entity in which they reside. There is no allegation that Petitioners are prevented from residing anywhere they choose within the United States, including in states where they could vote in local, state, and federal elections. Petitioners' suggestion that the right to vote in particular U.S. federal elections is an intrinsic human right that flows from citizenship is simply not supported by the text of the American Declaration or by international law, and there is no basis for the Commission to infer such a right here.

#### ***Efforts in Puerto Rico to Reevaluate the Territory's Political Status***

The federal government has provided the residents of Puerto Rico multiple opportunities to review and reconsider Puerto Rico's legal relationship with the United States. In 1952, the people of Puerto Rico, in an act of self-determination, voted by referendum to become a self-governing Commonwealth, or *Estado Libre Asociado*. The residents of Puerto Rico then participated in five different free and public referenda over the subsequent 65 years, and the majority of voters in each instance chose to retain the current Commonwealth status and relationship to the United States. In a sixth vote, through a plebiscite held on June 11, 2017, the majority of Puerto Rico voters indicated for the first time that they desired to pursue status for Puerto Rico as a U.S. state.

Following the plebiscite, Puerto Rico's Governor, Ricardo Rosselló (son of lead Petitioner Pedro Rosselló) initiated an "offensive" to pursue statehood aided by his creation of the Puerto Rico Statehood Commission. ...

\* \* \* \*

The United States cannot predict the outcome of this political process. The United States emphasizes, however, that all past U.S. territories that became U.S. states, other than the territories for the original 13 states, completed a political process culminating in Congress granting the relevant territory statehood and extending to the residents of that territory all the rights of a state under the U.S. Constitution, including the right to vote in presidential general elections and the right to be represented in Congress by two senators and a number of representatives in the House of Representatives commensurate with the new state's population. Puerto Rico has not yet completed this political process.

Further, legal issues relating to Puerto Rico's status are actively reviewed, not ignored, by the independent federal judiciary. A 2016 U.S. Supreme Court case noted that, while not a distinct sovereign for the narrow purposes of the U.S. Constitution's "double jeopardy" clause, "Puerto Rico today has a distinctive, indeed exceptional, status as a self-governing

Commonwealth” with “wide-ranging self-rule.” As noted above, the First Circuit Court of Appeals has also extensively and repeatedly reviewed Petitioner Igartua’s claims under the U.S. Constitution, which largely parallel the claims he has made before the Commission, and has found them lacking in merit. The Supreme Court has declined to review these decisions, including most recently with a denial of certiorari issued on June 18, 2018. The Commission should defer to the requisite political process, which is being conducted consistent with the U.S. Constitution, and should dismiss the above-captioned Petitions.

\* \* \* \*

**c. *Petition No. P-1756-10, Ismael Estrada***

Also on June 28, 2018, the United States submitted its response to various *pro se* submissions to the IACHR by Ismael Estrada, a federal prisoner and national of Panama. Excerpts follow (with footnotes omitted) from that response.

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The Petition is inadmissible because Mr. Estrada (“Petitioner”) has not exhausted the domestic remedies available to him in the United States. It is further inadmissible because the Petition does not in any way indicate even a potential failure on the part of the United States to live up to any commitment under the American Declaration of the Rights and Duties of Man (“American Declaration”). Moreover, insofar as it relies on legal arguments submitted to and rejected by courts in the United States, it impermissibly seeks to place the Commission in the position of acting as a fourth instance review mechanism. Accordingly, the United States respectfully requests that the Commission find the Petition inadmissible. Should the Commission nevertheless declare the Petition admissible and examine its merits, the United States urges it to deny the Petitioner’s request for relief, as the Petition is entirely without merit.

\* \* \* \*

**THE PETITION IS INADMISSIBLE AND SHOULD BE DISMISSED**

The matter addressed by the Petition is not admissible and must be dismissed because it fails to meet the Commission’s established criteria in Articles 31 and 34 of the Rules of Procedure (“Rules”). Petitioner has not exhausted the domestic remedies available in the United States, as required by Article 31 of the Rules. The Petition is also plainly inadmissible under Article 34 of the Rules. In particular, the Petition fails under Article 34(a) to state facts that tend to establish violations of rights set forth in the American Declaration; it is manifestly groundless under Article 34(b); and its consideration would be inappropriate in light of the Commission’s fourth instance formula.

***1. Petitioner Has Not Pursued or Exhausted Domestic Remedies***

The Commission should declare the Petition inadmissible because Petitioner has not satisfied his duty to demonstrate that he has “invoked and exhausted” domestic remedies under Article 20(c) of the Commission’s Statute and Article 31 of the Rules.

The Commission has repeatedly emphasized that a petitioner has the duty to pursue all available domestic remedies. Article 31(1) of the Rules states that “[i]n order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.” As the Commission is aware, the requirement of exhaustion of domestic remedies stems from customary international law, as a means of respecting State sovereignty. ...

Petitioner chose not to appeal the District Court’s denial of his objection to jurisdiction predicated on the immigration court’s order of removal when he appealed his conviction to the Eleventh Circuit. The fact that Petitioner later apparently came to regret this litigation decision does not entitle him to pursue before the Commission a claim he failed to exhaust domestically.

For these reasons, Petitioner has failed to exhaust his local remedies and the Petition is inadmissible under Article 31.

***2. The Petition Fails to Establish Facts that Could Support a Claim of Violation of the American Declaration***

The Petition is also inadmissible under Article 34 because it does not establish facts that even arguably could establish a violation of the American Declaration and it is manifestly groundless. Petitioner does not specify which provision or provisions of the American Declaration he alleges the United States to have violated, though he lists the rights he believes to have been violated as “the right to life, the right to personal liberty, the right to a fair trial, the right to compensation for having been sentenced by a final judgment through a miscarriage of justice, the right to equal protection of the law, the right to judicial protection against violation of fundamental rights, etc.” On Petitioner’s theory, his conviction allegedly violated these rights because he had a “right” not to be in the United States at all based on the immigration court’s order of removal. In other words, Petitioner seeks to transform his own wrongdoing—his evasion of justice for drug trafficking and money laundering—into the source of a “right” not to be held accountable for his criminal activities. Petitioner apparently seeks relief in the form of being released from prison and returned to Panama in lieu of serving his sentence for drug trafficking and money laundering.

However, nothing in the American Declaration recognizes a human right to evade criminal prosecution by fleeing a State in which one has committed a crime. On the contrary, the American Declaration affirms that “[i]t is the duty of every person to obey the law and other legitimate commands of the authorities of his country and those of the country in which he may be.” It is also a general principle of law recognized by international courts and tribunals that an unlawful act cannot serve as the basis for a claim under international law. Petitioner nevertheless seeks to use his own wrongful flight from the United States in violation of U.S. law as the basis for asserting that he has an alleged “right” not to be in the United States and that his subsequent extradition to face criminal charges for drug trafficking violated his human rights. The Commission should not allow itself to be used for such a purpose.

***3. The Commission Cannot Review the Merits of the Petition Without Running Afoul of the Fourth Instance Formula***

Furthermore, the Petition plainly constitutes an effort by Petitioner to use the Commission as a “fourth instance” body to review claims already heard and rejected by U.S.

courts. The Commission has repeatedly stated that it may not “serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction,” a doctrine the Commission calls the “fourth instance formula.”

\* \* \* \*

The United States’ domestic criminal process, including the availability of appellate and collateral review of trial and sentencing proceedings, affords those convicted of serious crimes the highest level of internationally recognized protection. Petitioner has availed himself of this legal framework to challenge his conviction and his sentence in multiple proceedings over a number of years, including on the basis of his claim of a purported “right” not to be in the United States to face criminal charges. He asserted this claim not only in the primary criminal proceedings—in which he pursued an appeal to the Supreme Court—but also in the variety of collateral claims and challenges he has pursued. In each of these proceedings, the courts carefully reviewed the evidence and rejected Petitioner’s jurisdictional argument as either meritless or procedurally barred due to his own litigation choices.

\* \* \* \*

### **THE PETITION IS MERITLESS**

Even if the Commission could overcome these many barriers and proceeded to examine Petitioner’s allegations—which it plainly lacks the competence to do—it should find the allegations without merit and deny Petitioner’s request for relief.

Petitioner provides no legal argument for the premise on which his Petition is based. It would appear that his theory is that U.S. immigration law, in the form of a court order that he should be removed from the United States, renders unlawful the operation of the U.S.–Mexico Extradition Treaty (“Treaty”). On this theory, he asserts a right—which he argues rises to the level of a human right—not to be in the United States or in its prison system and to be returned to Panama.

However, as explained above, there is no human right to avoid criminal prosecution based on due process of law, and an immigration court’s order that an individual is subject to removal from the United States cannot serve to nullify the operation of the U.S. criminal justice system. Indeed, the District Court that convicted and sentenced Petitioner took due notice of the order of removal by ordering that Petitioner be turned over to immigration authorities for appropriate deportation proceedings after he completed his sentence.

Nor can U.S. immigration law displace international law in the form of the Treaty. Equally meritless is Petitioner’s assertion that U.S. immigration regulations required permission from the U.S. Attorney General in order for him to enter the United States by means of extradition. This assertion relies on flawed reasoning concerning the relationship between immigration regulations and criminal laws; the former cannot, and do not, displace the latter.

It also ignores the fact that the Attorney General supervises the Department of Justice, and it was the Department of Justice that sought and accepted Petitioner’s extradition from Mexico and prosecuted him for his crimes. When individuals are extradited to the United States to face criminal charges, they are typically not admitted into the United States after inspection by an immigration officer, as Petitioner’s claim seems to imply; rather, they are paroled into the United States for purposes of prosecution pursuant to INA section 212(d)(5). As such, it can

hardly be argued that the Attorney General did not consent to Petitioner's return to the United States to stand trial for his crimes and serve the sentence he received.

\* \* \* \*

Finally, as one of the strongest supporters of the Commission and by far its largest financial contributor, the United States continues to have concerns about the efficient management of the Commission's resources. It is unclear why this Petition was forwarded to the United States despite its obvious inadmissibility. In any event, further consideration of the present matter would not be a prudent use of the Commission's limited resources.

\* \* \* \*

**d. *Petition No. P-1307-12, David Johnson***

Also on June 28, 2018, the United States submitted its observations on the petition regarding David Johnson. Petitioner is a Jamaican national who sought U.S. citizenship (his father had acquired U.S. citizenship but his mother had not). Petitioner was removed from the United States based on several felony convictions. Excerpts follow from the U.S. submission, with footnotes omitted.

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**A. *Admissibility***

Article 34(a) of the Rules provides that the Commission shall declare any petition or case inadmissible when the petition does not state facts that tend to establish a violation of the rights set out in the American Declaration. For the reasons set forth below, Mr. Johnson has failed to state facts that tend to establish a violation of his right to equal protection under the law, protection of his private and family life, his right to residence, or his right to nationality, under Articles II, V, VIII, and XIX of the Declaration.

**1. Right of Equality Before the Law—Article II**

Petitioner claims that former Section 321(a)(3) of the [Immigration and Nationality Act, or] INA contains impermissible distinctions based on gender, illegitimacy, and family composition that are contrary to Article II's provision that "all persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." Yet the IACHR, rightly, does not construe the wording of Article II to prohibit all differences in treatment: Although judgments of the Inter-American Court of Human Rights construing the American Convention on Human Rights do not govern U.S. commitments under the American Declaration, it is noteworthy that the Court has also recognized the validity of "distinctions" as opposed to "discriminations," in that only the latter constitute arbitrary differences that violate human dignity. The Court has opined that "[d]istinctions" that are "reasonable, proportionate and objective" are compatible with the American Convention on Human Rights.

*(a) The statute served important government interest in protecting parental rights.*

As noted in Section II.A, above, the statutory scheme embodied in former Section 321 is substantially related to the United States' important objective of protecting the rights of both parents when one or both parents become naturalized U.S. citizens. Congress looked to ensure that under the INA the interests of the naturalized parent would not crowd out the rights of the noncitizen parent, both for children of married parents and those born out of wedlock. Congress sought to protect the parental rights of the noncitizen parent, whose "parental rights could be effectively extinguished" when only one parent was naturalized. The baseline standard articulated in 321(a)(1), that *both* parents must naturalize in order to confer automatic citizenship on a child, "recognizes that either parent—naturalized or noncitizen—may have reasons to oppose the naturalization of their child, and it respects each parent's rights in this regard." The statute protected both parents' rights by preventing the automatic acquisition of U.S. citizenship by a child of a parent who had chosen not to naturalize. This mechanism reflected the fact that naturalization is a "significant legal event with consequences for the child here and perhaps within his country of birth or other citizenship."

*(b) Exceptions to two-parent baseline were well-grounded.*

Beyond the baseline standard, however, Congress recognized that there were situations where a child would not have two confirmed and living parents in a position to naturalize. In paragraphs (a)(2) and (a)(3) of former Section 321, Congress set forth governing rules for such situations that could still afford such children a path to U.S. citizenship. Significantly, eligibility for each of the statutory categories delineated in those paragraphs was determined, along with the threshold requirement of the naturalization of one parent, by the existence of a precise, objective, legally defined relationship or circumstance: death ((a)(2)); legal custody and legal separation ((a)(3), first clause); or lack of legitimation by the father ((a)(3), second clause).

None of these criteria corresponds to Mr. Johnson's situation. Mr. Johnson's mother never naturalized—so (a)(1) is not applicable. Mr. Johnson's mother was alive throughout his period of minority until after he turned 18 in 1993—so (a)(2) is not applicable. Mr. Johnson's father had legal custody of his child, but had never been married to Mr. Johnson's mother and hence there had been no legal separation—so the first clause of (a)(3) is not applicable. Last, again, Mr. Johnson's mother never naturalized—so the second clause of (a)(3) is not applicable.

\* \* \* \*

*(c) Mr. Johnson's alternative path to naturalization was never pursued.*

From the time of Mr. Johnson's father's naturalization in 1973 until the time Mr. Johnson turned 18 in 1983, Mr. Johnson's father could have sought a certificate of U.S. citizenship for his son pursuant to former Section 322 of the INA (codified then at 8 U.S.C. § 1433). That provision provided that a child born abroad would be a citizen upon petition of the child's parent if at least one parent was a U.S. citizen (either by birth or naturalization), the child was under the age of 18, and the child resided permanently in the United States pursuant to a lawful admission for permanent residence. Whether or not there had been a "legal separation" of Mr. Johnson's parents would have been immaterial. Mr. Johnson offers no explanation for why his father failed to secure his citizenship under Section 1433 other than an assertion that his father believed his son would automatically derive U.S. citizenship. But the validity of a statute is not called into question merely because an individual's misreading of the law and consequent inaction deprived his son of the readily available benefit of citizenship.

Moreover, a foreign-born child who develops substantial connections to the United States through marriage or permanent residence in the United States may apply to become a naturalized citizen upon reaching age 18 by meeting standard naturalization requirements. That Petitioner did not seek to take advantage of these options does not mean in consequence that the United States or its Congress can or should be deemed to have disregarded his right to equal protection under the law.

*(d) Mr. Johnson's arguments continue to be unavailing.*

Mr. Johnson had the opportunity to present his arguments to no fewer than five U.S. administrative and judicial forums—the immigration agency, two quasi-judicial review bodies at the Department of Justice, a court of appeals, and ultimately the U.S. Supreme Court. None accepted his claims as meritorious. The substantive decisions were reached in reliance upon the U.S. Constitution's well-established equal protection principles, consistently with Article II of the Declaration. So too here, regardless of what level of review the Commission might apply to the statute, Section 321(a)(3) did not violate Mr. Johnson's rights.

For these reasons as well, the Commission should dismiss the Petition in light of the “fourth instance formula” because it does not have the competence to second-guess the legal and evidentiary judgment calls of domestic courts unless there is “unequivocal evidence ... that guarantees of due process have been violated.”

2. Right to Family Life—Article V

*(a) This case does not fall within the ambit of Article V, which was intended to ensure that families are not subject to direct violence by the state.*

Petitioner claims that by removing him without considering his family and community ties, the United States violated Article V of the American Declaration. Article V refers to the right to be free from abusive attacks on one's honor, personal reputation, and private and family life. Petitioner's claims must fail because the right related to family and private life established by Article V was not intended to apply his situation. Rather, the language of Article V makes clear that it is intended to ensure that families are not subject to direct violence by the state.

Specifically, the text of Article V and much of the Commission's own jurisprudence demonstrate that Article V is intended to apply only to direct state action that affects family life. The words “abusive attacks upon ... private and family life” in Article V clearly imply something more than incidental interference. Rather, they imply some degree of state action directly aimed at harming family life.

The Commission's jurisprudence bears out this textually supported interpretation of Article V and related rights. In a case regarding the persecution of the Ache people in Paraguay, the Commission noted that the sale of children constitutes a “very serious” violation of the right to a family. In the case of the Gelman family in Uruguay, the Commission found the petition admissible in part on the basis that Article VI might have been violated by the forced disappearance of Maria Claudi Gelman and the suppression of the identity of her daughter.

Here, there is no such direct state action. As detailed above, removal proceedings—which form the basis of the Petitioner's complaint—are merely the civil consequence of the Petitioner's decision to commit serious crimes while residing in the United States, and his resulting failure to comply with the terms and conditions bearing upon his residence in the country. As a secondary consequence of the permissible exercise of the sovereign right of states to expel foreign nationals who commit serious crimes within their territory, removal proceedings are not the type of direct state action that Article V sought to target. Indeed, any expansion of Article V to cover the secondary consequences of lawful and reasonable state action, as in this case, would have the

effect of seriously disrupting the state's ability to make the many critical determinations necessary to provide for security and promote the general welfare.

*(b) Article V is not implicated by a state's lawful removal of a noncitizen who has committed serious crimes in violation of its immigration laws.*

Even if Article V could extend its reach beyond direct state action to the secondary consequences of state action, which the United States maintains it cannot, and a balancing of state interests in removal of a noncitizen against the noncitizen's family and community ties were appropriate, the Commission still could not find a violation of Article V in a case such as this involving a noncitizen who has committed multiple felonies, including drug trafficking and crimes of violence, in violation of his host state's immigration law. As made clear in the American Declaration, the state may limit the enjoyment of private and family rights by taking lawful actions that provide for the general welfare and protect the security of all. In no case is that standard more clearly met than in the case of a criminal noncitizen like Mr. Johnson, whose presence in the United States, following multiple criminal convictions for serious crimes, could harm public order and threaten the well-being of U.S. citizens and lawful noncitizen residents.

While not required to do so as a matter of international law, the United States, through its immigration laws, does routinely take into account a noncitizen's family ties both inside and outside the United States as relevant factors in determining a noncitizen's eligibility for discretionary immigration relief. Similarly, U.S. immigration authorities often give due consideration to family life in the exercise of prosecutorial discretion on a case-by-case basis. Yet consideration of family unity does not always outweigh other factors. As in this case, the United States will remove noncitizens who have committed an aggravated felony in the United States regardless of their family ties. While an expulsion of a noncitizen unlawfully present in the country will by its very nature have unfortunate consequences for that individual's family, the removal of such noncitizen on the basis of his criminal violations and in conformity with a carefully conceived set of rules of general application designed to protect a nation's welfare and security, which it is free to pursue as an incidence of its sovereignty, constitutes action that fully complies with international law. For these reasons, the United States maintains that the American Declaration is not violated by removal under these circumstances.

*(c) Article V is not implicated by U.S. nationality laws intended to protect parental rights.*

Petitioner further argues that the United States violated Article V by virtue of Section 321(a) of the INA, on the grounds that this provision discriminates on the basis of family composition. However, as set forth at length above, this statutory scheme is not discriminatory, but rather, reflects the state's rational interest in limiting automatic changes to a child's citizenship status, to situations where either (1) both parents are part of the decision regarding a family's naturalization; or (2) there is only one custodial parent. This approach serves the important objective of protecting the rights of both parents of a foreign-born child when one or both parents become naturalized U.S. citizens, ensuring that the interests of the naturalized parent would not crowd out the parental rights of the noncitizen parent without his or her knowledge or consent. As a result, and in direct contradiction to Petitioner's argument, the naturalization provisions that Petitioner challenges in this case were intended to safeguard the very privacy and family interests he contends he was deprived of.

### 3. Right to Residence—Article VIII

(a) *The United States did not violate Mr. Johnson’s right to residence under Article VIII by removing him from the country of which he is not a national.*

Petitioner argues that the United States violated his “right to residence” in the United States under Article VIII of the American Declaration by permanently removing him from the state in which he lived the majority of his life. However, there is no “right” to reside in a country other than one’s own. Article VII of the American Declaration, which provides that “[e]very person has a right to fix his residence within the territory of the state *of which he is a national*,” is, by its terms, inapplicable given that Mr. Johnson is not a national of the United States, and his longtime residence in this country does not change that fact.

Not only is Article VII by its terms inapplicable to Mr. Johnson’s circumstances given that he lacks U.S. citizenship, but any other reading would be inconsistent with the universally recognized sovereign right of States under international law to regulate the entry and residence of noncitizens in their territory, and to expel noncitizens, consistent with international obligations. A nation’s legitimate interests in controlling the admission of noncitizens, their departure, and their conditions and duration of stay within the country has been universally recognized from the earliest times and reaffirmed through treaty law. . . .

Finally, the United States wishes to emphasize that Mr. Johnson could have avoided being removed from the United States if he had chosen not to commit serious criminal acts while in the United States, or if his father had petitioned for U.S. citizenship on his behalf, or potentially if he himself had applied for U.S. citizenship. None of these circumstances being the case, Mr. Johnson remained subject to the immigration laws that he now challenges before the Commission.

### 4. Right to Nationality—Article XIX

*The United States did not violate Mr. Johnson’s right to nationality under Article XIX by denying him automatic derivative citizenship.*

Petitioner next argues that the United States violated his “right to nationality” under Article XIX of the American Declaration by denying him automatic derivative citizenship. Petitioner’s position is once again inconsistent with the textual right he invokes. Article XIX provides that “[e]very person has the right to the nationality *to which he is entitled by law*” (emphasis added). Inherent in the articulation of this right is the sovereign right of countries to establish their own standards and procedures for determining who is (and who is not) its citizen or national—in other words, the “law” from which any entitlement to nationality derives is the domestic law of the particular state. While the United States is in agreement with the petitioner that under international law a state must not arbitrarily deprive a national of his or her nationality, Mr. Johnson, a Jamaican citizen, does not have and never has had a U.S. nationality to which he is entitled or of which he could have been deprived.

In this regard the *Case of the Yean and Bosico Children v. Dominican Republic* is clearly distinguishable from the present facts. The petitioners in *Yean and Bosico*, having been born in the Dominican Republic, were entitled to Dominican citizenship as a matter of its domestic law, but were unable to obtain the birth certificates that would have allowed them to prove it or otherwise have their citizenship acknowledged so as to avail themselves of that citizenship. In contrast, Mr. Johnson was never entitled to citizenship under U.S. law. For the reason stated, he was not eligible for automatic derivative citizenship under former Section 321 of the INA. As the child of a U.S. national father, the law provided an avenue for Mr. Johnson to *pursue* U.S. citizenship, but Mr. Johnson never applied for U.S. citizenship on his own behalf and Mr.

Johnson's father also failed to use the procedure Congress created to apply for U.S. citizenship on his son's behalf. Because Mr. Johnson never became a U.S. citizen, Article XIX is not implicated in this case.

**B. Merits**

For the reasons set forth above, the Commission should not reach the merits of the Petition because it is inadmissible in its entirety under Article 34(a) of the Rules. Should the Commission nevertheless declare the Petition admissible, the United States urges it to find the Petition lacking in merit. Petitioner has not provided sufficient evidence that the United States discriminated against him on the basis of sex or illegitimacy in violation of equal protection under the law. Petitioner has also failed to show that the United States violated his right to family life, residence, or nationality. While the United States reserves the right to provide further views on the merits should the Commission declare the Petition admissible, we reiterate that international law recognizes the right of states to regulate the exclusion and admission of noncitizens, subject to the states' international obligations.

\* \* \* \*

**e. Petition No. MC-505-18 (Antonio Bol Paau) and Petition No. MC-731-18 (Migrant Children)**

On June 29, 2018, the United States submitted its response to a request for information from the IACHR regarding U.S. migration policy and actions with respect to migrant families. The testimony of Ambassador Trujillo mentioned in the U.S. response excerpted below is discussed in section D.1.c., *supra*.

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\* \* \* \*

As Ambassador Trujillo noted in his remarks before the Organization of American States (OAS) Permanent Council this morning, the topic of migration is one of significant interest to the United States, as reflected by our ongoing engagement in several migration-related matters before the Commission and in other OAS bodies. As the Commission is aware, the United States is a welcoming home for immigrants, having welcomed more than 1.1 million legal immigrants in the last year alone, a legacy of which we are proud.

We are also a nation of laws. As the Commission itself has repeatedly recognized, it is the sovereign right of States to control their borders and set migration policies in accordance with their domestic laws and policies, consistent with their international obligations. States retain the discretion to determine whether to expand migration pathways, detain migrants who seek entry, impose criminal penalties for illegal immigration, or adjust the status of migrants. With this in mind, the United States will continue to exercise its sovereign authority over its immigration policy.

\* \* \* \*

With respect to issues pertaining to child migrants, the United States is assisting governments in the region to strengthen migration management policies and implementation. Through our partner the International Organization for Migration, we have longstanding cooperation with governments that focuses on identifying migrants in situations of vulnerability, including unaccompanied children, and providing them with information and assistance. We also provide support for governments and civil society to disseminate information to migrants so they understand the dangers that await them on the route to entering the United States illegally.

As to cases involving family separation during detention, on June 20—after the Petitioners in the above-referenced matters submitted their respective petitions for precautionary measures—President Trump signed an Executive Order that directs the Administration to continue to protect the border, while simultaneously avoiding the separation of families to the extent we can legally do so. The U.S. Departments of Homeland Security and Health and Human Services are also working to reunify parents with their children. In light of litigation on these matters before our independent judiciary and recent court decisions, we are unable to provide the Commission with further details at this time.

Finally, we take this opportunity to reaffirm our longstanding position that the Commission lacks the authority to require that States adopt precautionary measures. We refer the Commission to past submissions, which state the reasons for the U.S. position on precautionary measures in detail. Because the United States is not a State Party to the American Convention, the Commission has only the authority “to make recommendations . . . to bring about more effective observance of fundamental human rights.” As such, should the Commission adopt a precautionary measures resolution in the above-captioned matters, the United States will take it under advisement and construe it as recommendatory.

\* \* \* \*

On August 9, 2018, the United States submitted its response to letters from the IACHR Executive Secretary requesting information regarding U.S. migration policy and actions with respect to migrant families in the cases of *Bol Paau* and *Migrant Children*. Excerpts follow from the August 9 letter. The letter reiterated the U.S. position regarding precautionary measures, as stated in the June 29 letter, *supra* (and not excerpted again below).

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\* \* \* \*

Under order of the U.S. District Court for the Southern District of California (*Ms. L., et al. v. U.S. Immigration and Custom Enforcement, et al.*), the Departments of Health and Human Services (HHS), Homeland Security (DHS), and Justice (DOJ) have been reunifying eligible alien parents with their minor children in the custody of HHS. Dedicated teams at HHS, DHS, and DOJ have worked to ensure the safety of the children of *Ms. L* class members. For the latest information on reunifications pursuant to the order, we respectfully refer the Commission to the supplemental filing to the most recent joint status report filed in the case on August 2, 2018.

Throughout this process, the primary goal of the U.S. Government has been to protect the safety and welfare of children in our custody and reunify them with their eligible parents. This

critically important task was carried out by the dedicated employees of the administration who have spent weeks meeting this challenge to reunify expeditiously while at the same time ensuring familial relationships and safety of the child.

In the coming days and weeks, the U.S. Government will continue to reunify additional parents with children as they are located and their wishes regarding reunification are identified. The U.S. Government will also continue working to reunify removed adults, including those who previously indicated a preference for leaving their child in the United States but who now would like to be reunified. Finally, if the U.S. Government is unable to reunify a child with his or her parent—because the parent chose not to be reunified the child or is deemed ineligible—HHS will continue to adhere to its sponsorship process to place the child with a sponsor in the United States—often a family member.

The U.S. Government leads international efforts to develop solutions to the underlying conditions driving irregular migration from Central America. The U.S. Government works in partnership with regional governments, international organizations, the private sector, and civil society to enhance citizen security, improve governance, and boost economic prosperity.

In light of ongoing litigation on these matters before our independent judiciary, we are unable to provide the Commission with further details at this time.

\* \* \* \*

On August 20, 2018, the Commission transmitted Precautionary Measures Resolutions 63/2018 and 74/2018 in the cases of *Bol Paau et al.*, and *Migrant Children*. The United States submitted a further response letter providing further information on the issues in these cases on August 30, 2019. Excerpts from that letter follow.

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\* \* \* \*

We acknowledge receipt of your office's communications of August 20, 2018, transmitting Precautionary Measures Resolutions 63/2018 and 64/2018. Consistent with our longstanding position on the Commission's lack of competence to require precautionary measures, we have construed Resolutions 63/2018 and 64/2018 as recommendations and have transmitted them to the relevant offices within the U.S. Government for their consideration.

We take this opportunity to inform the Commission of further progress by the U.S. Government to reunify class member parents with their children. The U.S. Government is currently implementing a court-approved Reunification Plan to reunite minors who were separated from class member parents and who have been removed or have departed from the United States. The U.S. Government also continues to reunify class member parents who are in, or have been released from, the custody of U.S. Immigration and Customs Enforcement. The ACLU Family Reunification Hotline has been posted on U.S. Embassy websites. The Reunification Plan for parents outside the United States is attached for the convenience of the Commission. For the latest information on reunifications, we respectfully refer the Commission to most recent joint status report filed on August 23, 2018, in the *Ms. L., et al. v. U.S. Immigration and Custom Enforcement, et al.* litigation. As reflected in the joint status report, the U.S. Government continues the reunification of class member parents with children pursuant to

the Reunification Plan. As noted in the report, the data remain dynamic and continue to change as more reunifications or discharges occur.

In this regard, the United States remains concerned about the Commission's tendency to attempt to intervene in domestic political and legal matters that are complex, fast-changing, and the subject of ongoing domestic litigation. This can make it very difficult for the United States to meaningfully engage with the Commission about such matters, and reduces the value of the Commission's involvement. The Commission is well aware of our similar longstanding concerns about the practice of convening thematic hearings about matters in active litigation in our domestic system.

We understand the Commission's desire to provide its views on important issues of the day. And we acknowledge the Commission's effort to engage with us before recommending precautionary measures, as we asked it to do in sensitive matters. But the recommendation of precautionary measures in these matters reflects a larger problem of increasing concern to the United States: the Commission has been expending an inordinate amount of its limited resources involving itself in high-profile and sensitive on-going domestic political discussions instead of taking decisive action to address the severe and growing backlog of individual petitions. As a strong supporter of the Commission and by far the Hemisphere's largest financial contributor, we are concerned that the Commission is operating outside of its mandate and not focusing its limited resources as it should.

\* \* \* \*

**f. Hearings**

On February 27, 2018, the U.S. delegation participated in IACHR hearings in Bogotá, Colombia on two themes. Excerpts follow (with footnotes omitted) from the U.S. remarks at the thematic hearing on "Regulation of Gun Sales and Social Violence."

\* \* \* \*

Distinguished Commissioners, colleagues at the other table, and Secretariat colleagues—I am Andrew Stevenson of the U.S. Mission to the Organization of American States, and I am here with James Bischoff of the U.S. Department of State's Office of the Legal Adviser to represent our delegation at this hearing.

\* \* \* \*

...I will take a few minutes to convey the serious concerns of my government about the Commission's decision to convene this hearing and the next one this morning.

Just over a month ago, the Commission sent the United States notification of its decision to hold these hearings—this one on Regulation of Gun Sales and Social Violence, and the next one on Temporary Protected Status and Deferred Action for Childhood Arrivals.

In those notifications, the Commission said that it was convening these hearings on its own initiative, presumably under Article 61 of the Rules. We also understand that they are

intended to be “Hearings of a General Nature”—or “thematic” hearings—governed by Article 66 of the Rules.

Increasingly in recent years, the Commission seems to have made it standard practice to insert itself into ongoing domestic political discussions through the mechanism of a thematic hearing. The subjects on which the Commission convenes thematic hearings are often complex, fast-changing, the subject of significant domestic litigation or congressional consideration, and of great political sensitivity. This can make it very difficult for the United States to meaningfully engage with the Commission about them, and reduces the value of the Commission’s involvement.

The Commission is well aware of our similar longstanding concerns about the practice of convening thematic hearings about matters in active litigation in our domestic system. As we have repeatedly told the Commission, we cannot discuss specific details on such matters while the outcome of litigation is pending. It was in part for this reason that we found ourselves unable to participate in the March 2017 hearings at all.

The number of thematic hearings has risen sharply in recent years, and now dwarfs the number of petition-based hearings, even as the Commission’s backlog of petitions continues to grow and undermine its effectiveness. Since 1996, the Commission has convened 90 hearings involving the United States. From 1996 through 2011, petition-based hearings represented 75% of all hearings, with the Commission holding 34 petition-based hearings and just 13 thematic hearings.

By contrast, from 2012 to the present, the Commission has convened just eight petition-based hearings, contrasted with 35 thematic hearings, meaning that thematic hearings have represented over 80% of all hearings in the past six years.

We understand the Commission’s desire to provide its views on important issues of the day. But the disproportion between thematic and petition-based hearings feeds directly into a larger problem of increasing concern to the United States: the Commission has been expending an inordinate amount of its limited resources involving itself in high-profile and sensitive ongoing domestic political discussions instead of taking decisive action to address the severe and growing backlog of individual petitions. As a strong supporter of the Commission and by far the Hemisphere’s largest financial contributor, we are concerned that the Commission is operating outside of its mandate and not focusing its limited resources as it should.

For the United States alone, there are nearly 100 cases open on the Commission’s docket. In the vast majority of the open cases, action lies with the Commission to make a decision. Newly opened cases are typically at least five years old by the time the Commission is able to send them to the United States for a response.

The backlog continues to grow because the number of petitions received in any given year far exceeds the number of decisions per year. The Commission usually issues one or two merits decisions per year involving the United States, typically many years after the events being complained about.

The IACHR’s statistics website indicates much larger numbers for other OAS Member States such as Mexico, Colombia, and Peru. Although we applaud recent efforts to streamline case management, you face a monumental task simply in addressing the cases currently before you.

The Commission’s strength and credibility in the region depend on its ability to operate effectively and efficiently in a constrained budgetary environment. It must demonstrate to States, civil society, and individuals that it is an efficient and effective institution. The severe backlog of

individual petitions, and the long amount of time that elapses between the filing of a petition and the case's ultimate resolution, significantly diminishes this perception.

To be sure, dealing with individual petitions is tedious, requires examination of alleged abuses that occurred years ago, and occurs mostly out of public view. But as you of course appreciate, it is indispensable work on which many individuals across the Hemisphere hang their hopes.

In sharp contrast, the topics to be discussed at the hearings today are not the subject of a petition before the Commission. Nor do they lack full and transparent debate and consideration in all relevant democratic and judicial fora in the United States. They were instead convened at the Commission's own initiative, using a rarely invoked provision of the Rules, at least with respect to the United States.

We understand that you may disagree with the views we have just set forth. We respect your independence and will, of course, listen to your point of view and to that of civil society.

Nevertheless, it remains the position of my government that the Commission should not have convened hearings on these issues, especially absent a petition. Each time the Commission convenes yet another thematic hearing on a hotly contested political issue that is the subject of robust debate in democratic institutions or a matter in active litigation, the United States finds itself reevaluating the utility of participating in hearings. Despite these concerns, we ultimately decided it was important to come here and relate our concerns to you, and to convey our desire to continue this discussion in Washington at a mutually convenient time.

Turning now to the topic of this hearing, I will give the floor to my colleague from the Office of the Legal Adviser, Mr. Bischoff.

***James Bischoff, Office of the Legal Adviser***

Distinguished Commissioners, good morning. My name is James Bischoff, and today I will discuss the Commission's lack of competence to consider the domestic regulation of firearms and private violence perpetrated by firearms. I will then discuss the constitutional right to bear arms in the United States, U.S. laws and regulations on firearms, and prosecutions of those who violate gun laws.

***Lack of competence***

As provided under Article 20 of its Statute, the Commission has the competence to examine allegations that the United States, which has not chosen to ratify the American Convention on Human Rights, has failed to live up to its commitments in the American Declaration of the Rights and Duties of Man.

This year marks the 70th anniversary of the Declaration, a proud moment the Commission is celebrating at this Period of Sessions. It was truly a groundbreaking instrument that set forth, months before the Universal Declaration on Human Rights, key human rights commitments that States of the Americas undertook voluntarily to respect, as well as duties that individuals owe toward one another and to society—such as the duty to obey the law. Many of the Declaration's rights reflected rights contained in our own Constitution's Bill of Rights, another groundbreaking document at the time of its adoption.

Despite the importance of the Declaration as a statement of moral and political commitments, the commitments in it are, in the United States' longstanding view, nonbinding. By the same token, the Commission has recommendatory but not binding powers, as the terms of the Commission's Statute make clear—in particular, Articles 18 and 20 thereof.

We of course understand that the Commission and the Inter-American Court take the view that the Declaration is a source of legal obligation. Yet while we have great respect for the

Commission and the Court, the United States has never accepted this view, and is not bound by it as a matter of international law.

While we recognize the good intentions of those who would wish the Declaration had binding force, it would seriously undermine the process of international lawmaking, by which sovereign States voluntarily undertake specified legal obligations, to impose legal obligations on States where no obligation has been accepted, through some form of *ipse dixit*. This is precisely how this jurisprudence originated in the Commission's *Baby Boy* decision back in 1981, backed up by a Court advisory opinion in 1989.

Contrary to the Commission's and Court's assertions in those two decisions, it is not the case that the States that negotiated and ratified the OAS Charter or its amendments or the States that adopted the Commission's Statute, intended the Commission to apply the American Declaration as a binding source of international law.

This basic fact holds true no matter how many times the Commission restates the view that the Declaration has binding force, and it does so frequently. But as far as we are aware, neither the Commission nor the Court has ever seriously reconsidered the legal reasoning underlying this view.

Nevertheless, we continue to make our objections known. As a sovereign State, the United States voluntarily undertakes international law obligations, and it takes those obligations seriously. But we have never undertaken an obligation that would render the Declaration binding—not when it was adopted and not since then. And we have persistently objected to any such notion in scores of written and oral submissions since at least 1979.

In sum, the Declaration remains, after 70 years, one of the key blueprints for the protection and promotion of human rights in the Americas. But as a matter of international law, it also remains nonbinding, just as those who negotiated and adopted it intended 70 years ago. While the United States and the Commission disagree on this basic issue, we always do so in a spirit of respectful dialogue.

Turning now to the substance of the Declaration and the topic of this hearing, there is no article in the Declaration addressing the right of individuals to bear arms, in contrast to the United States Constitution, where as our friends at the other table mentioned, the right is set forth in the Second Amendment of our Constitution. The constitutional right to bear arms is the starting point for any discussion of firearms in the United States.

Furthermore, the Declaration is silent on any right to be free from private violence, including violence inflicted by firearms.

More broadly, as we have explained in numerous submissions over the years, the United States does not recognize that OAS Member States, by pledging support for the Declaration or joining subsequent OAS instruments, undertook a commitment—much less an obligation under international law—to prevent private violence.

Those who unjustifiably use guns against other individuals certainly fail to respect their duty to obey the law. But there is no provision in the Declaration or in the other governing instruments of the Commission that would permit such private conduct to be imputed to the State.

Of course, as a matter of domestic law and policy, the United States government takes very seriously its responsibility to prevent and punish crime.

However, as a matter of international human rights, questions of private gun violence and States' regulation of firearms and States' actions to address private violence lie beyond the Commission's competence to consider.

***Right to bear arms***

Despite this lack of competence, I will briefly discuss for the Commission’s benefit some aspects of the U.S. domestic legal regime related to the right to bear arms and firearm regulation.

As noted above, the Second Amendment of the U.S. Constitution states that “the right of the people to keep and bear Arms[] shall not be infringed.”

This right has been explained by the U.S. Supreme Court, in the case *District of Columbia v. Heller*, as “guarantee[ing] the *individual* right to possess and carry weapons.” The Court also held that this right extends to “all instruments that constitute bearable arms, even those that were not in existence at the time of the founding [of the United States].”

The Second Amendment means that governments at all levels of our federal system are prohibited from outright banning ownership, possession, and sale of firearms, because to do so would run afoul of the Constitutional right to bear arms.

***Firearm regulation and efforts to combat gun violence***

However, the existence of the right does not mean that governments are powerless to regulate firearm sale and possession. As the Supreme Court has also recognized, governments may lawfully impose prohibitions on the possession of firearms by, for example, felons and the mentally ill. Governments may also, as two more examples given by the Supreme Court, forbid the carrying of firearms in schools or government buildings; and impose conditions on the commercial sale of arms.

Both federal and state laws address firearms possession and use. And the federal government has recently undertaken a number of important efforts to ensure violent offenders—including those who criminally misuse firearms—are held accountable.

In March 2017, Attorney General Sessions sent a memorandum to Department of Justice prosecutors, ordering them to prioritize cases against the most violent offenders, those who are driving the violence in the most violent places in the United States. In October, he reinvigorated the Department’s Project Safe Neighborhoods program, directing federal prosecutors to partner with law enforcement at all levels of government, along with the communities they serve, to develop localized plans to reduce violent crime.

In 2017, federal prosecutors brought cases against the greatest number of violent criminals in at least a quarter century – the most since the Department began tracking a “violent crime” category. And they prosecuted more defendants on federal firearms charges than they have in a decade.

\* \* \* \*

Excerpts below from the February 27 hearings in Bogotá are from the presentation by James Bischoff of the Office of the Legal Adviser on the situation of human rights of persons affected by the cancellation of the Temporary Protected Status (“TPS”) and Deferred Action for Childhood Arrivals (“DACA”) in the United States.

\* \* \* \*

The right to admit, exclude, expel, and regulate the presence of noncitizens within a State's borders is an inherent and inalienable right of every State, essential to its safety, independence, and welfare. As the Commission itself has acknowledged, international law has long recognized this sovereign right, subject to States' respective international treaty obligations.

This principle is also set forth in the Havana Convention of 1928, which provides that "States have the right to establish by means of laws the conditions under which foreigners may enter and reside in their territory."

Our domestic courts, including the U.S. Supreme Court, likewise have recognized this maxim of international law for more than a century.

Under our constitutional system, the U.S. Congress passes laws on the admission and exclusion of noncitizens. It also passes laws to prescribe the terms and conditions on which they be permitted to enter or on which they remain after having been admitted; and to establish rules for removing noncitizens who entered or have remained in violation of the law. In enforcing the immigration laws, Executive Branch agencies, such as the Department of Homeland Security (DHS) and its components such U.S. Immigration and Customs Enforcement (ICE), act in accordance with the U.S. Constitution, federal statutes and regulations, and the President's enforcement priorities. The President also has inherent executive authority to control the entry of noncitizens.

#### ***Temporary Protected Status***

Congress established the statutory framework for Temporary Protected Status, or TPS, in 1990 by amending the Immigration and Nationality Act (INA). Congress designed TPS as a discretionary humanitarian measure to provide temporary safe haven to foreign nationals already present in the United States who meet certain requirements and are temporarily unable to return to their home country due to an ongoing armed conflict, environmental disaster resulting in a substantial, but temporary, disruption of living conditions in the area affected, or extraordinary and temporary conditions. The foreign national must request TPS.

Congress, through the INA, has given the Secretary of Homeland Security the authority to designate a country for TPS and to extend or terminate a country's existing designation. TPS designations and any extensions are limited to periods of up to 18 months before they must be reviewed and assessed to determine whether they should continue.

Prior to the expiration date of a country's existing TPS designation, DHS reviews conditions in the country and, after consultation with appropriate federal agencies, determines whether the statutory conditions for TPS continue to be met. If DHS determines that the conditions upon which the country's designation is based continue to be met, it will extend the designation, which prolongs TPS for existing beneficiaries who timely re-register. DHS has the discretion to make a new designation for TPS on the same or an alternative basis, which could allow for new beneficiaries.

If, on the other hand, DHS determines that the statutory conditions for the existing TPS designation are no longer met, it must terminate the designation. Termination ends a country's TPS designation and establishes a date by which beneficiaries who do not hold another lawful immigration status must depart the United States. DHS generally allows for a period of between six and eighteen months for such individuals to retain TPS and TPS-based employment authorization while they prepare for their orderly departure.

TPS is only available to individuals who were physically present in the United States prior to the date of their country's designation for TPS, as well as meeting other criteria. Throughout the period of designation, DHS cannot detain TPS beneficiaries because of their

immigration status, and it cannot remove them from the United States, although TPS may be withdrawn from certain individuals who are no longer eligible to receive it. Beneficiaries are authorized for employment and may obtain permission to travel outside the United States and return.

It is important to emphasize that TPS is at its heart designed to be a *temporary* benefit. DHS may only designate TPS for a given country for a maximum of 18 months, and must then re-examine the conditions in the country in order to determine whether to extend or terminate the TPS designation.

DHS makes this temporary nature clear to applicants, informing them through various channels of the expiration date associated with a designation that TPS does not lead to lawful permanent resident status or give any other immigration status on its own, and that, upon termination, TPS beneficiaries continue in any other immigration status they maintained or obtained while holding TPS, unless that other immigration status has expired. Individuals granted TPS must re-register each time their country's TPS designation is extended by submitting an application to DHS, and must also apply to extend their employment authorization documentation.

Beneficiaries of TPS and other stakeholders are provided notice of all TPS decisions. In addition to a notice in the *Federal Register*—the official journal of the U.S. government—TPS decisions are announced on the DHS website and the website of USCIS, the DHS component that administers TPS programs.

TPS does not preclude an individual from seeking a different immigration status. For example, a TPS beneficiary could petition for a change to nonimmigrant status, file for adjustment of status to permanent resident based on an immigration petition (for example, based on marriage to a U.S. citizen) or seek asylum or withholding of removal—that is, withholding of deportation—if he or she fears persecution or torture in his or her home country.

In 2017, DHS announced decisions on TPS designations for 7 countries that were set to expire: Haiti, Honduras, Nicaragua, Somalia, South Sudan, Sudan, and Yemen. Following careful consideration of available information, including recommendations from other Executive Branch agencies, DHS determined that the conditions supporting the designation for TPS continued to exist in Somalia, South Sudan, and Yemen.

Thus far in 2018, DHS has announced decisions on TPS designations for two countries that were set to expire: El Salvador and Syria. Following careful consideration of available information, including recommendations from other Executive Branch agencies, DHS determined that the conditions supporting the designation for TPS continued to exist in Syria.

For El Salvador, Haiti, Nicaragua, and Sudan, DHS determined that the conditions supporting the designation of these countries for TPS no longer existed, and therefore the designations could not legally be extended.

In sum, Congress designed TPS to be a temporary humanitarian measure that does not lead to permanent residence or a path to citizenship. The law requires the Executive Branch to terminate a country's TPS designation when the conditions that led to the designation no longer exist.

The United States has provided significant resources and support to the governments of Haiti and Central America to help them recover from the events that prompted their TPS designations and promote a safe and prosperous region. Thankfully, conditions in these countries are now better, and as a result, those individuals who benefited from TPS may now return home or seek another lawful immigration status allowing them to remain in the United States.

### *DACA*

I will now say a few words about the Deferred Action for Childhood Arrivals policy, known as DACA.

DACA was established by a memorandum from the Secretary of Homeland Security on June 15, 2012. The stated purpose of the policy at the time was to protect from deportation those brought illegally to the United States as children.

Under DACA, individuals who meet several key guidelines may request consideration of deferred action for a period of two years, subject to renewal. They also may apply for work authorization. DACA determinations are made on a case-by-case basis.

Deferred action is a discretionary determination to defer removal of an individual as an act of prosecutorial discretion. Deferred action does not confer lawful status upon an individual. In addition, although an individual whose case is deferred will not be considered to be accruing unlawful presence in the United States during the period deferred action is in effect, deferred action does not excuse individuals of any previous or subsequent periods of unlawful presence.

Under the June 15, 2012 memorandum, individuals could be considered for DACA as a matter of discretion if they:

- Were under the age of 31 as of June 15, 2012;
- Came to the United States before reaching their 16th birthday;
- Have continuously resided in the United States since June 15, 2007, up to the present time;
- Were physically present in the United States on June 15, 2012, and at the time of their request for consideration of deferred action with USCIS;
- Entered without inspection before June 15, 2012, or their lawful immigration status expired as of June 15, 2012;
- Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and
- Have not been convicted of a felony, significant misdemeanor, three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety.

DACA does not confer lawful permanent resident status or a path to citizenship, a fact that the U.S. administration made clear to the public and to individual requestors. Only the Congress, acting through its legislative authority, can confer these rights.

On September 5, 2017, in light of pending litigation, DHS rescinded the original memorandum that had put DACA in place and announced that it would “take all appropriate actions to execute a wind-down of the program.”

As part of the winding-down process, DHS stated that it would continue to adjudicate pending DACA initial and renewal requests and associated applications for employment authorization.

More recently, in response to federal court orders, DHS resumed accepting requests to renew a grant of deferred action under DACA on the same terms as were in place before September 5, 2017. However, DHS is not accepting requests from individuals who have never before been granted deferred action under DACA. DACA recipients may not request permission to travel via advance parole.

With Congress currently debating legislation to address the status of DACA and others who meet similar criteria and several pending lawsuits on the legality of DACA, it is clear that this matter is in flux and is working its way through the democratic political process to find a permanent solution.

We are unable to comment further given the ongoing litigation before the federal courts.

\* \* \* \*

On October 5, 2018, the United States participated in an IACHR hearing in Boulder, Colorado, on “Four Million American Citizen Residents of Puerto Rico.” The hearing was convened based on petitions (*Igartua* and *Roselló*) claiming denial of the right to vote by residents of Puerto Rico. The U.S. brief responding to the petitions on the merits is discussed *supra*. Excerpts follow from the prepared remarks of Ambassador Carlos Trujillo, U.S. Ambassador to the OAS.

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Both petitions raise the same fundamental issue—the scope of federal representation accorded to residents of Puerto Rico under the U.S. Constitution. This is a domestic political issue if there ever was one.

The *Igartua* petition focuses on participation in U.S. Presidential elections. The *Rosello* petition focuses on participation both in Presidential as well as in Congressional elections. Given the similar legal and factual issues here we have consolidated our responses to both petitions and we encourage the Commission to do the same.

We hope consolidation will also help the Commission start to clear the backlog of cases like this one—which has been pending now more than a decade.

The petitions are framed in terms of voting rights. However, these petitions are really about the political status of Puerto Rico as a Commonwealth in the U.S. Federal system. As a Commonwealth, Puerto Rico does not have voting representatives in the U.S. House of Representative and Senate, or voting electors in the Electoral College—just as other non-state territories in our Federal Union. Residents of Puerto Rico—as U.S. citizens—are free to reside in U.S. states that do have voting representatives and voting electors, as delineated by the United States Constitution, and to participate in elections for those representatives and electors.

The U.S. Constitution’s allocation of representatives and electors with respect to Puerto Rico is not inconsistent with the American Declaration or the Inter American Democratic Charter. Nothing in the American Declaration entitles Puerto Rico to statehood in the U.S. Federal system. I will address this in more detail in a few minutes.

But it bears emphasizing at the outset that these petitions plainly seek to litigate the political status of Puerto Rico before this Commission. The Commission should not allow itself to be used in this way.

On behalf of the U.S. Government, we reiterate our request that the Commission dismiss both petitions in their entirety and wrap up these cases promptly. The petitions are totally without merit and attempt to convert a domestic political matter into a human rights matter.

The question of Puerto Rico's legal status is one under consideration now within the United States. Just last year, the residents of Puerto Rico voted in an island-wide public referendum to pursue statehood. The Government of Puerto Rico is now pursuing that path energetically.

Finally, I urge the Commission to focus on the subject of these petitions. This hearing is not about the scope or effectiveness of hurricane relief efforts after Hurricane Maria. Nor are these petitions about the scope of federal relief efforts related to Puerto Rico's fiscal crisis. And the question of the political status of Puerto Rico within the U.S. Federal system is well-beyond the competence of this Commission. The petitioners would seek to have the Commission merge all these issues together and somehow identify violations of the American Declaration.

#### Competence of the Commission

Before I turn to the merits of the *Ignartu* and *Rossello* petitions, I must make one observation about the competence of the Commission.

The only relevant instrument which the Commission could be competent to evaluate in relation to the conduct of the United States would be the nonbinding American Declaration.

Article 27 of the Rules of Procedure directs the Commission to "consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments . . . ."

Article 23 of the Rules, in turn, identifies the American Declaration as an "applicable instrument" with respect to nonparties to the American Convention. Although Article 23 lists several other instruments, the United States is not a party to any of those other instruments. Thus, for the United States, the American Declaration is the only "applicable instrument."

However, in its 2017 admissibility report on the *Igartua* petition, the Commission indicated its intent to "take into account the terms of" the Inter-American Democratic Charter, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights in the present case.

Under the Rules of Procedure, the application of instruments beyond the American Declaration in the present case would be manifestly improper and beyond the competence of the Commission.

#### Merits of the Petitions

Turning now to the merits of the petitions.

The United States Constitution governs how states are represented in the House of Representative and the Senate, and how states participate in the Electoral College, which chooses the President. Article 1 of the United States Constitution, the supreme law of our land, establishes apportionment of representatives and Senators amongst the states. Article 2 of the Constitution, and the 12<sup>th</sup> Amendment, provide the procedure for electing the President and Vice President by states through the Electoral College.

As a result, pursuant to Article 1 of the U.S. Constitution, Senators and U.S. Representatives are elected by the people of the **states**. Pursuant to Article 2 of the U.S. Constitution, the President of the United States is chosen by Electors—and those electors are chosen by the **states**.

There is one significant exception to these rules—the only **non-state** within the United States that chooses Presidential electors is the District of Columbia, which acquired that right by an express amendment to the Constitution adopted in 1961.

Citizens of the United States are free to reside in whichever State they wish.

Other provisions under the U.S. Constitution govern how U.S. territories may evolve into U.S. states. Specifically, Article 4 of the Constitution provides for the admission of new States. Consistent with that process, a number of territories have become U.S. states over time.

Puerto Rico, however, is **not a state**. Accordingly, under the U.S. Constitution, residents of Puerto Rico enjoy US citizenship—and all of the rights and benefits thereof—but do not participate directly in Presidential or Congressional elections because Puerto Rico is not a state and, under Articles 1 and 2 of the United States constitution, only states are represented by voting Electors, Senators, and U.S. Representatives.

This does **not** mean that residents of Puerto Rico somehow enjoy fewer rights than other U.S. citizens.

If a resident of Puerto Rico wants to participate fully in Presidential or Congressional elections, the Constitution does not bar them from doing so—provided they move and begin to reside in any state of the United States.

I want to digress here a moment to correct the record. It is clearly not true, as Petitioners allege, that the residents of Puerto Rico have no “political voting rights at the federal level”. Puerto Rico residents can, among other things, vote in the presidential primaries for the purposes of choosing the party candidates for President. Puerto Rico residents also can vote in congressional elections, both in party primaries and in the general election. Thus, the residents of Puerto Rico **do** enjoy representation at the Federal level.

The difference in Federal election participation between residents of U.S. states and residents of territories arises from the very nature of statehood under the U.S. Constitution. Through the Constitution, the people of the United States created a federal union. That federal union provided for the distribution of political power among the states in that union. Within that structure, states that elected to join the union gave up a portion of their sovereignty. They took on certain responsibilities and obligations. They also acquired at the same time certain rights including the rights to choose the President, the Vice President, and members of Congress.

If Puerto Rico wishes to participate differently in this process, it must comply with the requirements under our Constitution to become a state. And as the Commission knows, the Government of Puerto Rico is vigorously pursuing that statehood path now.

Pursuing statehood is not just a theoretical possibility. Recall that Puerto Rico’s legal status has evolved significantly through the course of the 20<sup>th</sup> century. It has evolved from being a territory in 1898 to its current status as a self-governing Commonwealth. It can continue to evolve and join a number of other U.S. territories which have been admitted as States to the federal union during the course of our history.

The Commission’s role is not to help Puerto Rico bypass the political process of achieving statehood through a baseless claim of discrimination. It also is not the Commission’s task to influence that process or promote a particular outcome in that campaign.

Puerto Rico’s legal status is governed by the U.S. Constitution which reflects a careful balancing of the rights of the federal government, the states, and the territories.

Moreover, the U.S. Constitution’s structure of Federal representation does not violate Articles 2, 17, 18, or 20 of the American Declaration. Nor does it violate any provision of the Inter American Democratic Charter. I will highlight some key considerations in support of our position.

Article 2 of the Declaration focuses on the right to equality before the law. The U.S. Constitution’s structure of Federal representation does not constitute unequal treatment within the meaning of Article II the American Declaration. The difference in the political representation

of states and other territorial entities under our Federal system is not based on race, sex, language, creed or any other invidious distinction barred by Article 2. Rather, it arises from the very nature of statehood under the U.S. Constitution.

There is nothing discriminatory in this constitutional structure. U.S. citizens resident in Puerto Rico enjoy the freedom to move at will within the United States, and to establish new residency at any time, in any of the states—as state residents, those U.S. citizens have the same voting rights as any other state resident to participate in elections for the state’s Federal representatives and Electors.

Similarly, U.S. citizens resident in any of the states may at any time move to Puerto Rico and establish residency there—at which time they could not directly participate in Presidential and Congressional elections because Puerto Rico, as a Commonwealth, does not have voting Federal representatives or Electors.

Nothing in Article 2 or elsewhere in the American Declaration suggests that parties may not maintain federal systems in which their citizens’ participation in federal elections is determined by their residence or the status of the federal entity in which they reside.

Article 17 of the Declaration provides that every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights. Residents of Puerto Rico are U.S. citizens and enjoy the very same civil rights as all citizens. With respect to participation in federal elections, the same rules apply to all citizen of the United States. Residents of Puerto Rico are recognized everywhere in the United States as persons having rights and obligations, and entitled to enjoy basic civil rights. Petitioners have failed entirely to present a cognizable claim under Article 17 of the Declaration.

Article 18 of the Declaration provides that every person may resort to the courts to ensure respect for his legal rights. Residents of Puerto Rico have access to the courts of the United States just as any other citizen of the United States. As noted in our written submissions, petitioners’ claim here is really about the legal status of Puerto Rico. And the question of Puerto Rico’s legal status has been litigated repeatedly before the U.S. courts, including the Supreme Court. Most notably the Supreme Court took up two cases involving the legal status of Puerto Rico within the last year. Petitioner *Igartua*, himself, has pursued claims similar to those raised in his petition before this Commission before federal courts. The notion that the residents of Puerto Rico have somehow been denied access to U.S. courts is fanciful. Petitioners have failed to state a claim under Article 18. What Article 18 of the Declaration does not provide is that a court will always side with petitioners’ views.

To the extent that the Commission proposes to “analyze whether allegedly contradictory and restrictive decisions of Federal Courts could constitute a violation of the petitioners’ right to effective judicial remedies,” this evaluation of domestic judicial decisions would run afoul of the Commission’s “fourth instance formula.”

The fourth instance formula recognizes the proper role of the Commission as subsidiary to States’ domestic judiciaries, and indeed, nothing in the American Declaration, the OAS Charter, the Commission’s Statute, or the Rules gives the Commission the authority to act as an appellate body. The Commission has elaborated on the limitations that underpin the fourth instance formula in the following terms: “The Commission . . . lacks jurisdiction to substitute its judgment for that of the national courts on matters that involve the interpretation and explanation of domestic law or the evaluation of the facts.” It is not the Commission’s place to sit in judgment as another layer of appeal, second-guessing the considered decisions of a state’s

domestic courts in weighing evidence and applying domestic law, nor does the Commission have the resources or requisite expertise to perform such a task.

Article 20 of the Declaration, provides that “every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.” The residents of Puerto Rico have that right. Residents of Puerto Rico, for example, elect their own Governor and Senate and House of Representatives. They also have the right to vote in US elections in various capacities and even have had the right to vote repeatedly on their fundamental legal relationship with the United States periodically through public referendum. And, as I noted earlier, residents of Puerto Rico are represented by an elected delegate to the U.S. House of Representatives, known as the Resident Commissioner. As such, residents of Puerto Rico participate in both the government of their country as well as popular elections.

But the American Declaration does not dictate the exact modalities of such participation in elections. Specifically there is no indication, for example, whether political participation may or may not be effectuated through federated states. There is also no indication of whether political participation should be by majority or proportional rule, whether there should be a popularly-elected Presidents, mayors, regional councils, a parliamentary system, bicameralism, federalism, or any other specific feature of democratic participation.

Further there is no allegation that Petitioners are prevented from residing anywhere they choose within the United States, including in states where they could participate in different federal elections.

Similarly, neither Article 20 nor any other provision of the American Declaration mandates that every Federal office be subject to universal popular election by every citizen. Petitioners suggest, for instance, that Article 20 requires the United States to permit the popular election of federal judges, however nothing in Article 20 supports that claim. In the United States, Federal judges are appointed under the Constitution by the President, with the advice and consent of the Senate.

Moreover the idea that a state’s constitution can regulate representation at the Federal level is not dissimilar to the decision taken by some nations to exclude overseas residents from voting in elections or otherwise restrict participation in elections based on duration of stay abroad.

Finally, Petitioners’ suggestion that participation in particular U.S. federal elections is an intrinsic human right that flows from citizenship is simply not supported by the plain text of the American Declaration. There is no legal basis for the Commission to infer such a right here.

**g. *Decision in Case No. 12.958-A, Bucklew***

On April 11, 2018, the Commission issued its merits report in Case No. 12.958-A with respect to Russell Bucklew, an inmate scheduled for execution by the State of Missouri on March 20, 2018. On June 28, 2018, the United States submitted a letter to the IACHR Executive Secretary acknowledging the Commission’s recommendations and non-binding request for precautionary measures. The U.S. letter also conveyed the following:

After granting a stay of execution for the Petitioner on March 20, 2018, the Supreme Court of the United States granted a petition for *writ of certiorari* on April 30, 2018 in order to examine questions related to the method of execution

at issue in this case. The Court plans to hear the petitioner's case in the next term, which begins in October 2018, with a decision being reached several weeks or months thereafter.

The United States requests that the Commission rescind its prematurely issued final report on the merits. The Petitioner continues to be engaged in active domestic litigation and is being afforded due process with respect to the matters at issue in the report.

**Cross References**

*Temporary Protected Status*, **Ch. 1.C.1.**

*Visa Restrictions relating to Nicaragua*, **Ch. 1.B.2.d**

*ICJ judgment in Avena*, **Ch. 2.A.**

*UN Commission on Narcotic Drugs*, **Ch. 3.B.2.c.**

*ICC*, **Ch. 3.C.1.**

*ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties*, **Ch. 4.A.2**

*Termination of Treaty of Amity with Iran*, **Ch. 4.B.1**

*Withdrawal from Optional Protocol to VCDR Concerning the Compulsory Settlement of Disputes*, **Ch. 4.B.2**

*Withdrawal from the Universal Postal Union*, **Ch. 4.B.3**

*Efforts of the Palestinian Authority to Accede to Treaties*, **Ch. 4.B.4**

*Self Determination*, **Ch. 6.D**

*Termination of Treaty of Amity with Iran*, **Ch. 9.A.2**

*Venezuela*, **Ch. 9.A.8**

*Venezuela*, **Ch. 10.C.2**

*Immunities of International Organizations*, **Ch. 10.D**

*Venezuelan Navy's actions in Guyana's EEZ*, **Ch. 12.A.3.b**

*UNESCO*, **Ch. 14.A**

*UNCITRAL*, **Ch. 15.A.1**

*Iran/JCPOA*, **Ch. 16.A.1.a**

*Venezuela sanctions*, **Ch. 16.A.4**

*Nicaragua sanctions*, **Ch. 16.A.11.a**

*Export controls on South Sudan*, **Ch. 16.B.3**

*UN Relief and Works Agency for Palestine Refugees*, **Ch. 17.A.1**

*Closure of the PLO office in Washington*, **Ch. 17.A.1**

*Nicaragua*, **Ch. 17.B.6**

*South Sudan*, **Ch. 17.B.8**

## CHAPTER 8

### International Claims and State Responsibility

#### A. HOLOCAUST-ERA CLAIMS

The United States filed a statement of interest in *Scalin et al. v. SNCF*, No. 15-cv-3362 (N.D. Ill.), in 2015. See *Digest 2015* at 311-18. On March 23, 2018, the court issued its opinion, dismissing all claims. The court’s opinion is excerpted below. The court found that the plaintiffs could pursue remedies in France, through the Commission for the Compensation of Victims of Spoliations Resulting from the Anti-Semitic Legislation in Force During the Occupation (“CIVS”) and therefore had not exhausted their domestic remedies.

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In addition to the papers filed by the parties, the United States has submitted a statement of interest pursuant to 28 U.S.C. § 517, supporting dismissal of this lawsuit on the following grounds: (1) *forum non conveniens*, (2) principles of international comity, (3) failure to exhaust domestic remedies, and (4) lack of subject-matter jurisdiction (due to Plaintiffs’ failure to plead adequately the nexus required by the FSIA’s expropriation exception). In general, the United States has supported the dismissal of Holocaust-related claims in U.S. courts in favor of resolution of those claims through mechanisms established through dialogue, negotiation, and cooperation. The statement notes that the United States is supportive of the programs established by France to “provide a redress process and compensation for victims in a manner that serves the vital interest of compensating Holocaust victims more quickly and efficiently than the litigation process.” (U.S. Stmt. of Interest at 13, Dkt. No. 63.)

At the end of 2014, the United States and France signed an executive agreement (the “2014 Executive Agreement”) designed to expand upon a French pension program pursuant to which pensions are paid to surviving Holocaust deportees and their spouses. While not directly relevant to the claims at issue here,<sup>6</sup> the United States notes that:

The objectives and obligations set forth in the 2014 Executive Agreement underscore the continuing commitment of France to provide compensation for and resolve Holocaust-related claims, the United States’ interest in seeking a resolution of such claims outside of judicial proceedings in the United States, as well as the recognition by both countries that the CIVS, the French deportation compensation programs, and the program for Americans created by the Agreement are the exclusive mechanisms through which Holocaust deportation claims against France can best be resolved.

(*Id.* at 7.) The United States takes the position that CIVS provides Plaintiffs and other similarly-situated individuals with an adequate remedy for takings claims against SNCF. The statement of interest generally supports SNCF’s portrayal of CIVS as a fair program that provides comprehensive relief to a broader class of victims than would be possible in U.S. judicial proceedings. Overall, it is the position of the United States that CIVS is an available and adequate alternative forum and that both public and private interests weigh in favor of Plaintiffs utilizing that forum.

Plaintiffs argue that the U.S. government’s statement of interest does not merit deference, in part, because it suggests four legal (as opposed to policy-driven) grounds for dismissal and does not argue that U.S. policy interests provide an independent basis for dismissal. According to Plaintiffs, no cognizable interest of the executive branch would be adversely affected by the continuation of this litigation, nor would proceeding with this lawsuit interfere with the 2014 Executive Agreement between the United States and France. In addition, Plaintiffs contend that in its endorsement of CIVS, the United States adds no new information, no direct evidence, no independent verification, and no relevant declarations to strengthen its position. SNCF, on the other hand, argues that the United States’[] long-standing policy of recognizing French compensation programs as the exclusive fora for the resolution of claims such as those at issue here warrants particular weight.

Finally, an amicus brief in support of SNCF’s motion to dismiss has been filed by the Conseil Représentatif des Institutions Juives de France (“CRIF”), an umbrella organization consisting of over 60 institutions representing the Jewish community of France. According to its motion to intervene, CRIF has played a prominent role in advancing the interests of Holocaust victims and survivors as well as their descendants. CRIF’s brief notes that a fundamental principle of the French compensation programs is that “the French Republic is responsible for reparation for the consequences of the atrocities committed on French Territory” during the Nazi occupation. (CRIF Am. Br. at 2, Dkt. No. 20-1.) CRIF takes the position that the programs implemented by France are quite satisfactory and are actually broader and more generous than those established by other European countries. With respect to CIVS, CRIF asserts that compensation is available for any theft effectively perpetrated on French territory irrespective of the people involved and the methods used. CRIF views the Commission as suitable, fair, and effective and believes that it has consistently provided just and benevolent compensation. CRIF’s

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<sup>6</sup> It is undisputed that the 2014 Executive Agreement does not cover Plaintiffs’ claims.

brief reiterates that that CIVS considers claims without any statute of limitations and irrespective of the nationality of the Holocaust deportees or their descendants.

Taking all of the above into consideration, the Court sees no “legally compelling reason for [P]laintiffs’ failure to exhaust [French] remedies, such that the domestic exhaustion rule should not bar their claims.” *Abelesz*, 692 F.3d at 682. The Court will assume that French courts are closed to Plaintiffs['] claims, as SNCF has not presented any convincing argument to the contrary. With respect to CIVS, however, Plaintiffs have failed “to show convincingly that such remedies are clearly a sham or inadequate or that their application is unreasonably prolonged.” *Id.* at 681 (citing Restatement (Third) of Foreign Relations Law § 713 cmt. f).

First, Plaintiffs['] contention that their claims are not eligible for CIVS compensation has been flatly refuted by the Chairman of the Commission. In his supplemental declaration, Jeannoutot unequivocally states that if the property of Plaintiffs’ relatives was seized during the boarding of, or while aboard, SNCF trains in French territory, CIVS is willing and competent to hear the claims and recommend compensation. The statement of interest submitted by the United States and the amicus brief submitted by CRIF both support Jeannoutot’s position. And while CIVS’s 2014 annual report does not list property taken during deportations as a category of damages for which the Commission may provide compensation, there is no indication that the listed categories are exhaustive or that Plaintiffs’ claims could not be considered to fall within the “confiscation of money during internment at a camp” category.

While it appears that the Commission has not awarded compensation for any SNCF-related claims to date, there is no evidence to suggest that such is the case for jurisdictional or eligibility, as opposed to factual, reasons. The lack of such claims may be because there is no evidence (in the possession of potential claimants or in the archives consulted by CIVS) that SNCF expropriated deportees’ property—not because if SNCF did so, CIVS would not compensate claimants appropriately. That claims against SNCF may be novel does not necessarily lead to the conclusion that they are ineligible for compensation. And the fact that others have not submitted similar claims does not excuse Plaintiffs from having to exhaust available domestic remedies themselves. However, if Plaintiffs attempt to seek compensation from CIVS “and are blocked arbitrarily or unreasonably, United States courts could once again be open to these claims.” *Fischer*, 777 F.3d at 865–66.

Second, that CIVS is a non-judicial forum and does not operate exactly as a U.S. court—with rules of evidence, subpoena powers, etc.—does not mean that it is inadequate. The Seventh Circuit has held that Plaintiffs must exhaust domestic remedies; nowhere has the court stated that such remedies must be judicial in nature. *See Abelesz*, 692 F.3d at 684 (“[T]here is no reason for U.S. courts to take up these claims without a persuasive showing that Hungarian *law* is unresponsive.”) (emphasis added). *See also Fischer*, 777 F.3d at 855 (“[I]nternational law favors giving a state accused of taking property in violation of international law an opportunity to redress it by its own means, within the framework of its own legal system before the same alleged taking may be aired in federal courts.”) (internal citation and quotation marks omitted). As the Seventh Circuit has explained:

An alternative forum is adequate if it provides the plaintiff with a fair hearing to obtain some remedy for the alleged wrong. It is not necessary that the forum's legal remedies be as comprehensive or as favorable as the claims a plaintiff might bring in an American court. Instead, the test is whether the forum provides some potential avenue for redress for the subject matter of the dispute.

*Stroitelstvo Bulgaria Ltd. v. Bulgarian-Am. Enter. Fund*, 589 F.3d 417, 421 (7th Cir. 2009) (in the related context of *forum non conveniens*) (internal citations omitted). That is exactly what CIVS does: it provides a potential avenue for redress for Plaintiffs' claims. Actual redress need not be guaranteed; there are obvious reasons that cannot be the standard. Plaintiffs' assertions suggesting otherwise—for example, that 15% of claims are rejected—are unpersuasive.

Moreover, none of the asserted procedural obstacles deny relief to the extent that plaintiffs can claim that France provides no remedy at all. *See Fischer*, 777 F.3d at 861. The *Abelesz* court, after holding that exhaustion of domestic remedies is required before a plaintiff may assert a claim for expropriation in violation of international law, remanded the case to the district court with instructions that the plaintiffs either exhaust any available Hungarian remedies or present a legally compelling reason for their failure to do so. On remand, “the district court held that [certain] non-judicial remedies ‘were not truly available to Plaintiffs due to the time and circumstances surrounding the application for such remedies and certain limitations placed on recoveries under such remedies.’” *Id.* at 860 (quoting *Fischer v. Magyar Allamvasutak Zrt.*, No. 10-cv-00868, 2013 WL 4525408, at \*1 (N.D. Ill. Aug. 20, 2013)). Whether those non-judicial remedies were adequate was not an issue on appeal. *See id.* With respect to judicial remedies, the Seventh Circuit noted that the plaintiffs had “not established that procedural rules would arbitrarily or unreasonably bar their claims” or “that structural or political circumstances would prevent Hungarian courts from providing a fair and impartial hearing for th[o]se claims.” *Id.* at 860. Here, Plaintiffs have not shown that CIVS remedies are not truly available to them, that the Commission's rules would arbitrarily or unreasonably bar their claims, or that structural or political circumstances would prevent them from receiving a fair hearing.

With respect to the time and circumstances surrounding the application for CIVS compensation, Plaintiffs submit that it takes approximately three to five years to obtain a decision from the Commission, and approximately eight months after that to receive payment. Fraenkel's declaration states that it is not unusual for certain claimants to wait eight years to be indemnified. There is no doubt that eight, or even five, years is a long time, especially in this context where, as Plaintiffs' highlight, many claimants are elderly. But litigation in U.S. courts can drag on for just as long, if not longer. Moreover, CIVS was established in 1999. Plaintiffs waited over fifteen years to bring their claims, which undermines any assertion that the CIVS process is unreasonably prolonged. *See Abelesz*, 692 F.3d at 683 (rejecting plaintiffs' argument that any presently available Hungarian remedy was unreasonably prolonged, and noting that plaintiffs waited until 2010 to file their complaints in the United States.).

Nor do the purported limitations on recoveries cited by Plaintiffs show CIVS compensation to be “so clearly inadequate so as to provide no remedy at all.” *Fischer*, 777 F.3d at 867. *See also Abelesz*, 692 F.3d at 685 (“[D]omestic Hungarian remedies need not be perfectly congruent with those available in the United States to be deemed adequate.”) First, as noted above, there are no actual limitations on the amount of compensation the Commission may award. Second, Plaintiffs have failed to provide convincing support for their contention that the Commission's awards are arbitrary and subjective. Indeed, they point only to one example in which the panel did not follow the recommendation of the rapporteur. Moreover, the same might be said of jury awards in the U.S. judicial system. Jury verdicts are certainly not predictable, and the parties do not get complete transparency into the jury's decision-making with respect to damages awards. That does not mean the system is broken. Finally, Plaintiffs assert that the compensation awarded is often substantially below current market value. Again, there is little

evidence in the record to support that statement. And, as noted above, in at least one case, the Commission awarded compensation above and beyond what the claimant sought. An adequate alternative forum does not mean that recovery is guaranteed, much less that *full* recovery is guaranteed. In sum, “Plaintiffs have not shown that the remedies identified by [SNCF] are illusory.” *Fischer*, 777 F.3d at 861.

Nor have Plaintiffs identified any procedural rule that would unfairly bar their claims. There is no statute of limitations or deadline for the submission of claims. With respect to the parties’ dispute over good faith versus detailed and specific proof, even if it is true that some element of archival or other proof is required, that falls short of the preponderance of the evidence standard that would be applied here. In that respect, CIVS does apply relaxed evidentiary standards that would inure to Plaintiffs’ benefit. Finally, there is no indication that structural or political circumstances in France would prevent the Commission from giving Plaintiffs a fair hearing. Plaintiffs note that American claimants “do not have any faith in a quasi-independent commission in a country that let them and their relatives to be sent to the gas chambers.” (Pls.’ Resp. to U.S. Stmt. of Interest at 11, Dkt. No. 70.) The Court certainly understands that sentiment, but the Seventh Circuit has held that similar concerns “are too speculative to override the norm of requiring exhaustion of domestic remedies before resorting to foreign courts.” *Fischer*, 777 F.3d at 847. *See also id.* at 860 (“[P]laintiffs have offered explanations for their understandable doubts about the ability of Hungarian courts to treat them fairly. We believe, however, that in the face of uncertainty, international comity requires that those courts be given the first opportunity to hear the claims rather than have foreign courts assume the worst about them.”)

The Court’s decision here is consistent with that of the district court in *Freund v. Republic of France*, 592 F. Supp. 2d 540 (S.D.N.Y. 2008), *aff’d sub nom. Freund v. Societe Nationale des Chemins de fer Francais*, 391 F. App’x 939 (2d Cir. 2010). In *Freund*, which addressed claims virtually identical to those brought here, the court found that the FSIA’s expropriation exception was inapplicable (and that SNCF was therefore entitled to sovereign immunity) because the plaintiffs had not adequately alleged that the expropriated property (or any property exchanged for such property) was owned or operated by SNCF. *Id.* at 561.9 However, the court held that even if it had subject-matter jurisdiction pursuant to that exception, “the circumstances of the case would make abstention on justiciability grounds appropriate.” *Id.* at 564. In its discussion of principles of international comity, the *Freund* court explicitly concluded that the reparations programs in France, including CIVS, were “appropriate and adequate alternative fora for the pursuit of the eligible Plaintiffs’ claims.” *Id.* at 576. In so finding, the court rejected the plaintiffs’ objections based on the administration of CIVS—in which they pointed to instances of arbitrary or biased decision-making, denials of representation, delays in claims processing, erroneous compensation calculations, and the futility of appellate review—finding that those objections were based more on anecdotes than systemic defects. *Id.* The court noted that, “while the CIVS process unquestionably diverges from United States litigation procedures,” “such was the intention of its creators, who wished to focus on flexible and expedient recovery for as broad a class of victims as possible.” *Id.* at 577–78. Plaintiffs here have failed to differentiate this case from *Freund* or to convince the Court that it should hold differently.

Finally, the United States has made clear its position that CIVS is not only an available and adequate alternative forum, but that it is meant to provide the exclusive remedy for claims such as Plaintiffs’ claims. Regardless of whether the executive branch’s views merit special

deference, they are certainly entitled to some consideration. *Cf. id.* at 576 (“The Executive's views are entitled to particular deference where, as here, it chooses ‘to express its opinion on the implications of exercising jurisdiction over particular [parties] in connection with their alleged conduct ...’”) (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004)). Moreover, this Court agrees that the government’s position is “bolstered by the fact that the United States [] continues to engage in diplomatic efforts aimed at supporting and improving these alternative fora.” *Id.* at 569. While the 2014 Executive Agreement has no direct impact on Plaintiffs’ claims, the fact that the United States and France continue to work together to enhance the French compensation programs suggests that to allow these claims to proceed in this forum would undermine, or potentially interfere with, the two countries’ efforts to create programs that are more effective and efficient than litigation.

In sum, based on the record, the Court finds that Plaintiffs’ concerns about CIVS are based more on speculation and anecdotal evidence than any true structural or procedural defect that makes the process clearly inadequate. Many of the complaints about CIVS voiced by Plaintiffs might also be directed toward the U.S. judicial system. In fact, there appear to be many aspects of the Commission’s framework that arguably make it a more favorable forum for Plaintiffs’ claims than this Court. The basic argument put forth by Plaintiffs is that the recommendations of CIVS are not always equitable and the indemnification that it provides is not always adequate. That very well may be true. But if that were the applicable standard, what alternative forum would meet it? CIVS may not be perfect, but that does rise to a legally compelling reason for Plaintiffs’ failure to exhaust its remedies.

...Because CIVS is the appropriate forum for Plaintiffs’ claims, at least in the first instance, SNCF’s motion to dismiss is granted and Plaintiffs’ complaint is dismissed without prejudice. *See Citadel Sec., LLC v. Chicago Bd. Options Exch., Inc.*, 808 F.3d 694, 701 (7th Cir. 2015) (“A dismissal for lack of subject[-]matter jurisdiction is not a decision on the merits, and thus cannot be a dismissal with prejudice.”) (internal citation omitted).

\* \* \* \*

On April 24, 2018, plaintiffs in *Scalin* filed a notice of appeal to the U.S. Court of Appeals for the Seventh Circuit. The U.S. brief in the court of appeals is discussed in Chapters 5 and 10 of this *Digest*.

## **B. IRAN CLAIMS**

On January 1, 2018, Professor Nicolai Michel of the University of Fribourg was appointed as a Member of the Iran-United States Claims Tribunal (“Tribunal”), and assumed the role of President. Professor Michel replaced President Hans van Houtte, who submitted his resignation in June 2017.

On February 20, 2018, U.S.-appointed Tribunal Judge David Caron died. To replace Judge Caron, the United States appointed Sir Christopher Greenwood, QC. Judge Greenwood previously served as a judge on the International Court of Justice, as an arbitrator on numerous arbitration panels, and as a professor of international law at the London School of Economics.

In February 2018, the Tribunal began a series of hearings on Case B/1 (Claims 2 and 3), pertaining to Iran's former Foreign Military Sales program. Hearings in Case B/1 were scheduled to continue through June 2019.

### C. IRAQ CLAIMS UNDER THE 2014 REFERRAL TO THE FCSC

The Foreign Claims Settlement Commission ("FCSC") began issuing decisions in 2016 in the Second Iraq Claims program, which was established by a referral dated October 7, 2014, from the State Department's Legal Adviser under a 2010 claims settlement agreement between the United States and Iraq. As of December 31, 2018, the total value of awards issued was \$109,145,000. See <http://www.justice.gov/fcsc/current-programs>. For background on the 2014 referral, see *Digest 2014* at 315-16. The following discussion focuses on some of the more noteworthy decisions in 2018.

#### 1. Claim No. IRQ-II-066, Decision No. IRQ-II-230 (2018) (Proposed Decision)

This claim under Category A of the Referral was denied on the basis that the claimant failed to provide sufficient evidence that he was "seized or detained" as required under the Commission's hostage-taking standard. The Commission's analysis of this issue includes a discussion of the weight given to written statements under international law. The Commission also concluded that claimant had failed to provide any evidence that Iraq detained him "in order to compel a third party, such as the United States government, to do or abstain from doing any act as an explicit or implicit condition for the claimant's release[,] a required element of the Commission's standard for hostage-taking under international law. Excerpts follow from the decision.

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\* \* \* \*

(2) Hostage-taking: To satisfy the hostage-taking requirement . . . , Claimant must show that Iraq (a) seized or detained him and (b) threatened him with death, injury or continued detention (c) in order to compel a third party, such as the United States government, to do or abstain from doing any act as an explicit or implicit condition for his release. Claimant fails to satisfy this standard for two reasons: (i) the evidence he has submitted is insufficient to meet his burden to show that he was in fact seized or detained on January 13, 1991, as he alleges; and (ii) Claimant has failed even to allege, let alone establish, that the reason for any alleged seizure or detention by Iraq was "to compel a third party . . . to do or abstain from doing any act as a condition for his release."

(i) Claimant's failure to meet his burden to prove the facts he alleges.

The Commission's regulations place the burden to establish the facts on the Claimant who makes the allegations. Here, the only evidence Claimant has submitted all comes either directly from Claimant's own recent statements (all but one of which appear to have been unsworn) or from descriptions in medical records that also appear to have been based solely on Claimant's own narration of the events. In short, Claimant's evidence appears to consist solely of Claimant's own statements.

This evidence is insufficient to establish that Claimant was in fact seized or detained at the Baghdad airport as he alleges. Where, as here, a claim relies heavily on written statements, the Commission considers certain factors in determining how much weight to place on them. These may include, for example, the length of time between the incident and the statement and whether the declarant is a party interested in the outcome of the proceedings. Unsworn statements will generally carry very little weight, and sworn statements will not carry much weight unless there has been an opportunity for cross-examination. In such cases, live, compelling testimony by the claimant under oath can do much to support a claim. The clarity and detail of the declarations should also be considered, as should the existence of corroborating declarations and other evidence.

Based on these factors, Claimant's assertions are insufficient to prove that he was in fact seized or detained. For one, the Claimant is clearly a party interested in the outcome of the proceedings, and at this stage, the Commission has not had the benefit of cross-examination. Moreover, Claimant's statements contain very little detail and are not entirely consistent. In his own sworn statement, he indicates that he escaped with the help of a relative after his Baath Party interrogators "left the room for [some] reason...." However, in a 2014 report on Claimant's medical conditions, Dr. Mohammed Ali Al-Bayati makes reference to the Iraqi secret agents "allowing him to [board] the plane to fly to Jordan[.]" This very different version of events—with the Iraqi officials "allowing him" to leave—appears to be based on the story as recounted to the doctor by Claimant himself. Claimant's own statements are therefore unclear as to whether he escaped from his alleged interrogators or whether they let him go. This inconsistency clearly undermines the reliability of Claimant's assertions.

Moreover, Claimant has not submitted *any* independent evidence, such as his then-valid U.S. passport containing entry and exit stamps, government records, newspaper articles, or relevant statements from non-interested third parties. To be sure, he does claim to have sought additional evidence, but even so, his claim rests solely on his own assertions. These statements are insufficient to prove that Claimant was in fact seized and detained by Iraq. Claimant has therefore failed to satisfy his burden of proving that he was held hostage by Iraq in violation of international law.

(ii) Claimant's failure to allege or establish that Iraq acted in order to compel a third party to act or abstain from acting as a condition of his release.

Even if all of Claimant's allegations were true, Claimant would still have failed to establish that Iraq took him hostage. Claimant's allegations amount only to a potential claim of improper detention, not a claim of hostage taking. The standard for hostage taking under Category A requires that Claimant show not just that Iraq seized or detained him, but also that Iraq did so "in order to compel a third party, such as the United States government, to do or abstain from doing any act as an explicit or implicit condition for the claimant's release." Claimant has made no such allegation here.

\* \* \* \*

## **2. Claim No. IRQ-II-069, Decision No. IRQ-II-045 (2018) (Final Decision)**

This claim under Category A of the Referral was denied on the basis that the claimant failed to prove that she was a U.S. national from the time of the alleged incident through the date of entry into force of the U.S.-Iraq Claims Settlement Agreement of

2010. The decision emphasizes that, under the International Claims Settlement Act, the U.S.-Iraq Settlement Agreement's requirement of continuous U.S. nationality is controlling. The claim was denied even though, under a separate U.S. law, the claimant was considered in hostage status and was eligible for U.S. government benefits because her daughter, who was also considered a hostage for purposes of that statute, was a U.S. citizen. Excerpts follow from the decision.

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\* \* \* \*

Because Claimant has not requested an oral hearing, her objection relies entirely on her May 11, 2017 letter. In that letter, Claimant asks the Commission to reconsider its Proposed Decision, which was based on the fact that Claimant was not a U.S. national at the time of the alleged hostage taking. Claimant does not dispute, however, that she was not a U.S. national at the time of the alleged hostage taking and has not provided any evidence that she was a U.S. national at the time. In fact, she has not provided any new documentary evidence at all.

Claimant argues that the Commission failed to consider the benefits she claims were available to “Parents of American Minor Citizens” under Public Law No. 101-513, a 1990 statute that provided certain benefits to, among others, “United States nationals, or family members of United States nationals, who are in a hostage status in Iraq or Kuwait during the period beginning on August 2, 1990, and terminating on the date on which United States economic sanctions against Iraq are lifted....” Claimant further suggests that the Commission should not have relied on the Claims Settlement Agreement because it “contradicts” U.S. law by not taking into account the benefits available to her under Public Law No. 101-513. Claimant also points to a letter from the U.S. Department of State in which the Department allegedly “acknowledged” that she and her family were hostages. The letter, dated April 7, 1993, states that Claimant and other members of her family “were in hostage status beginning August 2, 1990,” and, further, that Claimant and her husband received hostage benefits under Public Law No. 101-513.<sup>[1]</sup><sup>[SEP]</sup>

The argument Claimant appears to be making about Public Law No. 101-513 is incorrect. Public Law No. 101-513 does not affect this Commission's jurisdiction in any way. Rather, as we explained in the Proposed Decision, the Commission's jurisdiction in this program comes from the Secretary of State, who has statutory authority under the International Claims Settlement Act of 1949 (“ICSA”) to refer “a category of claims against a foreign government” to this Commission. The Secretary delegated that authority to the State Department's Legal Adviser, who then referred the category of claims at issue here to the Commission via the 2014 Referral. One of the threshold requirements for hostage-taking claims in this program is that the claim be brought by a “U.S. national.” As we noted in the Proposed Decision, the term “U.S. national” has a specific legal meaning that the Commission is bound to apply in deciding claims under the 2014 Referral. The ICSA requires the Commission first to “apply the ... provisions of the applicable claims agreement....” Here, the “applicable claims agreement” is the U.S.-Iraq Claims Settlement Agreement. That agreement states that “[r]eference to ‘U.S. nationals’ shall mean natural and juridical persons who were U.S. nationals *at the time their claim arose* and through the date of entry into force of this agreement.” Thus, applying the applicable provisions of the ICSA, the Commission's authorizing statute, the Commission must interpret the term “U.S. national” to mean a person who was a U.S. national at the time the claim arose. In this

case, the claim arose in August 1990. It is undisputed that Claimant was not a U.S. national at that time. She therefore does not meet the jurisdictional requirement under Category A of the 2014 Referral that the claim be brought by a U.S. national.<sup>[1]</sup><sub>SEP</sub>

Public Law No. 101-513 is not relevant to the Commission's jurisdiction or the requirement that a claimant have been a U.S. national at the time the claim arose. The beneficiaries of Public Law No. 101-513 included "family members of United States nationals" who were not themselves "United States nationals." Therefore, even though a "family member[] of [a] United States national[]" may have been eligible for benefits under Public Law No. 101-513, such a family member would not be eligible for compensation in the Commission's Iraq Claims Program unless he or she were also a "United States national" within the meaning of the Claims Settlement Agreement. In short, the relevant U.S. law is the Commission's own authorizing statute, the ICSA, which requires that a claimant in this program be a "United States national." Nothing in the Claims Settlement Agreement "contradict[s]" Public Law No. 101-513. The Claims Settlement Agreement defines "U.S. nationals," while Public Law No. 101-513, in contrast, provides benefits for a different group of individuals, including "family members of United States nationals." The fact that Public Law No. 101-513 granted benefits to family members of U.S. nationals has no bearing on *this* claims program, which is based on the 2014 Referral, which is in turn based on the Claims Settlement Agreement.

Finally, Claimant also appears to assert that the Commission should reconsider its decision because she experienced hardship during her ordeal in Kuwait and Iraq in 1990. Whatever hardship Claimant and her family faced during the Iraqi invasion and occupation of Kuwait, this does not give the Commission legal authority to decide the claim. Because the relevant law requires that Claimant have been a U.S. national at the time of the alleged hostage-taking, the degree of hardship Claimant suffered plays no role in the Commission's decision: The decision is based solely on the fact that Claimant was not a U.S. national at the time of the alleged hostage taking.

\* \* \* \*

### **3. Claim No. IRQ-II-318, Decision No. IRQ-II-027 (2018) (Final Decision)**

This claim under Category A of the Referral was also denied on the basis that the claimant was not a U.S. national at the time of the alleged hostage-taking. Claimant argued that he should be treated as a U.S. national because, *inter alia*, he was eligible to become a U.S. national at the time; put his life at risk to rescue his U.S. national wife and children; and would otherwise be deprived of his right to bring a claim against Iraq. The Commission rejected all these arguments, citing its holding in earlier programs that U.S. nationality can be acquired "only by birth or by naturalization under the process set by Congress." Because claimant was not yet a naturalized U.S. citizen at the time of his alleged hostage-taking, the Commission had no jurisdiction over his claim.

\* \* \* \*

Even assuming that Claimant was eligible to become a U.S. citizen at the time of the alleged hostage-taking (August 1990), this would not be sufficient to establish U.S. nationality for our purposes here. It is a well-settled principle in the Commission's jurisprudence that U.S. nationality can be acquired "only by birth or by naturalization under the process set by Congress." We have previously recognized that this principle precludes a claimant from qualifying as a U.S. national merely because he has taken steps towards becoming a U.S. citizen or is otherwise eligible for U.S. citizenship. Thus, even assuming Claimant was eligible to become a U.S. citizen at the time of the alleged hostage-taking (August 1990), he would not qualify as a U.S. national for the purposes of the 2014 Referral.

Claimant's claim that he saved the lives of U.S. national family members who were escaping from Kuwait and Iraq is also insufficient to make him a U.S. national. To support this argument, Claimant cites the U.S. government practice of offering U.S. citizenship "to Iraqi citizens who...saved American lives during the Iraqi war." Yet, while there is evidence that shows the U.S. government offered Iraqi nationals who assisted the U.S. during the Second Gulf War special immigrant status that permitted them to apply for permanent residence, there is no evidence that these individuals were directly offered U.S. nationality for their efforts. More importantly, even if Congress had enacted a law offering U.S. nationality in that context, this would not be sufficient to establish that Claimant was a U.S. national for our purposes here. As we noted above, the only factor relevant in determining whether a claimant who was not a U.S. national at birth has acquired such nationality for the purpose of the 2014 Referral is the date of his "naturalization under the process set by Congress." Thus, because Claimant was not naturalized as a U.S. citizen in August 1990, he does not qualify as a U.S. national for our purposes here regardless of any assistance that he offered his U.S. citizen family members at that time.<sup>[1]</sup> Claimant also appears to argue that, as the spouse of a U.S. national who suffered in captivity in Iraq, he is eligible for compensation in this program even though he was not a national of the United States at the time of the alleged hostage-taking. To support this argument, Claimant looks to the Commission's decisions in claims brought by the spouses of non-U.S. nationals. This jurisprudence, however, is unavailing. Claimant has not identified any claim in which the Commission has exercised jurisdiction over a non-U.S. national in a program such as this one that is governed by an international agreement or statute that requires the application of the continuous nationality principle. In such circumstances, the Commission has consistently maintained that it does not have the authority to make awards to those who fail to satisfy the continuous-nationality requirement.

Claimant contends that the Commission should nevertheless make an exception to the continuous nationality rule and treat him as a U.S. national because the Claims Settlement Agreement deprives him of his right to bring suit against Iraq. While Article V of the Agreement did require the U.S. government to "secure...the termination of any claim, suit or action, regardless of claimants' nationality, in U.S. federal or state court...and preclude any new claim, suit or action in any U.S. federal or state court," that provision applies only to courts in the United States; nothing in the agreement indicates that the U.S. government settled, espoused, or otherwise extinguished Claimant's claim. Moreover, any difficulty Claimant might face in obtaining compensation from Iraq because of his inability to bring suit in U.S. courts has no bearing on our determination of whether Claimant is a U.S. national within the meaning of the 2014 Referral and the Claims Settlement Agreement. As we have previously recognized in a claim brought by a non- U.S. national who similarly invoked the lack of a "future forum to press

its claim,” “the relevant...law is clear, and the Commission has no authority to change the law for policy reasons.”

\* \* \* \*

4. **Claim No. IRQ-II-081, Decision No. IRQ-II-238 (2018) (Final Decision)**

The Category A claimant in this case was a U.S. diplomat stationed at the U.S. Embassy in Kuwait City during the 1990 invasion and occupation by Iraq. In its decision, the Commission, citing the jurisprudence of various international tribunals and other sources, held that “diplomatic personnel may bring claims for hostage-taking under international law standards applicable during an armed conflict.” Excerpts follow from the Commission’s final decision.

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\* \* \* \*

Claimant’s hostage-taking claim is based on the Iraqi government’s treatment of U.S. diplomats and other U.S. nationals employed by the U.S. government at the U.S. Embassy in Kuwait, and their dependents. Claimant’s allegations involve the period after Iraq invaded Kuwait on August 2, 1990, but before a U.S.-led coalition force joined with Kuwaiti forces in January 1991 to expel Iraq from Kuwait.

During the first few days after the invasion, the Iraqi government began seizing and detaining foreign nationals (including U.S. nationals) in Kuwait and relocating many of them to Baghdad against their will. When doing so, Iraq gave no indication that it intended to treat U.S. diplomatic personnel in Kuwait and their dependents any differently from U.S. nationals without official status. ...

On August 23, 1990, over 100 members of the embassy staff and their dependents left Kuwait in a diplomatic convoy, traveling for approximately 19 hours from Kuwait to Baghdad. As the convoy prepared to leave Baghdad early in the morning on August 24, 1990, Iraq informed State Department officials that a new regulation prohibiting the departure of embassy personnel from countries that had refused to close their embassies in Kuwait was in effect and that, as a result, the staff from the U.S. Embassy in Kuwait and their family members—who were now in Baghdad—would not be permitted to depart. Later that morning, Iraqi soldiers surrounded the U.S. Embassy in Kuwait and blocked access to the entrance and exit, preventing those remaining in the embassy from leaving.

Immediately after the diplomatic convoy was prevented from leaving Baghdad, State Department officials asked Iraq to release the Kuwait Embassy staff members and their dependents, but Iraq’s Foreign Minister at the time, Tariq Aziz, rejected this request. On the very next day, August 25, 1990, however, Iraq’s Ministry of Foreign Affairs informed State Department officials that the *dependents* of Kuwait Embassy staffers could leave. The following day, August 26, 1990, 55 dependents departed Baghdad for Turkey in another convoy. Three of the male dependents in this group, however, were not allowed to cross the Iraqi-Turkish border because they were not minors; these three were forced to return to the U.S. Embassy in Baghdad, where those Kuwaiti Embassy personnel who had not been allowed on the convoy to Turkey remained confined.

The State Department continued to raise concerns about Kuwait Embassy personnel and dependents who were confined in the U.S. embassies in Kuwait and Baghdad in meetings with Iraqi officials in September and October of 1990. ...

Despite these conditions, State Department officials consistently maintained that the U.S. would not close its embassy in Kuwait in response to Iraqi threats and illegal orders concerning, among other things, the departure of its embassy staff. Other countries whose diplomats Iraqi authorities also prohibited from leaving Kuwait adopted a similar policy, and, in late October 1990, the U.N. Security Council passed a resolution that called on Iraq to allow diplomatic and consular personnel to leave Kuwait and to rescind orders for the closure of foreign missions in Kuwait. Yet, Iraq continued to refuse to allow Kuwait Embassy staff members who were confined in the Baghdad and Kuwait embassies to depart, and most were not able to leave until after December 6, 1990, when Iraq authorized all foreign nationals remaining in Kuwait and Iraq to leave.

Claimant states that Iraq held her hostage from August 2, 1990, until December 13, 1990, a total of 134 days. Claimant asserts that she was one of the U.S. diplomats stationed at the U.S. Embassy in Kuwait when Iraq invaded ... on August 2, 1990. She claims that immediately after the invasion, she reported to her office at the U.S. Embassy. Claimant further states that she was not among those in the convoy of staff and dependents that traveled from Kuwait to Baghdad on August 23, 1990, and that she was on the Embassy's premises when Iraqi soldiers surrounded the compound the following day. Claimant contends that she remained confined in the U.S. Embassy in Kuwait until December 7, 1990, which she asserts was the date on which Iraq released all remaining foreign nationals in Iraq and Kuwait. Claimant flew out of Kuwait (via Baghdad, Iraq) on an evacuation flight chartered by the U.S. government on December 13, 1990.

#### *Supporting Evidence*

Claimant has supported her claim with, among other things, her sworn Statement of Claim, a copy of her U.S. passport, which contains an Iraqi exit stamp dated December 13, 1990, a declaration that describes the circumstances of her alleged detention and ultimate departure from Kuwait, a certificate of recognition that she received from an organization for her service in Kuwait from February 1990 to December 1990, a form signed on April 30, 1991, nominating her for a State Department award for her service in Kuwait, a certificate identifying her as a recipient of a different State Department award for her service after Iraq invaded Kuwait on August 2, 1990, and an article published in an undated and unidentified publication that does the same.

Claimant has also submitted a number of documents that provide background about the broader geopolitical situation during the First Gulf War in 1990-91, including some that relate specifically to the circumstances faced by U.S. nationals in Iraq and Kuwait at the time. These documents include statements from U.S. and Iraqi officials, resolutions of the United Nations Security Council, newspaper articles, a report from Amnesty International on human rights violations committed by Iraq in 1990, unclassified cables and a memorandum from the U.S. Department of State, and affidavits submitted in two lawsuits brought by other U.S. nationals who were also in Kuwait or Iraq during the First Gulf War.

Additionally, the Commission takes notice of Federal News Service transcriptions of press briefings by U.S. government officials, news articles, and publically available unclassified State Department documents that provide further information about Iraq's treatment of U.S. diplomatic personnel accredited to the U.S. Embassy in Kuwait and their dependents after the August 2, 1990 invasion.

\* \* \* \*

*Legal Standard*

To make out a substantive claim under Category A of the 2014 Referral, a claimant must show that (1) Iraq was engaged in an armed conflict and (2) during that conflict, Iraq took the claimant hostage. The Commission has previously held that, to establish a hostage-taking claim under international law in this program, a claimant must show that Iraq (a) seized or detained the claimant and (b) threatened the claimant with death, injury, or continued detention (c) in order to compel a third party, such as the United States government, to do or abstain from doing any act as an explicit or implicit condition for the claimant's release. A claimant can establish the first element of this standard by showing that the Iraqi government confined the claimant to a particular location or locations within Iraq or Kuwait, or prohibited the claimant from leaving Iraq and/or Kuwait. The legal standard we apply in this program applies equally to diplomatic personnel and their families.<sup>13</sup>

*Application of Standard to this Claim*

(1) Armed Conflict: Claimant alleges that Iraq took her hostage in Kuwait on August 2, 1990, and held her hostage for 134 days, until December 13, 1990, when Iraqi officials allowed her to leave Kuwait. In its first decision awarding compensation for hostage-taking under the 2014 Referral, the Commission held that during this entire period, Iraq was engaged in an armed conflict with Kuwait. Thus, Claimant satisfies this element of the standard.

(2) Hostage-taking: ...

(a) Detention/deprivation of freedom: ...

Under this standard, Claimant remained under Iraq's control until December 13, 1990. The Commission has previously held that Iraq imposed conditions on air travel that limited the ability of foreign nationals, including U.S. nationals, to leave Iraq and/or Kuwait in December 1990. Indeed, the available evidence indicates that Claimant left Iraq at the first reasonable opportunity after the December 6th announcement, on the U.S. government-chartered flight that left Iraq on December 13, 1990. We thus conclude that she was under Iraq's control and thus detained from December 6, 1990, to December 13, 1990. In sum, Iraq thus detained Claimant from August 2, 1990, until December 13, 1990.

(b) Threat: The Iraqi government threatened Kuwait Embassy staff members, diplomats, and dependents with continued detention. This included Claimant. ...

<sup>13</sup> The jurisprudence of international tribunals establishes that diplomatic personnel may bring claims for hostage-taking under international law standards applicable during an armed conflict. See *Eritrea-Ethiopia Claims Commission: Diplomatic Claim – Eritrea's Claim 20*, Partial Award, 26 R.I.A.A. 381, 399-400, ¶¶ 48-50, (Dec. 19, 2005); *Eritrea-Ethiopia Claims Commission: Diplomatic Claim - Ethiopia's Claim 8*, Partial Award, 26 R.I.A.A. 407, 415, 420, ¶¶ 11, 31 (Dec. 19, 2005). The United Nations Compensation Commission ("UNCC") also allowed the employees of foreign ministries to submit claims for injuries, which could include "hostage-taking or other illegal detention." See Decision taken by the Governing Council of the United Nations Compensation Commission during its third session, at the 18th meeting, held on 28 November 1991, as revised at the 24th meeting held on 16 March 1992, ¶¶ 7, 22, U.N. Doc. S/AC.26/1991/7/Rev.1, Mar. 17, 1992; Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the First Installment of Claims by Governments and International Organizations (Category "F" Claims), ¶ 9, 30 n.8, U.N. Doc. S/AC.26/1997/6, Dec. 18, 1997. Relevant documents in the Commission's files also support the conclusion that U.S. diplomatic personnel were eligible to submit claims for injuries arising out of "hostage-taking and other illegal detention" before the UNCC. See also 4 Int'l Comm. of the Red Cross, *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 51 (1958) (observing that all diplomatic representatives on enemy territory during armed conflict enjoy at minimum the standards of protection codified in the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War).

In short, the Iraqi government made an unequivocal threat to continue to detain Kuwait Embassy staff members in Kuwait and Iraq. Claimant was a U.S. diplomat accredited to Kuwait at the time. Claimant has thus established that Iraq threatened to continue to detain her.

(c) Third party coercion: The reason Iraq detained Claimant and threatened her with continued detention was to compel the United States government to act in a certain way as an explicit and/or implicit condition for their release. Iraqi authorities informed the U.S. that before it would release detained diplomats, embassy personnel, and their dependents, it wanted the United States to close its embassy in Kuwait. Indeed, at the time, the U.S. government itself understood Iraq's actions to be hostage-taking.

In sum, this claim meets the standard for hostage-taking within the meaning of the 2014 Referral. Iraq held Claimant hostage in violation of international law for a period of 134 days, and Claimant is thus entitled to compensation.

\* \* \* \*

## D. LIBYA CLAIMS

### 1. Referrals to FCSC

The Commission's Third Libya Claims Program concluded in 2018. See *Digest 2013* at 242-43 for background on the referral of these categories of claims to the FCSC. Information on the Libya programs is available at <https://www.justice.gov/fcsc/claims-libya-december-2008-referral-and-january-2009-referral>, and decisions are available at <https://www.justice.gov/fcsc/index-claims-under-november-2013-referral-department-state>. One noteworthy decision, excerpted below (with footnotes omitted), considered claims of a group of former pilots of Pan American Airways. Claim No. LIB-III-036 *et al.*, Decision No. LIB-III-045 (2018) (Final Decision). See *Digest 2016* at 343-46 for discussion of the Commission's proposed decision on the claims. The Commission's January 16, 2018 final decision reaffirmed the proposed decision in denying the claims for failure to prove that Libya's bombing of Pan Am Flight 103 caused the claimants' job losses. The final decision reversed one aspect of the proposed decision, concluding that the 2005 settlement agreement between Libya and Pan Am did not extinguish these claims.

\* \* \* \*

Under the international law of state responsibility, a State committing an internationally wrongful act is “under an obligation to make full reparation for the injury caused by the internationally wrongful act.” And since “the mid-air destruction of an aircraft by terrorists in such circumstances as are present here is an internationally wrongful act,” Libya must ‘make full reparation’ for any injury ‘caused by’ the downing of Pan Am Flight 103.” To establish that a claimant’s injury was “caused by” an internationally wrongful act under international law, the claimant must prove two things. First, the claimant must establish factual causation, also known as but-for causation. Second, the claimant must establish legal causation, also known as proximate causation. Thus, in order to demonstrate that the Lockerbie bombing caused their injury, Claimants must show, under the applicable international-law principles, *both* but for

(“factual”) and proximate (“legal”) causation. In other words, they must show both that, as a factual matter, if not for the Lockerbie bombing, they would not have lost their jobs with Pan Am, and that, as a legal matter, their job losses were directly connected to, and not too remote from, the bombing.

Relying largely on our earlier analysis in the Initial Proposed Decision, the Consolidated Proposed Decision found that Claimants had failed to meet their burden to show that the bombing of Pan Am Flight 103 was either a but-for cause of their injury or a proximate cause of their injury. The Commission therefore concluded that, under the applicable legal principles, Claimants had failed to prove the necessary causal connection between Libya’s actions and their injury, and that Libya was thus not liable for Claimants’ injury.

On objection, Claimants contend that the Proposed Decisions’ causation analysis was flawed. In their Consolidated Notice of Objection and Hearing Brief, Claimants make numerous overlapping arguments. During the oral hearing, Claimants’ counsel consolidated those arguments, framing them around five points: 1) The Proposed Decisions failed to understand the importance of cash to an airline’s ability to operate; 2) The airline industry is unique in its need to forecast future performance based on recent past performance; 3) Nothing broke the causal chain connecting the Lockerbie bombing in December 1988 to Pan Am’s closure in December 1991; 4) Under international law, proximate cause was established because Libya’s attack was intentional and it was foreseeable that Pan Am would go out of business; and 5) Claimants’ claims are unique and will not create any future precedent.

Having reviewed the newly submitted evidence along with all of the evidence Claimants previously submitted, we conclude that none of Claimants’ arguments undermine the Consolidated Proposed Decision’s determinations on causation. The Commission therefore affirms its holding that, under the applicable legal principles, Claimants have failed to establish that Libya’s actions caused their injury. For that reason, we affirm our denial of their claims.

## *2. Claimants Have Not Shown That Cash Lost Due to Lockerbie Caused Pan Am’s Demise*

On objection, Claimants argue that, “but for Lockerbie, Pan Am *would have had enough cash assets to remain viable and pursue strategic alternatives* regardless of whether it sought Chapter 11 protection and notwithstanding the geopolitical events experienced by the entire industry beginning in July 1990.” Claimants’ principal objection to the Proposed Decisions on this point is their argument that the Proposed Decisions failed to “[u]nderstand the [c]ritical [i]mportance of [c]ash to an [a]irline’s [a]bility to [o]perate.”

In support of this argument, Claimants have submitted several different estimates of the amount of cash Pan Am would allegedly have had if not for Lockerbie. ...

Each of these witnesses put forward different estimates of cash lost due to Lockerbie. ...

Claimants argue that the Proposed Decisions erred in concluding that their witnesses’ forecasts of lost cash were speculative. They argue that those forecasts were fully justified. In particular, they argue that the Proposed Decisions failed to understand that the airline industry is unique in its need to forecast future performance based on “recent past performance and projected growth.” Claimants thus argue that the Commission should limit its consideration of Pan Am’s financial performance to a single profitable quarter just before Lockerbie, rather than the several years preceding the attack, when Pan Am’s finances were much worse and fluctuated dramatically. Claimants contend that the improved 1988 third-quarter performance was the result of a turnaround plan that Pan Am’s then-new CEO, Mr. Plaskett, implemented and that Pan Am’s finances would have continued to improve if not for the Lockerbie bombing.

Claimants contend that the uniqueness of the airline industry justifies using projections of future performance based on immediate past performance and assumptions about future growth ...

There are several problems with Claimants' projections about how much cash Pan Am would have had if not for Lockerbie: (a) Claimants' estimates are not based on consistent past performance; (b) Claimants' projections rely on methodologies not shown to be reliable predictors of actual performance; and (c) Claimants' witnesses' estimates are not consistent and are not supported by contemporaneous evidence.

\* \* \* \*

### *3. Claimants Have Not Shown That Cash Lost Due to Lockerbie Prevented Pan Am from Acquiring Northwest Airlines*

Claimants have failed to show that they can prevail based on a claim that Pan Am would have purchased Northwest Airlines. Claimants argue that, if not for Lockerbie, Pan Am would have acquired Northwest Airlines in 1989 and that this purchase would have prevented Pan Am from going out of business (thus preserving their jobs). Before the Consolidated Proposed Decision, Claimants had submitted two pieces of evidence to support this claim: (1) an affidavit from Mr. Plaskett, Pan Am's CEO at the time, that contained one paragraph that alluded to a possible purchase of Northwest; and (2) a statement from Mr. Rederer, an economist, who opined that, but for the cash lost due to the Lockerbie bombing, Pan Am could have acquired Northwest. Both Proposed Decisions concluded that this evidence was insufficient to establish that, but for Lockerbie, Pan Am would have purchased Northwest and that, in any event, any hypothetical purchase of Northwest was too speculative to satisfy the law of proximate causation.

On objection, Claimants introduced new evidence to support their claim that, if not for Lockerbie, Pan Am would have purchased Northwest. In particular, Claimants rely on the testimony of three former Pan Am executives: Mr. Plaskett, Mr. Punwani, and Mr. Pappas. All three testified at the hearing, and Mr. Punwani reiterated in his unsworn post-hearing statement, that, if not for the Lockerbie bombing, Pan Am would have had enough cash to leverage a higher bid for Northwest and that Pan Am ultimately would have prevailed in what was in effect a competitive bidding process at the time. Mr. Punwani and Mr. Pappas also claimed that, but for the security concerns related to Lockerbie, KLM, a Dutch airline that helped finance the deal for the Checchi Group (Northwest's purchaser), would have helped Pan Am, rather than the Checchi Group, finance an acquisition of Northwest. Finally, Mr. Pappas testified that, had Pan Am acquired Northwest, it would have avoided Chapter 11 bankruptcy altogether.

This evidence is insufficient to establish that, but for Lockerbie, Pan Am would have acquired Northwest and, on that basis, avoided liquidation. Even with Claimants' new evidence, they have still failed to show as a factual matter that, but for Lockerbie, Pan Am would have purchased Northwest. Although the contemporaneous evidence does indicate that Pan Am bid for Northwest in 1989, it does not support Claimants' contention that, but for the Lockerbie bombing, Pan Am would have acquired Northwest.

First, Claimants have failed to show the amount of cash Pan Am lost due to the Lockerbie bombing and have thus failed to show that the additional cash if not for Lockerbie would have been enough for Pan Am to leverage into an offer to match or exceed the purchase price the Checchi Group ultimately paid for Northwest at the time (*i.e.*, in mid-1989).

Second, even if Pan Am's cash position had been sufficient for it to be able to match or outbid the Checchi Group's offer, Claimants have not shown that the Checchi Group (or any other bidder) would not have raised its bid and offered more. ...

Third, contemporaneous evidence also suggests that factors other than insufficient funding led Northwest to reject Pan Am as a suitor. In particular, Northwest's labor unions opposed a Pan Am acquisition, and there were potential antitrust concerns that could have derailed the deal as well.

Finally, Claimants failed to provide sufficient evidence to support their contention that, if not for Lockerbie, KLM would have helped Pan Am acquire Northwest. Both Mr. Punwani and Mr. Pappas maintained that, but for the security concerns related to Lockerbie, KLM would have helped Pan Am, rather than the Checchi Group, finance a Northwest acquisition. However, Claimants' witnesses' testimony is insufficient to establish what KLM would or would not have done. Claimants have not submitted any independent evidence, contemporaneous or otherwise, describing the reasons KLM decided to invest in the Checchi Group bid, rather than Pan Am. The only evidence they have submitted—the written and oral testimony of Mr. Pappas and Mr. Punwani—is hearsay and unsupported by any independent, contemporaneous documentation.

The evidence is thus insufficient to prove as a factual matter that, but for the bombing of Flight 103, Pan Am would have acquired Northwest Airlines. It is thus also insufficient to establish that any putative purchase of Northwest would have prevented Pan Am from liquidating.

Moreover, Claimants' theory that, if not for Lockerbie, Pan Am would have acquired Northwest and thus staved off liquidation runs counter to international law jurisprudence drawing a distinction between business opportunities lost as a direct result of a wrongdoer's action and downstream opportunities lost because of the subsequent consequences of such action. Importantly, Claimants' theory requires that they establish not simply that Pan Am would have acquired Northwest but also that the acquisition would have in turn prevented Pan Am's liquidation. But analogous claims before the UNCC make clear that the link between the Lockerbie bombing and the loss of any future financial benefit from a putative purchase of Northwest is too speculative and remote to permit recovery. Such claims are simply not connected directly enough to the Lockerbie bombing to hold Libya liable for them.

When addressing claims for lost profits, the UNCC made a clear distinction between, on the one hand, losses that were a *direct* result of Iraq's violation of international law—its invasion and occupation of Kuwait—and, on the other hand, those that arose secondarily because of a company's inability to secure a business opportunity the company might otherwise have been able to secure if not for the invasion and occupation. Only losses in the first category—direct losses—were recoverable.

For example, in one case, a construction company, Continental Construction, Ltd. ("CCL"), sought recovery for profits from a contract that it allegedly would have concluded if not for Iraq's invasion and occupation of Kuwait. CCL alleged that it was unable to submit a bid for the contract because of "its inability to secure the necessary bid bonds, which itself resulted from the economic losses it suffered in Iraq during the relevant period." A UNCC panel rejected CCL's claim because the failure to bid on the contract did not result from "the acts of the invasion and occupation themselves." That is, the losses were not sufficiently connected to Iraq's actions to meet the law's direct loss requirement.

Also on point was a claim involving a company that went bankrupt during the Iraqi occupation of Kuwait. That company, NRM, claimed that, just before the Iraqi invasion, it was “in the final stages of an initial public offering (‘IPO’) of its common stock[,]” and that because of the invasion, NRM lost contracts in Iraq, which in turn “caused the failure of the IPO and led to [its] subsequent bankruptcy.” Even though the bankruptcy occurred while the occupation was still in place and a mere four months after the Iraqi invasion, and even though NRM submitted a contemporaneous news report attributing the IPO’s failure to the “uncertainty caused by Iraq’s invasion and occupation of Kuwait,” the UNCC panel rejected NRM’s claim. Among the reasons the panel gave was that “[t]he actual loss to NRM is from future profits which could have been generated by the company if funds from the IPO had been received[]” and that “such a loss [could not] be said to be a direct result of Iraq’s invasion and occupation of Kuwait.”

Here, that distinction is the difference between the cash losses Pan Am suffered directly because of Lockerbie and any hypothetical financial benefit Pan Am would have received if it had used the Lockerbie-related losses to purchase Northwest. While Libya can be held accountable for cash lost directly because of Lockerbie, it cannot be held responsible for any financial gains that Pan Am might hypothetically have obtained from a Northwest acquisition. Claimants thus cannot recover against Libya based on a theory that a Pan Am acquisition of Northwest would have prevented Pan Am’s liquidation.

*4. Claimants Have Failed to Show That, But for the Lockerbie Bombing, Pan Am Would Have Reorganized and Survived the 1990 Recession and First Gulf War in 1990-91*

Claimants have also failed to show that they can prevail based on the theory that, but for Lockerbie, Pan Am would have had enough cash to create Pan Am II (*i.e.* consummate the deal Pan Am struck with Delta Air Lines in July 1991—after its Chapter 11 bankruptcy filing—to reorganize the carrier) and thereby avoid liquidation in December 1991. Both the Initial Proposed Decision and the Consolidated Proposed Decision concluded that this claim was too speculative.

On objection, Claimants argue that the Proposed Decisions failed to realize that the impact of the 1988 Lockerbie bombing lasted throughout the three-year period until Pan Am’s liquidation in December 1991 and that nothing subsequent to Lockerbie broke the causal chain. The thrust of this argument is that the Proposed Decisions erred by overemphasizing the role played by the First Gulf War, recession, and other events of 1990-91, rather than attributing Pan Am’s December 1991 liquidation to the cash lost due to the 1988 Lockerbie bombing. ...

*But-for Causation*

As a factual matter, Claimants have failed to prove that the impact of the Lockerbie bombing on Pan Am’s operations or its cash position was significant enough that Pan Am would otherwise not have gone out of business in 1991, *i.e.*, they have not proven that, but for the Lockerbie bombing, Pan Am would have weathered the challenges of the Gulf War, recession, and oil price spike in 1990-91.

Claimants’ core factual claim about the connection between the Lockerbie bombing and Pan Am’s liquidation three years later is that Lockerbie led to Pan Am having less cash than it otherwise would have had and that that additional cash would have prevented Pan Am from liquidating. But even assuming the cash lost due to the 1988 Lockerbie bombing would have been available to Pan Am in December 1991, Claimants have not shown that the amount of cash lost was enough to prevent Pan Am from liquidating.

Moreover, as the Consolidated Proposed Decision explained, insufficient cash was by no means the only factor in the breakdown of the 1991 deal with Delta Airlines to create a “Pan Am II.” Other factors included acts that Delta itself allegedly took to undermine the deal, Delta’s own financial problems, and labor relations issues. ...

Indeed, after Pan Am shut down in December 1991, the airline placed much of the blame squarely on Delta. In its court filings against Delta, Pan Am detailed Delta’s allegedly wrongful conduct at length. ...

Moreover, as we noted in the Consolidated Proposed Decision, Delta had problems of its own: it was having trouble absorbing Pan Am’s assets, its “bond ratings were sliding[,] and it was contemplating an economy that didn’t show many signs of recovery.”

In addition, as noted in the Consolidated Proposed Decision, there is evidence that labor disputes also played a role in Pan Am’s closure. ...

Finally, Claimants have failed to establish that, if not for Lockerbie, Pan Am would have been similarly situated to Continental Airlines or any other carrier that survived the 1990 recession and 1990-91 Gulf War. In their Hearing Brief, Claimants maintain that TWA and Continental “were very comparable to Pan Am, and endured the impact of the Gulf Crisis and the 1990-1991 Recession. ... However, there is no reason to think that the only relevant difference between the two airlines was their cash positions, and Claimants have provided no other detailed analysis of other factors (such as revenues or other aspects of financial performance) that might explain why Continental (or any other airline) did not liquidate. There could thus easily have been numerous material differences between Continental and Pan Am other than Lockerbie. Therefore, Claimants have failed to meet their burden to establish that, if not for Lockerbie, Pan Am would have, like Continental, emerged from Chapter 11 and not liquidated.

#### *Proximate Causation*

In addition, as a legal matter, any injury based on hypothetical lost cash due to the 1988 Lockerbie bombing—cash that might have helped Pan Am three years later—is too speculative, depending as it does on far too many unknowns and imponderables.

Under international law, proximate causation requires that Claimants’ injury not be too remote from the tortious act, either factually or temporally. Even where an act is intentional, the law of proximate causation limits a State’s liability to consequences that are sufficiently close in time. Indeed, the UNCC has denied requests for damages based on insufficient temporal proximity in cases very similar to these claims. In one set of claims before the UNCC, former employees of a bank sought damages because they had been “made redundant” as a result of Iraq’s intentional violation of international law—its invasion and occupation of Kuwait. The UNCC only allowed recovery for damages incurred within 17 months of the invasion (and within 11 months of the end of the occupation) because any losses incurred after that period “were too remote and did not meet direct causal requirements ...” Here, Pan Am’s liquidation was nearly three years after the Lockerbie bombing and is thus far too long after the bombing to hold Libya liable.

A 1903 international arbitration on which Claimants rely, the *Dix* case, does not undermine this crucial principle that a claimant’s injury may not be too remote from the tortious act. Claimants cite *Dix* to support their argument that when a state actor commits an intentionally wrongful act, it is responsible for the damages even if it did not foresee the *specific* damage. They quote *Dix* as articulating the “longstanding principle under international law that compensation for remote consequences of a wrongful act will be denied only ‘in the absence of

evidence of deliberate intention to injure.” The point, presumably, is that, because Libya had a “deliberate intention to injure,” it should be held liable even though it did not foresee Pan Am’s liquidation or Claimants’ job losses.

Claimants fail, however, to put the language they quote from *Dix* in context. In *Dix*, the American-Venezuelan Commission *denied* the relevant portion of the claim. The claimant, an American cattle rancher in Venezuela, sought to prevent the revolutionary Venezuelan army from confiscating some of his cattle by selling the cattle at a loss after the army had already taken some of his other cattle without providing any compensation. Yet, the commission denied his claim for the difference between the true value of the cattle and the sale price because the army did not “compel him to sell his remaining cattle to third parties at an inadequate price.” This holding therefore provides no basis to argue that *all* damages are compensable when a wrongful act is deliberate. Even under the broadest reading of *Dix*, the wrongdoing state still must have possessed an intent to cause the specific harm in question. Here, Claimants have presented no evidence that Libya’s intent was to put Pan Am out of business, much less to cause Claimants to lose their future wages and benefits. Thus, *Dix* does not help Claimants’ proximate causation argument.

Claimants also cite *Amco Asia Corporation v. Republic of Indonesia* for the proposition that “under international law, when there is an intentional attack the precise nature of the damage does not need to be specifically foreseeable.” However, Claimants misstate this decision too. The arbitral panel in *Amco Asia* stated that “foreseeability goes to causation and damages, and normally not the quantum of profit[,]” and that the “principle of foreseeability does not require that the party causing the loss [be] at that moment of time able to foresee the precise *quantum* of the loss actually sustained.” Thus, under *Amco Asia*, the party causing the loss—here, Libya—still needs to have been able to foresee the loss itself—here, that Claimants would lose their jobs—just not the precise quantum of the loss—here, the precise amount of wages and benefits lost. Since Claimants have presented no evidence that, at the time of the Lockerbie bombing in December 1988, Libya (or anyone else) could have foreseen Pan Am’s liquidation—let alone Claimants’ losing their jobs—three years later, Claimants’ injury is too remote to be viewed as proximately caused by the bombing.

Claimants further argue that several specific events that clearly had a significant impact on Pan Am’s finances in 1990 and 1991 should not be considered in the Commission’s proximate cause analysis, citing a 1928 arbitral decision, the *Angola* case. Claimants quote the case as stating that “only another more significant proximate cause should preclude an award.” They argue that the post-Lockerbie events did not break the chain of causation because, as they characterize it, the 1990-91 events were not as significant as the Lockerbie bombing.

There are two problems with this argument. First, it is factually wrong: Pan Am’s immediate losses from the Gulf War and recession were far closer in time and thus more proximately related to the company’s liquidation. Second, the *Angola* decision also holds that “the arbitrators...have not hesitated to refuse all indemnity in respect of injuries which, though standing in causal relation to the acts committed by [the wrongdoing state], also resulted from other and more proximate causes.” Because Pan Am was harmed by significant events that were temporally “more proximate” than, and unrelated to, the destruction of Flight 103—namely, the 1990 recession and the First Gulf War in 1990-91—the *Angola* decision undermines, rather than helps, Claimants’ argument. Here, Claimants have failed to show that the Lockerbie-related losses suffered by Pan Am were more significantly related to Pan Am’s liquidation than the more temporally proximate losses arising from the 1990-91 events.

In sum, while the existence of multiple links in the causal chain is not dispositive in determining proximate cause, the wrongful act must still not be too remote in both a temporal and factual sense, and here it is too remote in both senses. Claimants have therefore failed to prove that the bombing of Pan Am Flight 103 was the proximate cause of Pan Am's liquidation (and thus of their injury).

\* \* \* \*

## 2. Litigation

### a. Aviation v. United States

As discussed in *Digest 2016* at 347-50, the United States prevailed on summary judgment in the U.S. Court of Federal Claims in *Aviation v. United States*. Plaintiffs appealed to the U.S. Court of Appeals for the Federal Circuit. Plaintiff-appellants are foreign insurance companies that insured planes destroyed in terrorist attacks, including the hijacking of Egypt Air Flight 648 and the bombing of Pan Am Flight 103. They sued in federal court, but legislative and executive actions regarding Libya's sovereign immunity and a claims settlement with Libya occurred during the pendency of their suits. The U.S. brief on appeal is discussed in *Digest 2017* at 347-50. Excerpts follow from the appeals court's decision, affirming the dismissal of the claims. See *Aviation & General Insurance Company, LTD., v. United States*, 882 F.3d 1088, 1098 (Fed. Cir. 2018), available at <http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/16-2389.Opinion.2-9-2018.1.PDF>.

\* \* \* \*

We hold, however, that to the extent Appellants seek judicial review of the President's decision to exclude them from the settlement's proceeds, Appellants raise a nonjusticiable political question. We have identified similar questions as nonjusticiable political questions. In *Belk v. United States*, 858 F.2d 706, 710 (Fed. Cir. 1988), we addressed claims brought by the released victims of the Iranian hostage crisis. The United States had settled their claims by signing agreements (the Algiers Accords) with Iran. *See id.* at 707. The victims sued the Government, alleging a taking in violation of the Fifth Amendment and seeking the full amount of damages they would have recovered against Iran had their claims not been settled. *Id.* There, we found the case presented a nonjusticiable question because the appellants questioned whether the President should have sought better terms in the settlement agreement. We held that "[t]he determination whether and upon what terms to settle the dispute with Iran... necessarily was for the President to make in his foreign relations role." *Id.* at 710. We concluded that the appellants' claims were not appropriate for judicial resolution because "judicial inquiry into whether the President could have extracted a more favorable settlement would seriously interfere with the President's ability to conduct foreign relations." *Id.*

We hold that Appellants' claims directed to their exclusion from the distribution of proceeds arising from the Libya Claims Settlement Agreement present a similar nonjusticiable political question. As Appellants concede, *see* Appellants' Reply Br. 26, foreign relations and settlements to resolve foreign conflicts are soundly committed to the President's discretion. *See Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'— departments of the government...." (citation omitted)). It follows that the President had complete discretion and authority to implement the settlement with Libya and to decide to whom the settlement funds would be distributed. Appellants' argument that they should have been included in the distribution of settlement funds questions the President's policy decision to exclude them. The President's policy decision regarding the settlement proceeds is not a determination for judicial resolution. It is a question "of a kind clearly for nonjudicial discretion," and there are no 'judicially discoverable and manageable standards' for reviewing such a Presidential decision." *Belk*, 858 F.2d at 710 (quoting *Baker*, 369 U.S. at 217). "The Judiciary is particularly ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature.'" *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Thus, we do not reach Appellants' arguments regarding their exclusion from the settlement proceeds. We only address their alleged claims that termination of their lawsuits against Libya constituted a taking under the Fifth Amendment.

## II.

The Fifth Amendment states that private property shall not be taken "for public use, without just compensation." U.S. Const. amend. V. To state a claim for a taking, Appellants must establish that they had a cognizable property interest and that their property was taken by the United States for a public purpose. *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009). We assume, without deciding, that Appellants' lawsuits against Libya constituted a cognizable property interest for purposes of a takings claim. We hold, however, that even if Appellants had a property interest in their lawsuits, no taking occurred under the Fifth Amendment.

The parties agree that, under the circumstances in this case, whether a taking occurred requires analysis of the factors set forth in *Penn Central*. The *Penn Central* factors query: (1) "the character of the governmental action"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "[t]he economic impact of the regulation on the claimant." *Penn Central*, 438 U.S. at 124. In *Belk*, under facts similar to this case, we provided an explication of these factors to reflect the unusual circumstances of these types of cases, including:

the degree to which the property owner's rights were impaired, the extent to which the property owner is an incidental beneficiary of the governmental action, the importance of the public interest to be served, whether the exercise of governmental power can be characterized as novel and unexpected or falling within traditional boundaries, and whether the action substituted any rights or remedies for those that it destroyed.

*Belk*, 858 F.2d at 709. All relevant factors must be weighed to decide whether a compensable taking has occurred. *Id.* In the end, we must determine whether “‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.” *Penn Central*, 438 U.S. at 124.

We start with the first *Penn Central* factor—the character of the Government’s action. “In deciding whether a particular governmental action has effected a taking, this Court focuses...both on the character of the action and on the nature and extent of the interference with rights...as a whole.” *Penn Central*, 438 U.S. at 130–31. As we noted in *Belk*, “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” *Belk*, 858 F.2d at 709 (quoting *Penn Central*, 438 U.S. at 124). The character of governmental action in this case is the Government’s authority to settle and espouse claims and reinstate Libya’s sovereign immunity. While we recognize the significant degree to which the Appellants’ rights in maintaining their lawsuits were impaired—indeed, their lawsuits were terminated—the Government’s action nonetheless was not a physical invasion of Appellants’ property rights. Rather, the Government reinstated Libya’s sovereign immunity for the common good, reflecting the “current political realities and relationship[]” between the United States and Libya. *Republic of Iraq v. Beatty*, 556 U.S. 848, 864 (2009) (citation omitted); see also *Belk*, 858 F.2d at 709 (“Here there was no physical invasion of property, but only the prohibition on the assertion by the appellants of their alleged damage claims....”).

Turning to the second *Penn Central* factor—interference with investment-backed expectations—Appellants argue that they “had reasonable investment backed expectations, at the time of their investment, in receiving some compensation for the termination of their claims....” Appellants’ Br. 34. Appellants assert that in “looking back” at all historical examples of foreign claims settlements, claimants either received compensation upon termination of their lawsuits or otherwise directly benefited from the settlement itself. *Id.* at 32–33. Appellants note that, in contrast, they received no such compensation or benefit. Appellants further assert that the Government “failed to provide an alternative remedy to Plaintiffs *specifically* to gain a government benefit at their expense, the ability to pay more to” United States citizens. *Id.* at 34 (emphasis in original).

After considering Appellants’ arguments, we agree with the Court of Federal Claims that the Government’s action in changing the status of Libya’s sovereign immunity was neither novel nor unexpected and thus could not have interfered with Appellants’ reasonable investment-backed expectations. As the court recognized, since at least 1799, the United States, as a matter of foreign relations, has settled claims against foreign sovereigns as such litigious activity is a “source[] of friction” in our international relations. See *Summary Judgment Order*, 127 Fed. Cl. at 320 (quoting *United States v. Pink*, 315 U.S. 203, 225 (1942)). “Foreign sovereign immunity ‘reflects current political realities and relationships,’ and its availability (or lack thereof) generally is not something on which parties can rely ‘in shaping their primary conduct.’” *Beatty*, 556 U.S. at 864–65 (citation omitted). “[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries...by executive agreement[s]... [u]nder [which] the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures.” *Belk*, 858 F.2d at 709 (alterations in original) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981)). We conclude that Appellants could not

have reasonably expected that their lawsuits against Libya would be free from governmental interference. Indeed, even Appellants concede that “there was always a possibility [the Government] would interfere in [their] litigation against Libya... .” Appellants’ Br. 23.

Appellants’ argument that they nonetheless held a reasonable expectation of compensation following the Government’s termination of their claims based on historical examples is of no moment. As we have held, the President’s decision to exclude Appellants from the distribution of proceeds from this particular settlement is not a justiciable issue that this court can address. Moreover, we disagree that at the time Appellants invested in their insurance contracts or at the time of the terrorist attacks—the time at which Appellants’ claims accrued—Appellants had an expectation of being compensated for the claims they paid as a result of the attacks. At those times, Libya had sovereign immunity from suit in the United States. Thus, the Government’s *ex post facto* abrogation of Libya’s sovereign immunity could not have interfered with any reasonable expectation that Appellants could sue Libya at the time their claims accrued. *Cf. Beatty*, 556 U.S. at 865 (emphasis in original) (“Iraq was immune from suit at the time it is alleged to have harmed respondents. The President’s elimination of Iraq’s *later* subjection to suit could hardly have deprived respondents of any expectation they held at the time of their injury that they would be able to sue Iraq in United States courts.”). Indeed, Appellants’ ability to file a lawsuit against Libya was only made possible years after the attacks in 1996, when Congress temporarily lifted Libya’s sovereign immunity pursuant to the Terrorism Exception to FSIA.

Moreover, even if, as Appellants argue, they held a reasonable investment-backed expectation at the time Congress lifted Libya’s sovereign immunity, they could not have reasonably expected that the Government would not eventually change its position and interfere in their lawsuits. Surely, if Congress giveth, so too can it taketh away. After Congress fortuitously lifted Libya’s immunity from suit, permitting Appellants’ lawsuits in the first instance, Appellants should have reasonably foreseen that Congress could also reinstate Libya’s sovereign immunity. As occurred here, Congress altered the jurisdictional rule of sovereign immunity with respect to Libya *after* Libya’s conduct giving rise to Appellants’ claims. After the President exercised his authority to settle claims against Libya, Congress again altered the rules of sovereign immunity reinstating Libya’s sovereign immunity. Given the evident changing political climate between the United States and Libya during this time, it was unreasonable for Appellants to have expected that the waiver of Libya’s sovereign immunity would have remained static while their lawsuits were pending. Thus, we agree that the Government’s action did not constitute a novel interference with Appellants’ investment-backed expectations.

Additionally, we disagree with Appellants’ characterization that the Government failed to provide an alternative forum to litigate their claims against Libya. While the settlement and consequent legislation did not provide Appellants (as foreign nationals) a forum in the United States, the President’s Executive Order expressly provided that with respect to suits by foreign nationals “[n]either the dismissal of the lawsuit, nor anything in this order, shall affect the ability of any foreign national to pursue other available remedies for claims coming within the terms of Article I [of the Libya Claims Settlement Agreement] in foreign courts or through the efforts of foreign governments.” Executive Order No. 13,477, 73 Fed. Reg. 65,965. Thus, Appellants could have sought relief in foreign courts but chose not to do so. Appellants’ failure to seek relief in a foreign forum should not be a cost shouldered by the American public.

Regarding the third *Penn Central* factor—economic impact—we agree with the Court of Federal Claims that the economic impact is speculative and uncertain. As with any litigation, there was no guarantee that Appellants would have been successful in obtaining a judgment, let alone successful in enforcing that judgment against Libya. ...

\* \* \* \*

Finally, though not dispositive, we emphasize the importance of the public interest and policy considerations served by the Government’s action. The President’s action in settling claims against Libya was designed to normalize relations between the United States and Libya, restore international comity, and promote international commerce. Moreover, the President’s decision to espouse these claims implicates important policy decisions soundly committed to the President. To find that a taking occurred under these circumstances would interfere with the President’s authority to enter into foreign claims settlements for the benefit of United States foreign relations and may interfere with the structure of future settlements.

After balancing the pertinent considerations under *Penn Central*, we conclude that, on the undisputed facts of this case, Appellants have not stated a cause of action for a taking based on the United States’ termination of their lawsuits pursuant to the Libya Claims Settlement Agreement. The Court of Federal Claims did not err in granting summary judgment.

\* \* \* \*

After the United States prevailed in the court of appeals, plaintiffs filed a petition for certiorari in the U.S. Supreme Court. Excerpts follow from the September 14, 2018 U.S. brief opposing the petition. The Supreme Court denied the petition on October 29, 2018. *Aviation & General Insurance Company, LTD*, 882 F.3d 1088 (Fed. Cir. 2018), *cert. denied*, 139 S.Ct. 412 (2018).

\* \* \* \*

Petitioners renew their argument (Pet. 10-24) that the court of appeals misapplied *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), when it held that the reinstatement of Libya’s sovereign immunity did not effect a compensable taking under the Fifth Amendment. Petitioners also argue (Pet. 24-27) that claims regarding their exclusion from the settlement fund are justiciable. The court of appeals correctly rejected petitioners’ arguments, and its decision does not conflict with any decision of this Court or another court of appeals. In any event, this case would be a poor vehicle for addressing the questions presented. Further review is unwarranted.

1. The court of appeals correctly held that the Libyan Claims Resolution Act did not effect a taking of petitioners’ property requiring compensation under the Fifth Amendment when it reinstated Libya’s sovereign immunity in U.S. courts. Petitioners do not assert any conflict among the courts of appeals, arguing instead (Pet. 28) merely that the court below “disregarded or misapplied” longstanding principles of takings law. Petitioners’ argument based on the circumstances of this case is unpersuasive.

a. As an initial matter, the reinstatement of Libya's sovereign immunity did not interfere with any cognizable property right possessed by petitioners. During the course of this litigation, petitioners have "shifted their argument" concerning the supposed property rights at issue. Pet. App. 10a. In the Court of Federal Claims, petitioners argued that the government "took" their property "in the form of their legally cognizable claims against the government of Libya." *Ibid.* (citation, ellipsis, and emphasis omitted). On appeal, however, petitioners stated "that they 'do not allege that the sale of their claims to Libya was a taking, but are challenging the Government's decision to exclude them from the distribution of the Libya Claims Settlement Agreement proceeds.'" *Ibid.* (quoting Pet. C.A. Br. 26) (brackets omitted). Now before this Court, petitioners seem to be reverting to the argument they made in the Court of Federal Claims. See Pet. 21 ("Petitioners' property, their claims against Libya, were terminated.").

Regardless of how petitioners' takings argument is conceived, however, petitioners have not identified any cognizable form of constitutionally protected property. Petitioners assert (Pet. 15) that, under the LCRA, their claims were "sold to Libya for a cash payment." That assertion is incorrect. The LCRA reinstated Libya's sovereign immunity in suits in U.S. courts, thereby imposing "one particular barrier" to recovery in that venue. *Dames & Moore v. Regan*, 453 U.S. 654, 685 (1981). But the United States did not terminate petitioners' legal claims, much less did it take them or "sell" them (Pet. 21) to Libya. To the contrary, the Executive Order implementing the LCRA specified that, although the claims of foreign nationals could no longer be maintained in U.S. courts in light of the reinstatement of Libya's sovereign immunity, "[n]either the dismissal of the lawsuit, nor anything in th[e] order, shall affect the ability of any foreign national to pursue other available remedies for claims \* \* \* in foreign courts or through the efforts of foreign governments." E.O. 13,477 § 1(b)(iii). Petitioners thus "could have sought relief in foreign courts," or could have sought relief through the efforts of foreign governments, including those governments in a position to espouse their claims, but they "chose not to do so." Pet. App. 20a.

Even if the United States could plausibly be described as in some sense having terminated claims by foreign nationals based on conduct occurring abroad, moreover, petitioner has identified no authority supporting the notion that a potential tort claim, of the sort that petitioners seek to pursue against Libya, is a form of constitutionally protected property. To the contrary, courts have consistently held that "a pending tort claim does not constitute a vested right." *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996) (citing cases), cert. denied, 519 U.S. 1077 (1997); ... Nor can petitioners reasonably assert a property interest in the legal regime that existed at any point in time—for instance, during the six-month period between January and August 2008 in which Libya was unable to invoke a sovereign immunity defense against petitioners' claims. See *New York Cent. R.R. v. White*, 243 U.S. 188, 198 (1917) ("No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."); cf. *Republic of Iraq v. Beatty*, 556 U.S. 848, 864 (2009) ("Laws that merely alter the rules of foreign sovereign immunity, rather than modify substantive rights, are not operating retroactively when applied to pending cases.").

Finally, petitioners are wrong in arguing (Pet. 13) that their property rights were implicated by the President's decision to "exclude" them from access to proceeds from the \$1.5 billion settlement with Libya. Access to the settlement proceeds, by means of seeking compensation through the Commission, was afforded only to U.S. nationals whose claims were "espoused" (*i.e.*, adopted) by the United States. E.O. 13,477 § 1(a)(ii); see *Antolok v. United States*, 873 F.2d 369, 375 (D.C. Cir. 1989) ("In international law the doctrine of 'espousal'

describes the mechanism whereby one government adopts or ‘espouses’ and settles the claim of its nationals against another government.”). Petitioners are ineligible to receive proceeds from the settlement because their claims were not espoused by the United States. In complaining (Pet. 11) that the government “exclude[d] Petitioners” from the settlement agreement, therefore, petitioners are actually objecting to the government’s *refusal* to espouse their claims. Needless to say, petitioners do not possess any cognizable property interest in having their claims, based on injuries to foreign nationals, espoused and settled by the United States. See *American & European Agencies, Inc. v. Gilliland*, 247 F.2d 95, 97-98 (D.C. Cir.) (“No claimant \* \* \* has a right to participate” in distribution of Commission funds “in any amount until the Commission has made an award.”), cert. denied, 355 U.S. 884 (1957); see also 22 U.S.C. 1623(h) (no judicial review for decisions by the Commission about the distribution of settlement proceeds).

b. Even if petitioners could identify a cognizable property interest that was impaired by the LCRA, the court of appeals correctly applied the *Penn Central* test to determine that “no taking occurred under the Fifth Amendment.” Pet. App. 15a.

i. The court of appeals properly concluded that the reinstatement of Libya’s sovereign immunity did not interfere with petitioners’ “reasonable investment-backed expectations.” Pet. App. 17a. The availability or unavailability of a legal defense, much less a jurisdictional bar to suit like sovereign immunity, is not the type of interest on which a person may reasonably rely. As this Court has explained, a legislature “[o]f course \* \* \* remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether.” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982); see *Martinez v. California*, 444 U.S. 277, 281-283 (1980) (upholding California statute granting officials immunity for certain types of tort claims and rejecting litigant’s argument that the statute was “an invalid deprivation of property”).

Nor could petitioners have reasonably expected that the status of Libya’s sovereign immunity would remain stable. As this Court explained in *Beatty*, “[f]oreign sovereign immunity ‘reflects current political realities and relationships,’ and its availability (or lack thereof) generally is not something on which parties can rely ‘in shaping their primary conduct.’ ” 556 U.S. at 864-865 (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004)). That reasoning is particularly apt here, for several reasons. (1) At the time that petitioners’ claims accrued, “Libya had sovereign immunity from suit in the United States.” Pet. App. 19a. (2) Libya’s immunity was not lifted at all until 1996, and was not fully lifted against petitioners’ claims until January 2008. *Id.* at 19a-20a. (3) The jurisdictional rule on which petitioners seek to rely (the Terrorism Exception) targeted rogue nations whose orientation toward the United States was likely to change; indeed the rule was *intended* to change the behavior of those nations. *Id.* at 20a. (4) Libya’s immunity against suits like petitioners’ was revoked fully only for a period of about six months. *Id.* at 5a-6a.

Petitioners also could not reasonably have developed or relied on an expectation that the government would permit the continued litigation of their claims in U.S. courts. As a matter of foreign policy, Presidents have settled and terminated claims against foreign sovereigns “since at least 1799.” Pet. App. 17a; see *Dames & Moore*, 453 U.S. at 679 (“[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries.”). Petitioners argue (Pet. 18) that never before has “the government terminated claims as part of a foreign claims settlement agreement with a foreign sovereign without also providing access to an alternative remedy, forum, or specific benefit.” ... Although petitioners’ claims may no longer proceed in U.S. courts, absent an abrogation by Congress or a voluntary waiver of

sovereign immunity by Libya, those claims have not been resolved on the merits. Petitioners thus remain free “to pursue other available remedies for [the] claims \* \* \* in foreign courts or through the efforts of foreign governments.” E.O. 13,477 § 1(b)(iii).

Petitioners could not reasonably have expected to share in the settlement proceeds, moreover, because petitioners are foreign nationals or are otherwise unable to satisfy the Commission’s “continuous nationality” rule. Pet. App. 7a. As this Court has observed, “[t]here is no Constitutional reason why this Government need act as the collection agent for nationals of other countries when it takes steps to protect itself or its own nationals on external debts.” *United States v. Pink*, 315 U.S. 203, 228 (1942). Thus, since its establishment, the Foreign Claims Settlement Commission has lacked jurisdiction to consider claims brought by foreign nationals. See International Claims Settlement Act of 1949, ch. 54, § 4(a), 64 Stat. 13-14 (22 U.S.C. 1623(a)(1)).

In any event, petitioners are incorrect (Pet. 22) that their exclusion from the settlement proceeds was “unprecedented.” The Iranian hostage crisis led to the signing of the Algiers Accords, which “prohibit[ed] United States nationals from prosecuting claims related to” the crisis in any forum, foreign or domestic. *Belk v. United States*, 858 F.2d 706, 707 (Fed. Cir. 1988). Despite the hostage victims’ argument that their release was “not sufficient compensation for the extinguishment of [their] rights” against Iran, the Federal Circuit concluded that the Algiers Accords did not interfere with any investment-backed expectations. *Id.* at 710. Petitioners’ argument here is even less persuasive, given that they are foreign nationals who still retain the right to seek relief in foreign courts or through the efforts of foreign governments.

ii. The court of appeals also correctly determined that “[t]he character of governmental action in this case,” the reinstatement of Libya’s sovereign immunity, further demonstrates that no taking occurred. Pet. App. 16a. Petitioners argue (Pet. 14-16) that the court erred by focusing on the absence here of any physical invasion of petitioners’ property. Petitioners assert that the inquiry should have focused instead on the “severity of the burden” imposed on petitioners’ asserted property rights, and on whether petitioners were “ ‘singled out to bear a particularly severe regulatory burden.’ ” Pet. 14, 16 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539, 544 (2005)) (brackets omitted). Petitioners’ argument is based on a misreading of *Lingle*.

In *Lingle*, the Court explained that “[t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion.” 544 U.S. at 537. Although the Court has also “recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster,” *id.* at 537, the Court’s regulatory takings jurisprudence “aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain,” *id.* at 539. On the other end of the spectrum are governmental actions, like the reinstatement of sovereign immunity in this case, that “merely affect[ ] property interests through ‘some public program adjusting the benefits and burdens of economic life to promote the common good.’ ” *Id.* at 538 (quoting *Penn Central*, 438 U.S. at 124). As the court of appeals explained, “the Government reinstated Libya’s sovereign immunity for the common good, reflecting the ‘current political realities and relationship’ between the United States and Libya.” Pet. App. 16a (quoting *Beatty*, 556 U.S. at 864) (brackets omitted); see *id.* at 21a (“The President’s action in settling claims against Libya was designed to normalize relations between the United States and Libya, restore international comity, and promote international commerce.”). Indeed, the governmental action involved here—the adjustment of sovereign

immunity and court jurisdiction in domestic legal proceedings—is especially *unlike* a physical invasion of property.

In any event, petitioners were not “singled out to bear any particularly severe regulatory burden.” *Lingle*, 544 U.S. at 544. By reinstating Libya’s sovereign immunity in U.S. courts to what it was at the time of the conduct that is the basis of the suit, the LCRA did not resolve petitioners’ claims against Libya on the merits, but instead left petitioners free “to seek relief in a foreign forum.” Pet. App. 20a. The restoration of Libya’s immunity was also applied universally, to all individuals and corporations of any nationality, *id.* at 106a, and the Executive Order treated petitioners identically to other foreign nationals, *id.* at 5a-6a.

iii. Finally, the economic impact on petitioners of the LCRA was “speculative and uncertain.” Pet. App. 21. As the court of appeals explained, had petitioners’ suits been permitted to continue in U.S. courts, “there was no guarantee that [petitioners] would have been successful in obtaining a judgment, let alone successful in enforcing that judgment against Libya.” *Ibid.*; see *United States v. Sperry Corp.*, 493 U.S. 52, 63 (1989) (rejecting takings claim based on Algiers Accords where claimant “would have had no assurance that it could have pursued its action against Iran to judgment or that a judgment would have been readily collectible”). That is particularly so here because the Commission had already determined that, even if it could consider the merits of petitioners’ compensation claims, petitioners “failed to meet their burden of proof as to the validity of any of their theories of the claim[s].” C.A. App. 525.

Petitioners argue (Pet. 19) that the court of appeals failed to “account for th[e] 100% diminution in [the] value” of petitioners’ legal claims against Libya. But the economic impact of a governmental action on a property interest is inherently speculative if the value (and indeed the existence) of the property interest itself is speculative. See, e.g., *Tennessee Scrap Recyclers Ass’n v. Bredesen*, 556 F.3d 442, 456 (6th Cir. 2009); *In re Jones Truck Lines, Inc.*, 57 F.3d 642, 651 (8th Cir. 1995). Here, petitioners’ claims—even assuming they constitute a cognizable property interest—were of uncertain value given the real possibility that they would have failed in court, or would have been uncollectable even if successful. The value of petitioners’ claims also would have fluctuated with the existence or nonexistence of Libya’s sovereign immunity: Libya’s immunity was a barrier to suit when the claims accrued; was subsequently eliminated as a barrier; but was reinstated as a barrier in August 2008. See Pet. App. 19a. Petitioners are also incorrect (Pet. 21) that the value of their legal claims against Libya “is now zero.” Because the Executive Order expressly preserved the right of foreign nationals to seek relief against Libya “in foreign courts or through the efforts of foreign governments,” E.O. 13,477 § 1(b)(iii), petitioners may yet receive compensation from Libya for their claims.

c. Petitioners argue (Pet. 22) that the court of appeals’ decision leaves the government with “virtually unbridled discretion to appropriate and redistribute property so long as it is incident to a foreign claims settlement.” That argument mischaracterizes the court’s decision, which was appropriately based on the “ad hoc, factual inquiries” required by *Penn Central*. 438 U.S. at 124. The decision thus turned on case-specific factors, such as the particular nature of the governmental action at issue (reinstatement of sovereign immunity), Pet. App., 16a-17a; Libya’s long history of immunity in U.S. courts, which remained intact at the time that petitioners’ claims accrued, was lifted for a time, and was then reinstated, *id.* at 18a-19a; and the Executive Order’s preservation of petitioners’ right to seek relief in foreign courts, *id.* at 20a. Petitioners have identified no other case that shares those features.

2. Petitioners argue (Pet. 24-27) that the court of appeals erred in holding that, “to the extent [petitioners] seek judicial review of the President’s decision to exclude them from the settlement’s proceeds, [petitioners] raise a nonjusticiable political question.” Pet. App. 12a-13a. Petitioners acknowledge (Pet. 26) that “the President enjoys broad foreign policy powers, including the authority to terminate claims pursuant to a foreign claims settlement agreement,” but nevertheless contend that “the subsequent domestic decision of how to allocate the settlement proceeds among claimants” is subject to “constitutional constraints” that may be enforced by the judiciary. But the *distribution* of claims-settlement proceeds is intertwined with the settlement itself. See Pet. App. 14a (“[Petitioners’] argument that they should have been included in the distribution of settlement funds questions the President’s policy decision to exclude them.”). Petitioners essentially ask this Court to second-guess the President’s “policy decision” about which victims of international terrorist incidents most merit compensation, *ibid.*, and his decision to exclude from the monetary settlement and award distribution of settlement funds for the claims of foreign nationals. A judicial determination that the government took petitioners’ property by excluding them from settlement proceeds, moreover, could force the government to insist upon larger or differently tailored settlements, or even discourage the government from making future settlements altogether. see *Belk*, 858 F.2d at 710 (“A judicial inquiry into whether the President could have extracted a more favorable settlement would seriously interfere with the President’s ability to conduct foreign relations.”).

In any event, even if petitioners’ objection to being excluded from the settlement were justiciable, it would fail. Petitioners had no cognizable property interest in having their claims “espoused” and settled by the United States. E.O. 13,477 § 1(a)(ii); see pp. 13-14, *supra*. And any takings claim based on exclusion from the settlement would fail under the *Penn Central* test for the same reasons described above. See pp. 14-19, *supra*; see Pet. App. 18a-19a (rejecting argument “that at the time [petitioners] invested in their insurance contracts or at the time of the terrorist attacks \* \* \* [petitioners] had an expectation of being compensated for the claims they paid as a result of the attacks”).

\* \* \* \*

**b. Alimanestianu v. United States**

As discussed in *Digest 2016* at 350-56, the United States also prevailed on summary judgment in another case related to claims against Libya before the U.S. Court of Federal Claims, *Alimanestianu v. United States*. The Alimanestianu plaintiffs brought a federal suit against Libya, but their lawsuit was dismissed after the United States reached a claims settlement agreement with Libya. Although the Alimanestianu estate and family received nearly \$11 million from the settlement fund, they claimed the lost opportunity to pursue their suit in federal court constituted a taking. The U.S. brief filed in the Court of Appeals for the Federal Circuit in 2017 is discussed in *Digest 2017* at 350-56. The decision of the Court of Appeals affirming is excerpted below. *Alimanestianu v.*

*United States*, 888 F.3d 1374 (Fed. Cir. 2018), available at <http://www.ca9.uscourts.gov/node/23372>. \*

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We now consider the *Penn Central* factors to see if Appellants suffered a compensable taking. Looking to the character of the governmental action, Appellants provided no evidence that this factor should weigh in their favor. As the trial court noted, the Executive has an overwhelming interest in conducting foreign affairs. *Alimanestianu*, 130 Fed. Cl. at 145. “Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are ‘sources of friction’ between the two sovereigns ... [where] nations have often entered into agreements settling the claims of their respective nationals.” *Dames & Moore*, 453 U.S. at 679. “[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries,” whether it be by treaty or through executive action, and “Congress has implicitly approved th[is] practice.” *Id.* at 679–80. Thus, the trial court correctly observed that the Government was working well within its Constitutional prerogative in conducting foreign affairs when it espoused and settled Appellants’ claims.

As for the extent to which the regulation has interfered with distinct investment-backed expectations, Appellants have provided no evidence that they had an investment-backed expectation in their claims and non-final judgment. First, as *Abraham-Youri* points out, “those who engage in international commerce must be aware that international relations sometimes become strained, and that governments engage in a variety of activities designed to maintain a degree of international amity.” 139 F.3d at 1468. Further, the claims at issue were based on a “tenuous jurisdictional grant,” *Alimanestianu*, 130 Fed. Cl. at 145—the State Sponsor of Terrorism exception to FSIA and the government’s designation of Libya as a state-sponsor of terrorism—which was always subject to the ever-evolving relationship between the two nations, ... Furthermore, any recovery by Appellants of their judgment would depend on a cooperative Libyan court ordering its government to pay the judgment, or failing such cooperation, a coercive act against Libya by some other governmental body to compel Libyan satisfaction of the judgment. However, Appellants do not provide any evidence that such efforts have been successful in the past, or would have been successful in this case. Thus, the trial court did not err by concluding that such recovery was speculative, and that espousal did not interfere overall with any investment-backed expectation in Appellants’ claims and non-final judgment.

Finally, addressing the economic impact of the regulation on the claimant, the only evidence Appellants provide is that the Commission’s award was less than their non-final judgment. But this evidence in no way disputes the trial court’s observation that Appellants still received more than they would have without the Government’s action. *Alimanestianu*, 130 Fed. Cl. at 145–46. As noted by the trial court, Mihai’s estate received \$10 million, and each of Mihai’s children received \$200,000 through the Commission, which is likely more than could have been expected had Appellants attempted to enforce any U.S. judgment themselves. *Id.*

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\* Plaintiffs filed a petition for certiorari in the Supreme Court in 2018. *Alimanestianu v. United States*, No. 18-295. The U.S. brief in opposition will be discussed in *Digest 2019*. The Supreme Court denied the petition on February 19, 2019.

Instead, “the Government provided an alternative [adjudicatory forum] tailored to the circumstances which produced a result as favorable to the [Appellants] as could reasonably be expected.” *Abrahim-Youri*, 139 F.3d at 1468. Thus, “[w]here, as here, the private party is the particular intended beneficiary of the governmental activity, fairness and justice do not require that losses which may result from that activity be borne by the public as a whole, even though the activity may also be intended incidentally to benefit the public.” *Belk*, 858 F.2d at 709 (internal quotations omitted). “[T]he fact that [Appellants] are not satisfied with the settlement negotiated by the Government on their behalf does not entitle them to compensation by the United States.” *Abrahim-Youri*, 139 F.3d at 1468. Upon considering the *Penn Central* factors, Appellants have failed to show any evidence to demonstrate that they suffered a compensable taking. Therefore, the trial court did not err by granting summary judgment in favor of the Government.

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**Cross References**

Scalin v. SNCF, **Ch. 5.C.1.b**

*ICJ*, **Ch. 7.B**

*Expropriation under the FSIA*, **Ch. 10.A.2**

Scalin v. SNCF, **Ch. 10.A.2**

*Investment dispute resolution under free trade agreements*, **Ch. 11.B**

## CHAPTER 9

# Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues

### A. DIPLOMATIC RELATIONS

#### 1. Iraq

On September 28, 2018, U.S. Secretary of State Michael R. Pompeo made the determination to order the departure of U.S. personnel from the U.S. Consulate in Basrah, Iraq. See Department spokesperson press statement, available at <https://www.state.gov/on-ordered-departure-at-consulate-basrah/>. Secretary Pompeo explained the rationale for the determination in an additional September 28 press statement, available at <https://www.state.gov/threats-to-american-personnel-and-facilities-in-iraq-share/>, which includes the following:

Threats to our personnel and facilities in Iraq from the Government of Iran, the Islamic Revolutionary Guard Corps Quds Force, and from militias facilitated by and under the control and direction of the Quds Force leader Qasem Soleimani have increased over the past several weeks. There have been repeated incidents of indirect fire from elements of those militias directed at our Consulate General in Basrah and our Embassy in Baghdad, including within the past twenty-four hours.

I have advised the Government of Iran that the United States will hold Iran directly responsible for any harm to Americans or to our diplomatic facilities in Iraq or elsewhere and whether perpetrated by Iranian forces directly or by associated proxy militias. I have made clear that Iran should understand that the United States will respond promptly and appropriately to any such attacks.

Given the increasing and specific threats and incitement to attack our personnel and facilities in Iraq, I have directed that an appropriate temporary relocation of diplomatic personnel in Iraq take place. We are working closely

with our partners in the Government and Security Forces of Iraq to address these threats. We look to all international parties interested in peace and stability in Iraq and the region to reinforce our message to Iran regarding the unacceptability of their behavior.

## 2. Iran

On October 3, 2018, Secretary Pompeo announced that the United States is terminating the 1955 Treaty of Amity with Iran. See remarks to the media, available at <https://www.state.gov/remarks-to-the-media-3/>. As discussed in Chapter 7, the International Court of Justice ordered provisional measures in a case brought by Iran against the United States regarding the reimposition of certain sanctions on Iran after U.S. withdrawal from the Joint Comprehensive Plan of Action on Iran's nuclear program. In addition, as discussed *supra*, the United States ordered the departure of personnel from its consulate in Basra, Iraq due to attacks by Iranian-supported forces. Secretary Pompeo's remarks regarding relations with Iran are excerpted below.

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... Iran is the origin of the current threat to Americans in Iraq. It is to blame for the attacks against our mission in Basra and our embassy in Baghdad. Our intelligence in this regard is solid. We can see the hand of the ayatollah and his henchmen supporting these attacks on the United States.

On Friday, I ordered the temporary relocation of U.S. Government personnel from our consulate general in Basra. I also warned the Iranian Government that we will hold it directly responsible for any harm to Americans or our diplomatic facilities, whether perpetrated by Iranian forces or by associated proxies or elements of those militias.

These latest destabilizing acts in Iraq are attempts by the Iranian regime to push back on our efforts to constrain its malign behavior. Clearly, they see our comprehensive pressure campaign as serious and succeeding, and we must be prepared for them to continue their attempts to hit back, especially after our full sanctions are re-imposed on the 4th of November.

The United States will continue to stand with the people of Iraq as they chart a future based on Iraqi interest, not those dictated by Iran. Even with the temporary relocation of our staff, we are supporting the delivery of clean water to the 750,000 residents in Basra.

Now let me turn to the ICJ ruling from today. I'm announcing that the United States is terminating the 1955 Treaty of Amity with Iran. This is a decision, frankly, that is 39 years overdue. In July, Iran brought a meritless case in the International Court of Justice alleging violations of the Treaty of Amity. Iran seeks to challenge the United States decision to cease participation in the Iran nuclear deal and to re-impose the sanctions that were lifted as a part of that deal. Iran is attempting to interfere with the sovereign rights of the United States to take lawful actions necessary to protect our national security. And Iran is abusing the ICJ for political and propaganda purposes and their case, as you can see from the decision, lacked merit.

Given Iran's history of terrorism, ballistic missile activity, and other malign behaviors, Iran's claims under the treaty are absurd. The court's ruling today was a defeat for Iran. It rightly rejected all of Iran's baseless requests. The court denied Iran's attempt to secure broad measures to interfere with U.S. sanctions and rightly noted Iran's history of noncompliance with its international obligations under the Treaty on the Nonproliferation of Nuclear Weapons.

With regard to the aspects of the court's order focusing on potential humanitarian issues, we have been clear: Existing exceptions, authorizations, and licensing policies for humanitarian-related transactions and safety of flight will remain in effect. The United States has been actively engaged on these issues without regard to any proceeding before the ICJ. We're working closely with the Department of the Treasury to ensure that certain humanitarian-related transactions involving Iran can and will continue.

That said, we're disappointed that the court failed to recognize it has no jurisdiction to issue any order relating to these sanctions measures with the United States, which is doing its work on Iran to protect its own essential security interests.

In light of how Iran has hypocritically and groundlessly abused the ICJ as a forum for attacking the United States, I am therefore announcing today that the United States is terminating the Treaty of Amity with Iran. I hope that Iran's leaders will come to recognize that the only way to secure a bright future for its country is by ceasing their campaign of terror and destruction around the world.

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### **3. Somalia**

In a December 4, 2018 press statement, the State Department announced that the United States had reestablished a permanent diplomatic presence in Somalia. The press statement, available at <https://www.state.gov/reestablishment-of-a-permanent-diplomatic-presence-in-somalia/>, says:

On December 2, for the first time since the closure of the U.S. Embassy in Mogadishu on January 5, 1991, the United States reestablished a permanent diplomatic presence in Somalia. This historic event reflects Somalia's progress in recent years and is another step forward in formalizing U.S. diplomatic engagement in Mogadishu since recognizing the Federal Government of Somalia in 2013. Our return demonstrates the United States' commitment to further advance stability, democracy, and economic development that are in the interest of both nations. Ambassador Donald Yamamoto and his staff look forward to working closely with the people and the Federal Government of Somalia to strengthen our already close bilateral relationship in furtherance of these shared goals.

#### 4. Cuba

On March 2, 2018, the State Department announced in a media note, available at <https://cu.usembassy.gov/end-ordered-departure-u-s-embassy-havana/>, that the ordered departure of U.S. Embassy Havana staff instituted in 2017 would end on March 4, 2018 and a new staffing plan would take effect. See *Digest 2017* at 372-74 regarding the departure of U.S. personnel from Cuba. The full text of the March 2, 2018 media note follows.

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The U.S. Embassy in Havana has operated under ordered departure status since September 29, 2017, due to health attacks affecting U.S. Embassy Havana employees. It will reach the maximum allowable days in departure status on March 4.

On Monday, March 5, a new permanent staffing plan will take effect. The embassy will continue to operate with the minimum personnel necessary to perform core diplomatic and consular functions, similar to the level of emergency staffing maintained during ordered departure. The embassy will operate as an unaccompanied post, defined as a post at which no family members are permitted to reside.

We still do not have definitive answers on the source or cause of the attacks, and an investigation into the attacks is ongoing. The health, safety, and well-being of U.S. government personnel and family members are of the greatest concern for Secretary Tillerson and were a key factor in the decision to reduce the number of personnel assigned to Havana.

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On June 14, 2018, the United States and Cuba held their seventh Bilateral Commission meeting. The Bilateral Commission previously met in September 2017. See *Digest 2017* at 372. The seventh meeting was held in Washington, D.C. and included a U.S. delegation led by Deputy Assistant Secretary of State for Western Hemisphere Affairs John Creamer and a Cuban delegation led by Carlos Fernandez de Cossio, the Foreign Ministry's Director General for U.S. Affairs. See State Department media note, available at <https://cu.usembassy.gov/united-states-and-cuba-hold-seventh-bilateral-commission-meeting/>. The media note relates the concerns that the United States raised during the meeting as well as other subjects of discussion:

The United States reiterated the urgent need to identify the source of the attacks on U.S. diplomats and to ensure they cease. We also reiterated that until it is sufficiently safe to fully staff our Embassy, we will not be able to provide regular visa services in Havana. We expressed our continued concerns about the arbitrary detention of independent journalists and human rights defenders. The United States acknowledged progress in repatriating Cubans with final orders of removal from the United States, but emphasized Cuba needs to accept greater numbers of returnees.

The delegations also reviewed other areas for engagement that advance the interests of the United States and the Cuban people including combatting trafficking in persons; facilitating safe civil aviation; law enforcement cooperation; agricultural cooperation; maritime safety and search and rescue cooperation; resolution of certified claims; advancing understanding of environmental challenges; and protecting the national security and public health and safety of the United States.

On July 10, 2018, the United States and Cuba held the fourth Law Enforcement Dialogue in Washington, DC, at which the United States and Cuba addressed topics of bilateral interest on national security matters. See *Digest 2017* at 55 for background on the Law Enforcement Memorandum of Understanding and the Dialogue. The proceedings at the July 10 Dialogue are summarized in a State Department media note, available at <https://www.state.gov/united-states-and-cuba-hold-fourth-law-enforcement-dialogue-in-washington-dc/> as follows:

The United States and Cuba held the fourth Law Enforcement Dialogue in Washington, DC on Tuesday, July 10. During the dialogue, the United States and Cuba addressed topics of bilateral interest on national security matters, including fugitives and the return of Cuban nationals with final orders of removal. The delegations also discussed the health attacks against diplomatic personnel at the U.S. Embassy in Havana, including two recent cases. The U.S. delegation reminded the Cubans of their responsibility to protect U.S. diplomats from harm.

During the Dialogue, the delegations reviewed recent progress in the law enforcement relationship, such as new bilateral cooperation that resulted in the conviction of a Cuban national who murdered an American citizen and who had fled prosecution in the United States, as well as areas where there is more work to be done, such as trafficking in persons.

On July 11, 2018, the United States and Cuba held biannual Migration Talks in Washington, DC. The previous Migration Talks were held in December 2017. The January 2017 Joint Statement on Migration between the two countries is discussed in *Digest 2017* at 30-32. A State Department media note, available at <https://www.state.gov/united-states-and-cuba-hold-biannual-migration-talks-in-washington-dc/>, summarizes the talks as follows:

The delegations discussed the significant reduction in irregular migration from Cuba to the United States since the implementation of the January 2017 Joint Statement. Apprehensions of Cuban migrants at U.S. ports of entry decreased by 88 percent from fiscal year 2017 to 2018. The United States again raised the need for increased Cuban cooperation in the return of Cubans with final orders of removal from the United States.

The United States also reiterated that until it is safe to fully staff our Embassy, we are able to adjudicate only official and emergency visas in Havana.

A strong migration policy is vital to the United States' national security. The Migration Talks, which began in 1995, provide a forum for the United States and Cuba to review and coordinate efforts to ensure safe, legal, and orderly migration between Cuba and the United States.

## 5. Russia

On March 26, 2018, the State Department spokesperson issued a press statement regarding U.S. measures to hold Russia accountable for destabilizing actions it has taken in other countries. The statement is excerpted below and available at <https://www.state.gov/holding-russia-accountable-for-its-destabilizing-behavior/>.

On March 4, Russia used a military-grade nerve agent to attempt to murder a British citizen and his daughter in Salisbury. This attack on our [a]lly the United Kingdom put countless innocent lives at risk and resulted in serious injury to three people, including a police officer. In response to this outrageous violation of the Chemical Weapons Convention and breach of international law, today the United States will expel 48 Russian officials serving at Russia's bilateral mission to the United States. We will also require the Russian government to close its Consulate General in Seattle by April 2, 2018. We take these actions to demonstrate our unbreakable solidarity with the United Kingdom, and to impose serious consequences on Russia for its continued violations of international norms.

Separately, we have begun the process of expelling 12 intelligence operatives from the Russian Mission to the United Nations who have abused their privilege of residence in the United States.

The United States calls on Russia to accept responsibility for its actions and to demonstrate to the world that it is capable of living up to its international commitments and responsibilities as a member of the UN Security Council to uphold international peace and security.

Also on March 26, 2018, Ambassador Haley provided a statement on the expulsion of Russian intelligence operatives from the United States. The press statement is available at <https://usun.usmission.gov/press-release-ambassador-haley-on-the-expulsion-of-russian-intelligence-operatives-from-the-united-states/> and states, in part:

...After a review, we have determined that the 12 intelligence operatives engaged in espionage activities that are adverse to our national security. Our actions are consistent with the United Nations Headquarters Agreement.

Separately, President Trump ordered the expulsion of 48 Russian intelligence officers and the closure of the Russian Consulate General in Seattle.

... Beyond Russia's destabilizing behavior across the world, such as its participation in the atrocities in Syria and its illegal actions in Ukraine, it has now used a chemical weapon within the borders of one of our closest allies. Here in

New York, Russia uses the United Nations as a safe haven for dangerous activities within our own borders. ...

## 6. Libya

On June 27, 2018, a joint statement on Libyan oil facilities was released by the Governments of the United States of America, France, Italy, and the United Kingdom. The text of the joint statement, below, is available as a State Department media note at <https://www.state.gov/joint-statement-on-libyan-oil-facilities/>.

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The governments of France, Italy, the United Kingdom, and the United States are deeply concerned about the announcement that the Ras Lanuf and Sidra oil fields and facilities will be transferred to the control of an entity other than the legitimate National Oil Corporation. Libya's oil facilities, production, and revenues belong to the Libyan people. These vital Libyan resources must remain under the exclusive control of the legitimate National Oil Corporation and the sole oversight of the Government of National Accord (GNA), as outlined in UN Security Council Resolutions 2259 (2015), 2278 (2016), and 2362 (2017). UN Security Council Resolution 2362 (2017) condemns attempts to illicitly export petroleum, including crude oil and refined petroleum products, from Libya by parallel institutions which are not acting under the authority of the GNA.

Any attempts to circumvent the UN Security Council's Libya sanctions regime will cause deep harm to Libya's economy, exacerbate its humanitarian crisis, and undermine its broader stability. The international community will hold those who undermine Libya's peace, security, and stability to account. We call for all armed actors to cease hostilities and withdraw immediately from oil installations without conditions before further damage occurs. In September 2016, the LNA supported the legitimate National Oil Corporation's work to rebuild Libya's oil sector for the benefit of the Libyan people. This action served Libya's national interest. The legitimate National Oil Corporation must be allowed again to take up unhindered work on behalf of the Libyan people, to repair infrastructure damaged after the attack by forces under the direction of Ibrahim Jadhraan, and to restore the oil exports and production disrupted by that attack.

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On September 1, 2018, a further joint statement on Libya—this one on the situation in Tripoli—was released by the same group of governments. The text of the joint statement, below, is available as a State Department media note at <https://www.state.gov/joint-statement-on-libya-on-the-situation-in-tripoli/>.

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The Governments of France, Italy, the United Kingdom, and the United States strongly condemn the continued escalation of violence in and around Tripoli that has caused many casualties and continues to endanger the lives of innocent civilians. We reiterate that the targeting of civilians and indiscriminate attacks are prohibited under International Humanitarian Law.

These attempts to weaken the legitimate Libyan authorities and hamper the course of the political process are not acceptable. We urge armed groups to immediately cease all military actions and warn those who tamper with security in Tripoli or elsewhere in Libya that they will be held accountable for any such actions.

We reaffirm our strong and continued support to the United Nations Action Plan, as recalled by the President of Security Council on June 6th and by the Special Representative of the Secretary-General Ghassan Salame on July 16th. We call on all actors to refrain from any action that would jeopardize the political framework established by the UN-led mediation to which the international community is fully committed.

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On September 10, 2018, the State Department spokesperson issued a press statement in response to a terrorist attack that day on Libya's National Oil Corporation. The statement, which is available at <https://www.state.gov/attack-on-libyas-national-oil-corporation/>, reaffirms U.S. support for the Government of National Accord. It includes the following:

...We commend the efforts of the Government of National Accord to restore security and ensure that the National Oil Corporation is able to fulfill its mandate on behalf of all Libyans.

We stand in solidarity with the National Oil Corporation and all Libyans as they fight against terrorism and for a better and prosperous future. Libyan oil facilities, production, and revenues belong to the Libyan people. The National Oil Corporation and all sovereign state institutions must be allowed to work on behalf of all Libyans, free of threat and intimidation. Libya's oil resources must remain under the exclusive control of the legitimate National Oil Corporation and the sole oversight of the Government of National Accord, as outlined in UN Security Council Resolutions 2259 (2015), 2278 (2016), and 2362 (2017).

On December 4, 2018, Secretary Pompeo met with Libyan Prime Minister Fayez al-Sarraj in Brussels. The State Department released a readout of the meeting, which follows, and is available at <https://www.state.gov/secretary-pompeos-meeting-with-libyan-prime-minister-al-sarraj-2/>.

The Secretary thanked the Prime Minister for the Government of National Accord's strong partnership with the United States. The Secretary reiterated the United States' committed support for UN Special Representative of the Secretary-General Ghassan Salamé and his plan, as briefed to the UN Security

Council, for a Libyan-led National Conference to be held in the first weeks of 2019 and the subsequent electoral process to begin in the spring of 2019. The Secretary and the Prime Minister agreed on the importance of the Government of National Accord swiftly implementing comprehensive economic reforms, enhancing fiscal transparency, ensuring greater security for all Libyans, and stabilizing oil production. The Secretary and the Prime Minister reaffirmed their shared commitment to the U.S.-Libya counterterrorism partnership.

## **7. Armenia**

On April 24, 2018, the State Department spokesperson issued a press statement, available at <https://www.state.gov/the-united-states-urges-constructive-dialogue-in-armenia/>, expressing the U.S. view on the formation of a new government in Armenia. The statement says:

We urge all sides to engage constructively, within the legal framework of the Armenian constitution, to ensure a peaceful transition of power that follows the rule of law. We look forward to working closely with a new government on the many areas of shared interest between the United States and Armenia. As a friend and partner to Armenia, we commend the Armenian people for engaging in dialogue to forge their sovereign future through democratic and peaceful means.

On December 10, 2018, the State Department issued another press statement on Armenia, offering congratulations on the December 9, 2018 parliamentary elections. The statement, available at <https://www.state.gov/armenia-2018-parliamentary-elections/>, is excerpted below.

... We welcome the assessment by the Organization for Security and Cooperation in Europe's (OSCE) Office for Democratic Institutions and Human Rights that Armenia's parliamentary elections were competitive and that candidates were able to campaign freely. The United States concurs with the OSCE's preliminary conclusions that the elections process enjoyed broad public trust and respected fundamental freedoms. We encourage the authorities to address OSCE and Venice Commission recommendations for future elections.

This year has been a time of remarkable change in Armenia. For 27 years, the United States has sought to support the development of democratic processes and institutions in Armenia, and we will continue to do so. We look forward to working with the new Armenian Parliament and Government to deepen our bilateral partnership and cooperation to strengthen the rule of law and democratic institutions, combat corruption, promote trade and investment, and safeguard regional and global security.

## **8. Venezuela**

The United States repeatedly voiced its concerns in 2018 about the Maduro regime's antidemocratic actions in Venezuela. See Chapter 7 of this *Digest* for U.S. statements on Venezuela at the Organization of American States ("OAS"). On February 24, 2018, the State Department issued a press statement about its concerns for democracy in Venezuela. That statement is excerpted below and available at <https://www.state.gov/concerns-for-democracy-in-venezuela/>.

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The United States respects the decision by Venezuelan opposition parties, most recently the Democratic Unity Roundtable, to reject President Maduro's terms and conditions for April presidential elections. We reject ruling party calls to replace the democratically elected National Assembly simultaneously, rather than in 2021, as provided for under the 1999 Constitution. Deepening the rupture of Venezuela's constitutional and democratic order will not solve the nation's crises.

We reiterate our call for the establishment of a legitimate and independent National Electoral Council, selected by the National Assembly as required by the Constitution. We renew our call for the establishment of an electoral calendar in compliance with the Constitution and in consultation with the legitimate National Assembly. We note that the lack of agreed terms for an election seriously compromises the integrity of the process. A free and fair election should include the full participation of all political parties and political leaders, the immediate and unconditional release of all political prisoners, a proper electoral calendar, credible international observation, and an independent electoral authority.

The United States stands with democratic nations around the world in support of the Venezuelan people and their sovereign right to elect their representatives through free and fair elections.

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## **B. STATUS ISSUES**

### **1. Ukraine**

For discussion of U.S. sanctions in response to Russian actions in Ukraine, see Chapter 16. On March 14, 2018, Acting Under Secretary of State and Department Spokesperson Heather Nauert provided a statement repeating U.S. respect for the territorial integrity of Ukraine and condemning Russia's purported annexation of Crimea. Her statement ("Crimea is Ukraine") follows and is available at <https://www.state.gov/crimea-is-ukraine/>.

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Four years ago this week, Russia held an illegitimate, fabricated “referendum” in Ukraine in a futile attempt to legitimize its purported annexation of Ukrainian territory. Crimean residents were compelled to vote under scrutiny by heavily armed Russian troops. Russia’s claim that Ukrainians made a free choice in that sham “referendum” has always lacked credibility.

In his campaign rally in Crimea today, President Putin reiterated Russia’s false claims to Ukrainian territory in another open admission that the Russian government disdains the international order and disrespects the territorial integrity of sovereign nations.

In light of Putin’s remarks, it is important to call attention to the illegitimacy of the staged “referendum,” but also to the tremendous human costs the Russian government has imposed on the people of Crimea. Over the past four years, Russia has engaged in a campaign of coercion and violence, targeting anyone opposed to its attempted annexation. Russian occupation authorities have subjected Crimean Tatars, ethnic Ukrainians, pro-Ukrainian activists, civil society members, and independent journalists to politically motivated prosecution and ongoing repression, while methodically suppressing nongovernmental organizations and independent media outlets.

We stand behind those courageous individuals who continue to speak out about these abuses and we call on Russia to cease its attempts to quell fundamental freedoms of expression, peaceful assembly and association, and religion or belief.

We reaffirm our commitment to Ukraine’s sovereignty and territorial integrity within its internationally recognized borders. Crimea is part of Ukraine and our Crimea-related sanctions will remain in place until Russia returns control of the peninsula to Ukraine.

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On May 15, 2018, Department Spokesperson Heather Nauert issued a press statement condemning Russia’s construction and partial opening of the Kerch Strait Bridge between Russia and occupied Crimea. The statement is excerpted below and available at <https://www.state.gov/the-opening-of-the-kerch-bridge-in-crimea/>. For background on UN General Assembly Resolution 62/262, U.N. Doc. A/RES/68/262 (Apr. 1, 2014), referenced below, see *Digest 2014* at 345-46.

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[The construction and opening were] done without the permission of the government of Ukraine. Crimea is part of Ukraine. Russia’s construction of the bridge serves as a reminder of Russia’s ongoing willingness to flout international law.

The bridge represents not only an attempt by Russia to solidify its unlawful seizure and its occupation of Crimea, but also impedes navigation by limiting the size of ships that can transit the Kerch Strait, the only path to reach Ukraine’s territorial waters in the Sea of Azov. We call on Russia not to impede this shipping.

The United States has sanctioned numerous individuals and entities involved in this project. These and our other Crimea-related sanctions will remain in place until Russia returns control of the peninsula to Ukraine.

We once again reaffirm our commitment to Ukraine's sovereignty and territorial integrity and recall the international community's expression of that commitment in UN General Assembly Resolution 68/262.

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On July 25, 2018, the State Department issued the "Crimea Declaration" as a press statement by Secretary Pompeo. The declaration follows and is available at <https://www.state.gov/crimea-declaration/>.

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Russia, through its 2014 invasion of Ukraine and its attempted annexation of Crimea, sought to undermine a bedrock international principle shared by democratic states: that no country can change the borders of another by force. The states of the world, including Russia, agreed to this principle in the United Nations Charter, pledging to refrain from the threat or use of force against the territorial integrity or political independence of any state. This fundamental principle—which was reaffirmed in the Helsinki Final Act—constitutes one of the foundations upon which our shared security and safety rests.

As we did in the Welles Declaration in 1940, the United States reaffirms as policy its refusal to recognize the Kremlin's claims of sovereignty over territory seized by force in contravention of international law. In concert with allies, partners, and the international community, the United States rejects Russia's attempted annexation of Crimea and pledges to maintain this policy until Ukraine's territorial integrity is restored.

The United States calls on Russia to respect the principles to which it has long claimed to adhere and to end its occupation of Crimea. As democratic states seek to build a free, just, and prosperous world, we must uphold our commitment to the international principle of sovereign equality and respect the territorial integrity of other states. Through its actions, Russia has acted in a manner unworthy of a great nation and has chosen to isolate itself from the international community.

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On August 30, 2018, the State Department spokesperson issued a further press statement on Russian activity regarding Ukraine. The statement is available at <https://www.state.gov/russias-harassment-of-international-shipping-transiting-the-kerch-strait-and-sea-of-azov/> and condemns Russian harassment of international shipping in the Sea of Azov and the Kerch Strait. The statement includes the following:

Russia has delayed hundreds of commercial vessels since April and in recent weeks has stopped at least 16 commercial ships attempting to reach Ukrainian ports.

Russia's actions to impede maritime transit are further examples of its ongoing campaign to undermine and destabilize Ukraine, as well as its disregard for international norms.

The United States supports Ukraine's sovereignty and territorial integrity within its internationally recognized borders, extending to its territorial waters.

We call on Russia to cease its harassment of international shipping in the Sea of Azov and the Kerch Strait.

In a September 12, 2018 press statement from the State Department spokesperson, the United States condemned the Russian-backed sham elections announced for what the Russian government refers to as the "Donetsk and Luhansk People's Republics." The press statement, available at <https://www.state.gov/russia-backed-sham-elections-in-ukraine/>, includes the following:

Given the continued control of these territories by the Russian Federation, genuine elections are inconceivable, and grossly contravene Russia's commitments under the Minsk agreements. By engineering phony procedures, Russia is once more demonstrating its disregard for international norms and is undermining efforts to achieve peace in eastern Ukraine. The so-called "people's republics" that Russia created have no place within the Ukrainian constitutional order.

The United States remains fully committed to diplomatic efforts to resolve the Russia-instigated conflict in eastern Ukraine. U.S. support for Ukraine's sovereignty and territorial integrity remains unwavering.

The United States fully supported the addition of a new agenda item at the UN General Assembly on Ukraine on September 21, 2018. Mark Simonoff, Minister Counselor for the U.S. Mission to the United Nations, delivered the U.S. explanation of vote, which is excerpted below and available at <https://usun.usmission.gov/explanation-of-vote-on-the-inclusion-of-a-new-agenda-item-on-ukraine-in-the-un-general-assemblys-agenda/>.

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The United States' position on Ukraine is consistent and clear—we condemn Russia's ongoing occupation of Crimea and call on Russia to release the approximately 70 Ukrainian political prisoners it holds, including Oleh Sentsov, who remains on hunger strike and whose health is deteriorating.

We also condemn Russia's ongoing aggression in eastern Ukraine. Russia exerts direct control over anti-government forces in eastern Ukraine and has introduced thousands of pieces of heavy military equipment into the conflict zone.

We remain committed to the resolution of the conflict and call on Russia to fully implement its commitments under the Minsk agreements, including through the "withdrawal of all foreign armed formations" from the territory of Ukraine.

We urge all Member States to vote in favor of adding this item to the General Assembly's Agenda.

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On November 12, 2018, the Department issued a further press statement on Ukraine, condemning sham "elections" in eastern Ukraine on November 11. The statement is available at <https://www.state.gov/condemning-sham-elections-in-russia-controlled-eastern-ukraine/>, and includes the following:

The United States joins our European Allies and partners in condemning the November 11 sham "elections" in Russia-controlled eastern Ukraine. Yesterday's illegitimate processes were an attempt by Moscow to institutionalize its Donbas proxies, the so-called "Donetsk and Luhansk People's Republics." These entities have no place within the Minsk agreements or within Ukraine's constitutional government, and they should be dismantled along with the illegal armed formations.

If Russia calculated the November 11 illegal "elections" would lead to international respect for its proxies, the international reaction proves it was mistaken. The OSCE refused to monitor yesterday's farce. Russia's actions have been denounced in capitals on both sides of the Atlantic and on the floors of the UN Security Council and the OSCE. The United States and the European Union have spoken with one voice against yesterday's violation of Ukraine's sovereignty and territorial integrity. We will continue to impose Ukraine-related sanctions against Russia until Moscow fully implements the Minsk agreements and returns control of Crimea to Ukraine.

On November 26, 2018, the State Department issued a statement expressing concern over an incident in the Black Sea on November 25 when Russian vessels blocked Ukrainian vessels attempting to transit the Kerch Strait. See press statement, available at <https://www.state.gov/russias-dangerous-escalation-in-the-kerch-strait/>. The press statement is excerpted below.

Reports that Russian vessels rammed and fired on the Ukrainian ships, injuring Ukrainian crewmen, before seizing three vessels, represent a dangerous escalation and a violation of international law.

The United States condemns this aggressive Russian action. We call on Russia to return to Ukraine its vessels and detained crew members, and to

respect Ukraine's sovereignty and territorial integrity within its internationally recognized borders, extending to its territorial waters.

...

The United States supports Ukraine's sovereignty and territorial integrity within its internationally recognized borders, extending to its territorial waters, as well as the right of its vessels to traverse international waters. As stated in our Crimea Declaration, the United States rejects Russia's attempted annexation of Crimea.

On December 4, 2018, a senior State Department official briefed the press after a meeting of the North Atlantic Council on Ukraine and Georgia at which the Secretary of State and others spoke. The official's remarks are excerpted below and available at <https://www.state.gov/on-the-meeting-of-the-north-atlantic-council/>.

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I just came out of a meeting of the North Atlantic Council on Black Sea security. This is the format focused on Georgia and Ukraine. You may remember, and I want to call everyone's attention to the fact, that Hungary has been blocking participation of Ukraine in certain formats at NATO, a habit that we strongly object to. ...[I]t's now the second time this format has met, and it is a format that we put together to have these two countries continue to engage NATO, but it's a workaround to Hungary's blockage, which we continue to object to.

In that session, there were strong expressions of support for the territorial integrity and sovereignty of Ukraine and Georgia. The United States in particular sent a very clear and strong message of support for both of these countries, joining them in their stand against Russian aggression, both externally with regard to territorial acts of aggression and internally with regard to the building of democracy and continued efforts at reform.

There was a special focus in the NAC session just now on the November 25th incident outside the Kerch Strait. I know all of you have followed that closely and are aware of everything that happened. It's a serious concern for the United States for a couple of reasons. One is Ukraine itself. It marks an unmistakable escalation of the conflict there, not least because it's the first time that the Russian Government has openly and unapologetically used its own forces without any attempt at claiming it was done by so-called separatists; but secondly the demonstration effect of what happened in Kerch. There are a lot of international ... maritime passageways in the world.... We have principled reasons to be concerned about ... the demonstration effect like this sinking in, but also very practical and interest-based reasons to be concerned about a lot of places in the world where U.S. troops and commerce pass through, and we don't want this precedent to stick.

...[T]he Russian action in Kerch is both a clear military escalation and a violation of international law and freedom of the sea. Long before this latest incident in Kerch, the United States has been raising our concerns about Russian behavior in Azov and with the construction of the Kerch Bridge. We've had State Department statements on Kerch and Azov on numerous occasions, most recently in May, August, and November prior to this incident. We have raised

concerns about Azov and Russian behavior there in the OSCE Permanent Council on five occasions since last year.

I think all of you know [about] ... the President's decision some months ago to reverse the previous administration's blockage of lethal aid to Ukraine[.] [W]e've provided two cutters to enhance maritime security of Ukraine, and a senior State Department official was present at the handoff ceremony. We recently held a meeting of the U.S.-Ukraine Strategic Partnership Commission, which I chair, co-chaired with ... Foreign Minister Klimkin, and that included a special focus on Azov.

I would also note that the Russian entities who are involved in the Kerch Bridge construction and who are operating in Crimea, a number of those—at least a dozen by my count—are already sanctioned entities. In the period since this incident, we demarched all 28 EU members as well as Russia. We have pressed publicly and privately alongside allies for release of the crew and a reopening of the strait. The Secretary has made very strong and clear statements about this and has tweeted about it on numerous occasions. The President has spoken about this. Ambassador Haley made a statement about this. I think all of you know that the President canceled a Putin meeting because of his concern about this incident. We put out a G7 foreign ministers statement, we had a NATO-NAC statement on November 27th, and we're now working very closely with allies to assess the way forward.

And the final thing I would say is I think the Russians have this message; but if they don't, it should be abundantly clear to them that for as long as they hold these crew members, we will continue to raise the costs. They need to release the crews, return the ships, and this is not something that we're going to turn our attention away from.

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...[W]e are talking and working very closely with European allies right now to chart a unified way forward where the West is not only speaking with one voice, which I think we are right now, but what we're working on and a big part of why we're here today is charting the way forward in terms of actions.

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On December 6, 2018, A. Wess Mitchell, Assistant Secretary of State for European and Eurasian Affairs, addressed a Ukraine-hosted side event at the 2018 OSCE Ministerial Council on Crimea, the Kerch Strait, and the Sea of Azov, held in Milan, Italy. Assistant Secretary Mitchell's remarks are excerpted below and available at <https://www.state.gov/remarks-to-the-first-plenary-of-the-2018-osce-ministerial-council/>.

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The past four years of Russian aggression against Ukraine I think have been a wake-up call for all of us. If ever in the OSCE's history there were a reason for its existence, it's today, in

Ukraine. Recent events in the Black Sea and Sea of Azov should give us all a new sense of urgency.

Russia's unprovoked attack on Ukrainian naval vessels in the Black Sea near the Kerch Strait is a dangerous escalation. Russia's aim is to debase Ukraine's sovereignty and negate its territorial integrity. Russia's aggression includes its self-described annexation of Crimea. The world pays far too little attention to the abuses occurring every day against countless Ukrainian civilians in Crimea and Donbas. Altogether, this conflict has so far taken the lives of more than ten thousand people. This has happened in the 21st century, at the height of the modern era, in full view of international institutions like the OSCE.

Russia's blocking of the Kerch Strait on November 25 constitutes an unambiguous violation of international law. Europe and America must respond firmly to Russia's latest unjustified and unprovoked attack on a European state.

The United States calls on Russia to immediately release the 24 captured Ukrainian crew members and the three vessels it has unlawfully seized, and to keep the Kerch Strait open to vessels transiting to and from Ukrainian ports. Russia has reportedly charged the crew members with illegally crossing Russia's maritime border.

This is an astonishing claim given that Crimea is Ukrainian territory. In essence, the Russian government is charging the Ukrainian sailors with illegally crossing the Ukrainian border. This from a Russian government that claims to champion the principles of national independence and sovereignty.

In reality, Russia has violated international law by blocking the Kerch Strait and then launched an unprovoked attack as the three Ukrainian vessels attempted to withdraw to their home port in Odessa. Ukrainians chose not to return fire. This is not a situation in which both sides are to blame. One party is to blame and that is Russia.

The United States' response to Russian aggression has been firm. As Russia has ramped up its aggressive activities in the Sea of Azov over the past several months, the United States transferred two Coast Guard vessels to Ukraine to enhance its maritime security. We conducted the Sea Breeze naval exercise with Ukraine in conjunction with NATO Allies and issued multiple statements condemning Russian illegal maritime actions. We have also committed to maintaining sanctions against Russia for its aggression in eastern Ukraine and attempted annexation of Crimea. We have raised concerns about Russia's action in the Sea of Azov on numerous occasions at the OSCE Permanent Council in the months leading up to the latest incident.

As Secretary Pompeo stated in his July 25 Crimea Declaration, we will never recognize Russia's attempted annexation of Ukrainian territory. We will continue to impose costs for Russian aggression. We urge our European allies to show vigilance, unity, and moral clarity in the face of this latest aggression.

The United States encourages the OSCE to enable the OSCE Special Monitoring Mission to increase reporting on the Sea of Azov and Kerch Strait. This effort can begin immediately and without a change to the SMM's mandate. If, as the Russian Federation claims, its attacks on the retreating Ukrainian vessels off the coast of Ukrainian Crimea were somehow "provoked" by Ukraine, it should follow that the Russian Federation would support increasing the OSCE's ability to monitor activities in and around the Kerch Strait.

The United States encourages the OSCE to confront the polite fiction at the heart of this institution that allows Russia to attack fellow OSCE member states, kill their civilians, shoot down SMM drones, deny SMM access to Crimea, and hold habitual snap exercises while

impeding normal OSCE business, paying a paltry 4 percent of the budget of this organization, and claiming to be an OSCE participating State in good standing. The OSCE must confront this reality or expect to lose relevance in the 21st century.

Russia's aggression near the Kerch Strait was a miscalculation. It has strengthened Western resolve to maintain sanctions against Russia and has galvanized the international community's efforts to ensure respect for international law and lawful maritime passage.

By continuing on this path of aggression, Russia only further isolates itself and reduces the possibility of a better future for itself and its neighbors. It is time for Russia to rethink this approach, respect international law, and fulfill its commitments as an OSCE state and would-be member of the community of civilized nations.

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On December 17, 2018, in connection with the discussion of a draft resolution on Ukraine at the UN General Assembly, Mr. Simonoff delivered the following statement, available in the record of proceedings at the 56<sup>th</sup> plenary meeting of the 73<sup>rd</sup> session of the General Assembly, U.N. Doc. A/73/PV.56 at p. 18 (Dec. 17, 2018), *available at* <https://undocs.org/en/A/73/PV.56>:

The United States will vote against draft amendment A/73/L.68 and urges all delegations to do the same. We reject the notion of equivalency contained in the draft amendment. We do not support the General Assembly calling on both States to take action when the Russian Federation is the sole Member State to have repeatedly and shamelessly engaged in aggressive activities directed against Ukraine, including the purported annexation of Crimea and the aggressive activities in the Kerch Strait.

The United States is pleased to co-sponsor draft resolution A/73/L.47, which highlights serious concerns about the militarization of Crimea and Russia's recent unprovoked attack on Ukrainian naval vessels in the Kerch Strait. Russia's attack is a dangerous escalation in its ongoing aggressive activities towards Ukraine. The United States reiterates its call on the Russian Federation to immediately release the 24 captured Ukrainian crew members and the three detained vessels.

In short, the United States calls on all Member States to vote against the draft amendment and to vote in favour of the draft resolution.

## 2. Georgia

On January 26, 2018, State Department Spokesperson Heather Nauert issued a press statement regarding the Russian Federation's actions in violation of Georgia's sovereignty. The statement is excerpted below and available at <https://www.state.gov/russias-violations-of-georgian-sovereignty/>.

The United States condemns the Russian Federation's ratification of an agreement with the de facto leaders in Georgia's breakaway region of South Ossetia regarding a joint military force. We do not recognize the legitimacy of this so-called "treaty," which does not constitute a valid international agreement.

The United States' position on Abkhazia and South Ossetia is unwavering: The United States fully supports Georgia's territorial integrity within its internationally recognized borders.

The United States views ratification of this agreement as inconsistent with the principles underlying the Geneva International Discussions, to which Russia is a participant. The United States urges Russia to withdraw its forces to pre-war positions per the 2008 ceasefire agreement and reverse its recognition of the Georgian regions of Abkhazia and South Ossetia.

On May 8, 2018, the United States expressed its concerns about the decision by de facto South Ossetian authorities to temporarily close controlled crossing points in Russian-occupied Georgian territory. The press statement on the issue, available at <https://www.state.gov/closure-of-controlled-crossing-points-in-russian-occupied-georgian-territory-of-south-ossetia/>, includes the following:

These closures coincide with Georgia's celebration of Victory Day and restrict freedom of movement for residents living on both sides of the administrative boundary line. In addition, the United States calls for an immediate halt to the ongoing illegal detentions of Georgian citizens by de facto and Russian authorities along the administrative boundary lines with the Russian-occupied territories of Abkhazia and South Ossetia.

On May 30, 2018, State Department Spokesperson Heather Nauert issued a further statement on Georgia's territorial integrity in response to the Syrian regime's announcement that it would establish diplomatic relations with the Georgian regions of Abkhazia and South Ossetia. The statement follows and is available at <https://www.state.gov/statement-on-georgian-territories-of-abkhazia-and-south-ossetia/>.

The United States strongly condemns the Syrian regime's intention to establish diplomatic relations with the Russian-occupied Georgian regions of Abkhazia and South Ossetia. These regions are part of Georgia. The United States' position on Abkhazia and South Ossetia is unwavering. We fully support Georgia's sovereignty, independence, and territorial integrity within its internationally recognized borders, and call on all states to be mindful of their obligations under the UN Charter and do the same. And once again, the United States urges Russia to withdraw its forces to pre-war positions per the 2008 ceasefire agreement.

Section 7070(c)(1) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2018 (Div. K, Pub. L. 115–141), requires the State Department to make a determination when another government recognizes or establishes diplomatic relations with the Georgian territories of Abkhazia and South Ossetia. On March 6, 2018, the State Department made such a determination regarding Venezuela. 83 Fed. Reg. 9571 (Mar. 6, 2018). On July 30, 2018, the Department made such a determination regarding the Government of Nauru. 83 Fed. Reg. 39,806 (Aug. 10, 2018).

On December 7, 2018, Ambassador Natasha Cayer, Permanent Representative of Canada to the OSCE, delivered a joint statement on behalf of the Group of Friends of Georgia on the Russia-Georgia conflict at the 25th OSCE Ministerial Council closing plenary session. The statement, made on behalf of Bulgaria, Canada, Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania, Sweden, Ukraine, the United Kingdom, and the United States of America, follows.

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We reaffirm our unwavering support for Georgia’s sovereignty and territorial integrity within its internationally recognized borders.

We condemn that ten years since the Russian military invasion of Georgia, Russia’s occupation of Georgia’s Abkhazia and South Ossetia regions continues as the security and humanitarian situation on the ground in the conflict-affected areas further deteriorates.

We express our staunch support for the non-recognition policy with regard to these regions and call on all OSCE participating States to do so as well.

We call upon the Russian Federation to reverse its recognition of the so-called independence of Georgia’s Abkhazia and South Ossetia regions.

We underline the need for the peaceful resolution of the conflict, based on full respect for the UN Charter, the Helsinki Final Act, and the fundamental norms and principles of international law.

We welcome the progress made by Georgia in strengthening democracy and good governance, improving transparency of its institutions, and upholding human rights, as well as in the process of European and Euro-Atlantic integration and economic development. It is disappointing that these benefits cannot be enjoyed by the residents of Georgia’s Abkhazia and South Ossetia regions. We believe a peaceful resolution of the Russia-Georgia conflict would have a transformative effect not only on Georgia but on the region as a whole.

We express our deep concern over the increase of Russia’s military exercises and its further military build-up in Georgia’s Abkhazia and South Ossetia regions. Continuous violations of the EU-mediated 12 August 2008 Ceasefire Agreement by Russia destabilize the situation and erode the principles and norms upon which our security depends.

We reiterate our firm support to the Geneva International Discussions as a unique and important negotiation format to address the security, human rights and humanitarian challenges stemming from the unresolved conflict between Georgia and Russia. We regret the lack of progress on the core issues of the discussions, including the non-use of force, establishment of international security arrangements in Georgia’s Abkhazia and South Ossetia regions aimed at

providing security and stability on the ground, and ensuring the safe, dignified, and voluntary return of IDPs and refugees. We underline the crucial importance of participants in good faith to find durable solutions for the security and humanitarian challenges of those affected by the conflict and to reach tangible results on core issues of the negotiations.

We express our strong support for the Incident Prevention and Response Mechanisms (IPRMs) and emphasize their important role in preventing the escalation of the conflict. We express our great concern over the latest disruptions of the IPRMs in both Gali and Ergneti and call upon the participants to resume the IPRMs without further delay in full respect of the founding principles and ground rules. We encourage the participants to find proper solutions for the safety and humanitarian needs of the conflict-affected population.

We commend the valuable contribution of the EU Monitoring Mission in preventing the escalation of tensions on the ground and once again call upon the Russian Federation to allow the EUMM to fully implement its mandate and enable the Mission's access to Georgia's Abkhazia and South Ossetia regions.

We condemn the killings of Georgian Internally Displaced Persons (IDPs) Archil Tatumashvili, Giga Otkhozoria, and Davit Basharuli, and urge the Russian Federation, as the state exercising effective control over Georgia's Abkhazia and South Ossetia regions, to remove any obstacles to bringing the perpetrators to justice. In this context, we support preventive steps by Georgia aimed at eradication of the sense of impunity and abuses of human rights in Georgia's Abkhazia and South Ossetia regions, and we take note of the adoption of the Decree of the Government of Georgia on approval of the Otkhozoria-Tatumashvili list based on the relevant Resolution of the Parliament of Georgia.

We are deeply concerned over the ethnic discrimination against Georgians residing in Abkhazia and South Ossetia regions and condemn the abuses including allegations involving torture and cruel or degrading treatment or punishment, undue restrictions on rights related to freedom of movement and residence, housing, land and property, as well as the restriction of education in one's native language. We are concerned about the impact of closures of so-called crossing points.

We condemn the mass destruction of houses of IDPs, which illustrates Russia's purposeful policy aimed at completely erasing the traces of ethnic Georgian population and cultural heritage in Abkhazia and South Ossetia regions. We support the voluntary return of internally displaced persons and refugees to the places of their origin.

We underline that the ongoing process of fortification of the occupation line through installation of barbed and razor wire fences and other artificial obstacles, further aggravates the humanitarian conditions of conflict-affected population on the ground.

In this context, we call upon the Russian Federation to allow the unhindered access of international human rights monitoring mechanisms to Abkhazia and South Ossetia regions.

We support the peaceful conflict resolution policy of the Government of Georgia. We welcome Georgia's compliance with the EU-mediated 12 August 2008 Ceasefire Agreement and call upon the Russian Federation to respect its international obligations and fully implement the aforementioned Ceasefire Agreement, inter alia, to withdraw its military forces from the occupied territories of Georgia.

We welcome Georgia's unilateral commitment not to use force and call on the Russian Federation to reciprocate, to affirm and implement a non-use of force commitment.

We welcome the Georgian Government's efforts aimed at reconciliation and confidence building between divided communities. We reiterate our strong support to the peace initiative of the Government of Georgia, "A Step to a Better Future," aimed at fostering confidence building and interaction among the divided communities and improving the humanitarian and socio-economic conditions of people residing in Georgia's Abkhazia and South Ossetia regions

We welcome the Georgian Government's policy of dialogue with the Russian Federation in order to de-escalate tensions with full respect for Georgia's sovereignty and territorial integrity within its internationally recognized borders.

We encourage the OSCE's further active engagement in the process of peaceful resolution of the Russia-Georgia conflict and facilitation of confidence building and engagement between the communities divided by war and occupation line.

We encourage the OSCE participating States to agree on the opening of an OSCE cross-dimensional mission in Georgia for the benefit of the conflict-affected persons including a monitoring capacity able to operate in both the Abkhazia and South Ossetia regions. The mission will considerably strengthen the OSCE's engagement in the GID and IPRMs, as well as in implementation of confidence-building measures.

The Friends will redouble their efforts to keep the issues related to the Russia-Georgia conflict high on the international agenda, raise awareness of developments in Georgia's Abkhazia and South Ossetia regions, and emphasize the urgent need for peaceful resolution of the conflict.

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### **3. Macedonia**

On June 12, 2018, the United States congratulated the prime ministers of Greece and the Republic of Macedonia on their agreement to resolve the dispute over the name Macedonia. The U.S. statement, excerpted below, is available at <https://www.state.gov/agreement-on-macedonia-name-issue/>.

This resolution will benefit both countries and bolster regional security and prosperity. Prime Ministers Zaev and Tsipras demonstrated vision, courage, and persistence in their pursuit of a mutually acceptable solution. We also commend the commitment of UN mediator Matthew Nimetz for his steadfast efforts over more than two decades to end this dispute.

We stand ready to support this agreement, as requested by the two countries.

### **4. Moldova**

The United States affirmed its commitment to the sovereignty and territorial integrity of Moldova in a press statement by State Department Spokesperson Heather Nauert on April 24, 2018. The statement, available at <https://www.state.gov/welcome-step-forward-in-transnistria-peace-process-in-moldova/>, includes the following:

The United States supports a comprehensive settlement of the Transnistria conflict, and we welcome this week's agreement to allow vehicles from Transnistria to legally travel on roads outside of Moldova. This will bring real benefits to the lives of people on both sides of the Nistru River. We urge all sides to capitalize on this agreement and implement the three remaining "Package of Eight" deliverables that the sides reaffirmed in the 2017 Vienna Protocol. This is the only path to a settlement of one of Europe's longest-running conflicts. Any such settlement must be based on the sovereignty and territorial integrity of Moldova, with a special status for Transnistria within Moldova's internationally recognized borders.

## 5. Jerusalem

As discussed in *Digest 2017* at 391-97, the United States recognized Jerusalem as the capital of the State of Israel and announced that it would move its embassy from Tel Aviv to Jerusalem. The State Department spokesperson issued a press statement on February 23, 2018 regarding the opening of the U.S. Embassy in Jerusalem. The statement is available at <https://www.state.gov/opening-of-u-s-embassy-jerusalem/> and includes the following:

In May, the United States plans to open a new U.S. Embassy in Jerusalem. The opening will coincide with Israel's 70th anniversary. The Embassy will initially be located in the ... building that now houses consular operations of U.S. Consulate General Jerusalem. ... Consulate General Jerusalem will continue to operate as an independent mission with an unchanged mandate .... By the end of next year, we intend to open a new Embassy Jerusalem annex .... In parallel, we have started the search for a site for our permanent Embassy to Israel, the planning and construction of which will be a longer-term undertaking.

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On October 18, 2018, Secretary Pompeo announced in a press statement, available at <https://www.state.gov/on-the-merging-of-u-s-embassy-jerusalem-and-u-s-consulate-general-jerusalem/>, that the merger of U.S. Embassy Jerusalem and U.S. Consulate General Jerusalem was underway. Excerpts follow from the October 18, 2018 press statement.

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I am pleased to announce that following the May 14 opening of the U.S. Embassy to Israel in Jerusalem, we plan to achieve significant efficiencies and increase our effectiveness by merging

U.S. Embassy Jerusalem and U.S. Consulate General Jerusalem into a single diplomatic mission. I have asked our Ambassador to Israel, David Friedman, to guide the merger.

We will continue to conduct a full range of reporting, outreach, and programming in the West Bank and Gaza as well as with Palestinians in Jerusalem through a new Palestinian Affairs Unit inside U.S. Embassy Jerusalem. That unit will operate from our Agron Road site in Jerusalem.

This decision is driven by our global efforts to improve the efficiency and effectiveness of our operations. It does not signal a change of U.S. policy on Jerusalem, the West Bank, or the Gaza Strip. As the President proclaimed in December of last year, the United States continues to take no position on final status issues, including boundaries or borders. The specific boundaries of Israeli sovereignty in Jerusalem are subject to final status negotiations between the parties.

The Administration is strongly committed to achieving a lasting and comprehensive peace that offers a brighter future to Israel and the Palestinians. We look forward to continued partnership and dialogue with the Palestinian people and, we hope in the future, with the Palestinian leadership.

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**Cross References**

*ICC and Libya*, **Ch. 3.C.1.c.**

*Termination of Treaty of Amity with Iran*, **Ch 4.B.1**

*Efforts of the Palestinian Authority to accede to treaties*, **Ch. 4.B.4**

*Agreement to amend the Compact Review Agreement with Palau*, **Ch. 5.E**

*Certain Iranian Assets (ICJ case relating to Treaty of Amity)*, **Ch. 7.B.2**

*Relocation of the U.S. Embassy to Jerusalem (Palestine v. United States)*, **Ch. 7.B.3**

*Venezuela*, **Ch. 7.D.1.a**

*Closure of Seattle Consulate of the Russian Federation*, **Ch. 10.C.1.a**

*Venezuela*, **Ch. 10.C.2**

*The Downing of Malaysia Airlines Flight MH17 in Ukraine*, **Ch. 11.A.2**

*Venezuelan Navy's actions in Guyana's EEZ*, **Ch. 12.A.3.b**

*Libya cultural property*, **Ch. 14.A.1**

*Venezuela sanctions*, **Ch. 16.A.4**

*Russia sanctions*, **Ch. 16.A.5**

*Sudan sanctions*, **Ch. 16.A.11.c**

*South Sudan sanctions*, **Ch. 16.A.11.d**

*Libya sanctions*, **Ch. 16.A.11.e**

*Export controls on South Sudan*, **Ch. 16.B.3**

*Closure of the PLO office in Washington*, **Ch. 17.A.1**

*Ukraine*, **Ch. 17.B.3**

*Sudan*, **Ch. 17.B.7**

*South Sudan*, **Ch. 17.B.8**

*Libya*, **Ch. 17.B.9**

*Open Skies Treaty application to Abkhazia and South Ossetia*, **Ch. 19.C.6**

*Russia's use of chemical weapons*, **Ch. 19.D.4**

## CHAPTER 10

### Privileges and Immunities

#### A. FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. §§ 1330, 1441, 1602–1611, governs civil actions against foreign states in U.S. courts. The FSIA’s various statutory exceptions to a foreign state’s immunity from the jurisdiction of U.S. courts, set forth at 28 U.S.C. §§ 1605(a)(1)–(6), 1605A, 1605B, and 1607, have been the subject of significant judicial interpretation in cases brought by private entities or persons against foreign states. Accordingly, much of U.S. practice in the field of sovereign immunity is developed by U.S. courts in litigation to which the U.S. government is not a party and in which it does not participate. The following section discusses a selection of the significant proceedings that occurred during 2018 in which the United States filed a statement of interest or participated as *amicus curiae*.

#### 1. Waiver of Immunity under the FSIA

*BAE Systems v. Korea*, No. 17-1041 (4<sup>th</sup> Cir. 2018) is discussed in Chapter 5. The section of the Court’s opinion discussing the FSIA is excerpted below.

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Korea ... contends that the district court erred in refusing to accord it immunity from suit under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* (FSIA). That statute provides that “a foreign state shall be immune from the jurisdiction of the courts of the United States” unless one of the enumerated exceptions applies. 28 U.S.C. § 1604. BAE maintains that the district court properly exercised jurisdiction, because two FSIA exceptions apply here: the waiver exception and the commercial activity exception. We review applications of the FSIA *de novo*. *Wye Oak Tech., Inc. v. Republic of Iraq*, 666 F.3d 205, 212 (4th Cir. 2011).

The FSIA waiver exception states:

A foreign state shall not be immune from the jurisdiction of courts of the United States... in any case... in which the foreign state has waived its immunity either explicitly *or by implication*, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver....

28 U.S.C. § 1605(a)(1) (emphasis added).<sup>[1]</sup>“Waiver under the FSIA is rarely accomplished by implication,” and “the implicit waiver provision of §1605(a)(1) must be construed narrowly.” See *In re Tamimi*, 176 F.3d 274, 278 (4th Cir. 1999). In enacting the FSIA, however, Congress provided three examples of implicit waivers. See H.R. Rep. No. 94-1487, at 18 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6617; S. Rep. No. 94-1310, at 17–18 (1976). These three examples “involve circumstances in which the implicit waiver is unmistakable” and so the FSIA exception applies. See *Tamimi*, 176 F.3d at 278–79. One of these unmistakable implicit waivers occurs when “a foreign state has filed a responsive pleading in a case without raising the defense of sovereign immunity.” *Id.* at 278.

BAE initiated this lawsuit against Korea in November 2014. Korea moved to dismiss the action in September 2015 but did not raise the sovereign immunity defense in that motion. On February 18, 2016, after the district court denied Korea’s motion to dismiss, Korea filed an answer to BAE’s complaint and several counter-claims against BAE. This was Korea’s first responsive pleading. See Fed. R. Civ. P. 7 (an answer to a complaint is a “pleading,” but a motion to dismiss is not); 28 U.S.C. § 1608(d) (outlining timeline under FSIA for a foreign state to file “an answer or other responsive pleading”). In this initial pleading, Korea failed to assert sovereign immunity but instead asserted counter-claims against BAE for breach of contract, fraud, and negligent misrepresentation. In sum, by February 18, 2016, this litigation had been ongoing for over a year, Korea had not asserted a sovereign immunity defense, and Korea had filed a responsive pleading in the form of an answer and counter-claims. It thus appears that Korea impliedly waived its sovereign immunity defense.

Resisting this conclusion, Korea notes that it filed an amended answer and counter-claims on March 10, 2016, in which it did refer to FSIA. Korea added the following sentence in its amended answer and counter-claims:

Moreover, Defendants deny that the act upon which BAE TSS bases its claim— Defendants’ demand for payment of the amount of the bid bond required by Korean law—falls within the commercial activities exception of the Foreign Sovereign Immunities Act.

Although it referred to the FSIA in this amended answer and counter-claims, even then Korea did not raise the FSIA as an affirmative defense. Rather, Korea simply denied engaging in commercial activity under the FSIA.

Even assuming this statement in the amended answer sufficed to invoke FSIA protections, Korea cannot defeat a holding of implied waiver unless its amended answer and counter-claims rendered its initial answer and counter-claims irrelevant. Korea contends that this is the case, because an amended pleading generally supersedes the original, rendering the original of no legal effect. See *Appellants/Cross-Appellees Response/Reply Br.* at 32–33 (citing *Young v. City of Mount Ranier*, 238 F.3d 567, 572 (4th Cir. 2001)). Regardless of the ordinary

effect of an amended answer on the original answer, a court cannot ignore the original answer for FSIA waiver purposes.

Korea’s proposed interpretation—that only the latest amended answer matters for purposes of asserting sovereign immunity under FSIA—stands in tension with the statutory text, which states that a foreign state cannot withdraw an implied waiver once it is made. *See* 28 U.S.C. § 1605(a)(1); *see also Flota Maritima Browning de Cuba, S.A. v. Motor Vessel Ciudad de la Habana*, 335 F.2d 619, 621, 625 (4th Cir. 1964) (in pre-FSIA case, finding that Cuba waived its immunity “when it filed answers... without suggesting its immunity,” because “once the immunity is waived... it cannot be revived”). Korea’s interpretation could lead to absurd results, where a foreign state could avoid implied waiver simply by obtaining permission from a court to file an amended pleading.

We reject such an interpretation. Instead, we hold, as our sister circuits have, that filing a responsive pleading generally provides the last opportunity to assert sovereign immunity. *See Haven v. Polska*, 215 F.3d 727, 731 (7th Cir. 2000) (“If a sovereign files a responsive pleading without raising the defense of sovereign immunity, then the immunity defense is waived.”); *Drexel Burnham Lambert Grp. Inc. v. Comm. of Receivers for Galadari*, 12 F.3d 317, 326 (2d Cir. 1993) (“[T]he filing of a responsive pleading is the *last chance* to assert FSIA immunity if the defense has not been previously asserted.”); *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 277 (2d Cir. 1984) (describing a responsive pleading as “the point of no return for asserting foreign sovereign immunity”); *cf. Princz v. Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994) (“[A]n implied waiver depends upon the foreign government’s having *at some point* indicated its amenability to suit.” (emphasis added)).

Here, Korea participated in the litigation for over a year, including by filing a motion to dismiss and a responsive pleading, without giving any indication it asserted sovereign immunity. For that reason, it waived its immunity defense, and the district court had jurisdiction. The fact that Korea never “raise[d] the defense of sovereign immunity,” even in its amended answer and counter-claims, but rather only asserted its actions did not qualify for the commercial activity exception, supports this conclusion.

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## 2. Expropriation Exception to Immunity

The expropriation exception to immunity in the FSIA provides that a foreign state is not immune from any suit “in which rights in property taken in violation of international law are in issue” and a specified commercial-activity nexus to the United States is present. 28 U.S.C. § 1605(a)(3).

### a. *Venezuela v. Helmerich & Payne*

As discussed in *Digest 2016* at 406-14, the United States filed briefs as amicus curiae both at the petition stage and on the merits in the Supreme Court of the United States in *Venezuela et al. v. Helmerich & Payne Int’l Drilling Co., et al.*, No. 15-423, a case involving the expropriation exception. As discussed in *Digest 2017* at 408-13, the Supreme Court vacated the decision below and remanded. On remand, the U.S. Court of

Appeals for the D.C. Circuit invited the United States to file an amicus brief, which the United States did on January 17, 2018. After oral argument, the D.C. Circuit invited the United States to file a supplemental amicus brief addressing the circumstances under which a state action that depreciates the value of a corporation's shares might constitute an expropriation. The supplemental amicus brief of the United States on remand is excerpted below (with footnotes and hyperlinks omitted) and available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>. The amicus brief filed on January 17, 2018 (not excerpted herein) is also available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>

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1. As we previously described in the United States' initial amicus brief, under customary international law, foreign shareholders may challenge a state's expropriation only of their own direct rights related to the corporation, as established by municipal law. They may not properly challenge a state's expropriation of the corporation's property on the sole basis that it adversely affected the value of their shares. Initial Amicus Br. 10, 12-13.

The International Court of Justice has explained that a state's obligation to provide compensation for the expropriation of a foreign shareholder's property is governed "by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights. The separation of property rights as between company and shareholder is an important manifestation of this distinction." *Case Concerning the Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶ 41 (Feb. 5) (*Barcelona Traction*); see *id.* ¶¶ 44, 47. Thus, in assessing a shareholder's expropriation claim, a court must "assess whether, under [municipal] law, the claimed rights are indeed direct rights of the [owner of the limited liability company], or whether they are rather rights or obligations of the companies." *Case Concerning Ahmadou Sadio Diallo (Rep. of Guinea v. Dem. Rep. of the Congo)*, Judgment, 2010 I.C.J. 639, ¶ 114 (Nov. 30) (*Diallo*). States owe no "responsibility towards the shareholders" of companies for financial losses they sustain as a result of state acts "directed against and infringing only the company's rights." *Barcelona Traction*, ¶ 46. But "[w]henver one of [a shareholder's] direct rights is infringed" by the state, the shareholder has a cognizable international expropriation claim. *Id.* ¶ 47; see *id.* (identifying "the right to any declared dividend, the right to attend and vote at general meetings, [and] the right to share in the residual assets of the company on liquidation" as examples of "direct rights of the shareholder" under typical "municipal law").

In its filings before international tribunals, the United States has long recognized the importance of this distinction between shareholder and corporate rights. See, e.g., Submission of the United States, ¶ 9, *GAMI Invs., Inc. v. United Mexican States* (NAFTA/UNCITRAL Arb. Trib. June 30, 2003) (*GAMI U.S. Submission*) ("Under customary international law, no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares. Only *direct* loss or damage suffered by shareholders is cognizable.") (footnotes omitted); Memorial on Jurisdiction and Admissibility of Resp't United States at 5, *Methanex Corp. v. United States* (NAFTA/UNCITRAL Arb. Trib. Nov. 13, 2000) ("Neither Article 1116 [of the North American Free Trade Agreement] nor the

principles of customary international law against which it was adopted \* \* \* permit a shareholder to claim in its own right for injuries to a corporation.”).

2. The United States also has long recognized that, under customary international law, a state may expropriate a foreign shareholder’s direct property rights in two ways: directly or indirectly. As explained below, a direct expropriation of a shareholder’s direct rights occurs through a formal expropriation of the shareholder’s own property rights (rather than just the corporation’s property rights), whereas an indirect expropriation of a shareholder’s direct rights occurs through measures that have an effect equivalent to a formal expropriation of the shareholder’s own property rights.

First, a state may directly expropriate a foreign shareholder’s direct rights. See, *e.g.*, 2012 U.S. Model Bilateral Investment Treaty, Annex B (U.S. Model B.I.T.) (“[A] direct expropriation [occurs under customary international law] where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.”). That occurs, for example, when a state formally takes title to the corporation’s shares and the rights that accompany them, thereby directly taking ownership of the corporation. See, *e.g.*, *GAMI* U.S. Submission, ¶ 9 (identifying as “an expropriation of the shares” a direct expropriation of shareholders’ direct rights); see generally *Diallo*, ¶¶ 99-159 (considering and rejecting claims of direct expropriation of direct rights of the sole owner of two limited liability companies).

Second, a state may indirectly expropriate a shareholder’s direct rights. In general, an indirect expropriation occurs “where an action or series of actions by a [state] has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.” U.S. Model B.I.T., Annex B; see Restatement (Second) of the Foreign Relations Law of the United States § 192 (Am. L. Inst. 1965) (“Conduct attributable to a state that is intended to, and does, effectively deprive an alien of substantially all the benefit of his interest in property, constitutes a taking of the property, \* \* \* even though the state does not deprive him of his entire legal interest in the property.”). State responsibility for indirect expropriations of foreign nationals’ property is well established in customary international law. See *e.g.*, *In re Claim of Corn Prods. Refining Co.*, No. 1352, Final Decision at 12-13 (Foreign Claims Settlement Comm’n Dec. 15, 1954) (imposition by Yugoslavia of war-profit tax approximately three times the pre-war value of the plant “is nothing else but a total confiscation of the entire property,” and so an indirect expropriation of property).

Whether a state has indirectly expropriated a foreign property owner’s rights in property is a fact-intensive, case-by-case inquiry that considers, “among other factors,” the economic impact of the state action; the extent to which the state action interferes with the property owner’s distinct, reasonable investment-backed expectations; and the character of the state action. U.S. Model B.I.T., Annex B; *cf. Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). With respect to the first factor, “for an expropriation claim to succeed, the claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as to support a conclusion that the property has been ‘taken’ from the owner.” Submission of the United States, ¶ 13, *Lone Pine Res., Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2 (Aug. 16, 2017) (*Lone Pine Res.* U.S. Submission) (quotation marks omitted). But the “adverse effect” of the state’s action “on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred.” U.S. Model B.I.T., Annex B. Under the second factor, the reasonableness of a foreign property owner’s expectations depends “in part on the nature and extent of governmental regulation in the relevant sector.” *Lone Pine Res.* U.S.

Submission, ¶ 14 (quotation marks omitted). And the third factor considers such things as whether the state's action was an exercise of its general regulatory power or was instead discriminatory. *Id.* ¶ 15 & n.22.

3. In the case of a foreign shareholder, the indirect-expropriation inquiry focuses on that shareholder's bundle of direct rights, taking into account the domestic-takings rule that a domestic corporation does not have a cognizable claim under international law for a state's taking of property belonging to the domestic corporation *itself*. See, e.g., *Tidewater Inv. SRL v. Bolivarian Rep. of Venezuela*, ICSID Case No. ARB/10/5, Award, ¶ 105 (Mar. 13, 2015) (*Tidewater*) (identifying as factors "useful to consider" and "relevant" to determining whether state indirectly expropriated shareholders' direct rights in one case: whether "(a) The investment has been nationalized or the measure is confiscatory; (b) The investor remains in control of the investment and directs its day-to-day operations, or whether the State has taken over such management and control; (c) The State now supervises the work of employees of the Investment; and (d) The State takes the proceeds of the company's sales"). An indirect expropriation of certain shareholder direct rights would occur if the state prevents shareholders from exercising their rights to declared dividends, to attend and vote in general meetings, or to share in the residual assets of the company on liquidation. *Barcelona Traction*, ¶ 47; see also Restatement (Third) of the Foreign Relations Law of the United States § 712, cmt. g (Am. L. Inst. 1987) (describing state actions that have the effect of "taking" property). Similarly, a state would indirectly expropriate certain shareholder direct rights if it permanently took over management and control of the company, making decisions for the corporation that are reserved to the shareholders. See, e.g., *Starrett Hous. Corp. v. Government of the Islamic Republic of Iran*, Interlocutory Award, 1983 WL 233292, at \*25-26 (Iran-U.S. Claims Trib. 1983) (applying principles of international law, concluding that where Iran appointed a manager and where language of a statute "seems to indicate that the right to manage such projects ultimately rests with the Ministry of Housing and Bank Maskan," majority shareholders demonstrated that Iran "had interfered with [their] property rights in the Project to an extent that rendered these rights so useless that they must be deemed to have been taken").

Significantly for present purposes, the United States has long recognized that, as a matter of customary international law, foreign shareholders' direct rights are taken when a state indirectly expropriates the entire enterprise, for example, by permanently depriving shareholders of management and control of the business, completely destroying the beneficial and productive value of the shareholders' ownership of their company, leaving the shareholders with shares that have been rendered useless. See, e.g., Memorial of the United States of America at 90, *Case Concerning Elettronica Sicula S.p.A. (United States v. Italy)* (I.C.J. May 15, 1987) ("[I]t repeatedly has been recognized that interference with management and control sufficient to constitute a 'taking' of property will be considered to have occurred where the foreign investor has no reasonable prospect of regaining management and control."). That principle was recognized in several of the earliest bilateral investment treaties entered into by the United States. See, e.g., Treaty Concerning the Encouragement and Reciprocal Protection of Investment, art. III, Mar. 12, 1986, Bangl.-U.S., Treaty Doc. 99-23 (including as measures that may be "tantamount to expropriation \* \* \* the impairment or deprivation of [a company's] management").

Notably, international tribunals have also endorsed that principle. See, e.g., *SEDCO, Inc. v. National Iranian Oil Co.*, Interlocutory Award, 1985 WL 324069, at \*22 (Iran-U.S. Claims Trib. 1985) (“When, as in the instant case, it also is found that on the date of the government appointment of ‘temporary’ managers there is no reasonable prospect of return of control, a taking should conclusively be found to have occurred as of that date.”); *Tidewater*, ¶¶ 100, 110 (concluding that “the business as a whole had been effectively nationalized” where Venezuela took “possession of the assets and control of the operations” of a foreign-owned company); cf. *Pope & Talbot, Inc. v. Government of Canada*, Interim Award, ¶ 100 (NAFTA/UNCITRAL Arb. Trib. June 26, 2000) (finding no indirect expropriation where, among other things, “the Investor remains in control of the Investment [and] directs the day-to-day operations of the Investment,” and where the State did “not take any other actions ousting the Investor from full ownership and control of the Investment”); see *id.* ¶ 96 (stating that provision of North American Free Trade Agreement recognizing indirect expropriation codifies customary international law standard).

4. Importantly, however, a state’s expropriation of a corporation’s property that does not result in the expropriation of the entire enterprise is not an indirect expropriation of foreign shareholders’ direct rights under customary international law, even if it reduces the value of the shares to zero. See *Barcelona Traction*, ¶¶ 48, 52 (rejecting notion of state responsibility for derivative shareholder claims concerning state action that allegedly “emptied [shares] of all real economic content”); see generally Initial Amicus Br. 7-11 (discussing domestic-takings rule).

The same is true under United States law. United States courts have repeatedly recognized that the shareholder standing rule “generally prohibits shareholders from initiating actions to enforce the rights of the corporation.” *Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990); see, e.g., *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 625-34 (D.C. Cir. 2017) (holding that, under applicable Delaware law, breach-of-fiduciary-duty claims of shareholders of Fannie Mae were derivative and so barred because any benefit of recovery would go to the company, but breach-of-contract claims of shareholders of Fannie Mae and Freddie Mac involved shareholders’ direct rights and so could proceed in case challenging Federal Housing Finance Agency’s conservatorship of those companies). And courts have rejected shareholders’ derivative claims even where the government’s action allegedly resulted in an extreme devaluation of the company’s stock. See *Starr Int’l Co. v. United States*, 856 F.3d 953, 966-73 (Fed. Cir. 2017) (holding that, under applicable Delaware law, the injuries of shareholders of American International Group, Inc. (AIG), alleged to be indistinguishable from the seizure of four out of every five shares of the shareholders’ stock, were derivative of the alleged harms of the company, and so shareholders lacked standing to assert claim that the United States’ acquisition of AIG equity as part of the government’s financial assistance to the company constituted an illegal exaction in violation of the Federal Reserve Act).

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#### **b. Simon v. Hungary**

On June 1, 2018, the United States filed an amicus brief in the U.S. Court of Appeals for the D.C. Circuit in *Simon v. Hungary*, No. 17-7146. Plaintiffs are Holocaust survivors who were in Hungary during World War II and their complaint alleges the Republic of Hungary and the state-owned Hungarian railway participated in confiscating the personal property of Hungarian Jews and transporting Hungarian Jews to ghettos and to

concentration and slave-labor camps. This case, and several other cases in which the United States submitted briefs in 2018 which are discussed, *infra*, present the question of whether a court may dismiss or decline to exercise jurisdiction over claims based on the doctrines of international comity and *forum non conveniens* even when the claims are brought under the expropriation exception in the FSIA. The U.S. brief in *Simon v. Hungary*, excerpted below, argues that both doctrines can properly be applied to dismiss claims brought under the expropriation exception. The brief is available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

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The United States deplors the acts of violence that were committed against plaintiffs and their family members, and supports efforts to provide them with a remedy for the wrongs they suffered. The policy of the United States Government with regard to claims for restitution or compensation by Holocaust survivors and other victims of the Nazi era has consistently been motivated by the twin concerns of justice and urgency. No amount of money could provide compensation for the suffering that the victims of Nazi-era atrocities endured. Nevertheless, the moral imperative has been and continues to be to provide some measure of justice to the victims of the Holocaust, and to do so in their remaining lifetimes. The United States has advocated that concerned parties, foreign governments, and non-governmental organizations act to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation, rather than subject victims and their families to the prolonged uncertainty and delay that accompany litigation.

With respect to Hungary specifically, the 1947 Peace Treaty between Hungary and the Allied Powers (including the United States) contained provisions in Articles 26 and 27 addressing property claims of non-Hungarian and Hungarian nationals. In 1973, the United States reached a claims settlement agreement with Hungary, in which the United States accepted \$18.9 million in settlement of claims relating to Hungary's obligations under Articles 26 and 27 of the 1947 Peace Treaty, as well as certain other claims against Hungary. That settlement, however, only resolved individual claims for individuals who were U.S. nationals at the time their claims arose, and hence does not apply to the claims of the named plaintiffs here. More broadly, while the United States continues to advocate for the Hungarian government to resolve remaining Holocaust-era restitution issues, the United States has not had specific substantive involvement in efforts to address the types of property-related claims that are at issue in this case.

Thus, in contrast to the United States' involvement in the establishment of certain Holocaust claims processes in a number of other European countries, such as Germany, Austria, and France, the United States has not participated in efforts of the Republic of Hungary toward establishing a claims mechanism for the Holocaust victims whose claims are at issue in this case and were not resolved by the prior settlement agreements. Nor does the United States have a working understanding of the mechanisms that have been or continue to be available in Hungary with respect to such claims. Accordingly, the United States does not express a view as to whether it would be in the foreign policy interests of the United States for plaintiffs to have sought or now seek compensation in Hungary. The United States therefore takes no position on the

particular facts and circumstances of this case as to whether the district court properly applied the doctrines of prudential exhaustion and *forum non conveniens* to dismiss plaintiffs' claims in favor of litigation in Hungarian courts.

The United States files this brief as *amicus curiae*, however, in response to the Court's invitation and to express its view that the doctrines of *forum non conveniens* and international comity can, in an appropriate case, be grounds for dismissal of claims brought against a foreign state or its agency or instrumentality under the FSIA's expropriation exception. Plaintiffs cite federal courts' "virtually unflagging obligation" to exercise their jurisdiction, Appellants Br. 29, but that principle does not require U.S. courts to adjudicate claims in circumstances where, for example, such litigation would be at odds with the foreign policy interests of the United States and the sovereign interests of a foreign government.

It is well-established—and plaintiffs themselves acknowledge, Appellants Br. 32—that claims over which a district court has subject matter jurisdiction under the FSIA may be dismissed on the ground of *forum non conveniens*. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490 n.15 (1983) ("The [FSIA] does not appear to affect the traditional doctrine of *forum non conveniens*."); see also, e.g., *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 100 (D.C. Cir. 2002) ("[T]he doctrine of *forum non conveniens* remains fully applicable in FSIA cases."); *Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A.*, 760 F.2d 390, 394 (2d Cir. 1985) (same). Plaintiffs assert that the availability of *forum non conveniens* makes it unnecessary to apply a doctrine of international comity in appropriate cases, but their argument ignores the critical interests served by comity.

*Forum non conveniens* applies even in cases involving purely private parties, if the balancing of interests supports resolution of the dispute in a foreign court. International comity is relevant in cases that implicate more significant sovereign interests, by discouraging a U.S. court from second-guessing a foreign government's judicial or administrative resolution of a dispute (or provision for resolution), or otherwise sitting in judgment of the official acts of a foreign government. See generally *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). And despite Congress' enactment of the FSIA to govern foreign sovereign immunity, "the foreign policy implications of the application of that Act obviously occasion a continuing involvement by the Executive" in identifying circumstances in which sovereign interests support application of comity principles. *Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879, 881-82 (D.C. Cir. 1988) (act of state doctrine).

In an appropriate case, and as we explain further below, foreign policy and foreign sovereign interests can support a court's decision to defer to an alternative foreign forum rather than to exercise jurisdiction over claims under the FSIA's expropriation exception. Judicial deference to the Executive's expressed view of the potential impact of litigation on our foreign affairs under a comity analysis derives from "the primacy of the Executive in the conduct of foreign relations." *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality op.) (cited with approval in *Millen Indus.*, 855 F.2d at 881). Given the long pendency of this action and the significant questions as to the court's subject matter jurisdiction, however, it would have been advisable in this case for the district court to resolve the question of its jurisdiction under the FSIA before dismissing the case on prudential exhaustion grounds that the district court suggested would permit plaintiffs to return to U.S. courts.

### **A. A District Court May Dismiss A Case Brought Under The FSIA's Expropriation Exception In Deference To An Alternative Forum As A Matter Of International Comity.**

In the view of the United States, a district court may dismiss an action brought under the FSIA's expropriation exception in deference to an alternative available forum as a matter of international comity. Although exhaustion is not mandatory in this context under international or domestic law, it is an available doctrinal basis for declining to exercise jurisdiction in an appropriate case, where consideration of the interests of the United States and the foreign state weighs sufficiently in favor of an adequate alternative forum. Dismissal on international comity grounds can play a critical role in ensuring that litigation in U.S. courts does not conflict with or cause harm to the foreign policy of the United States, such as in circumstances where U.S. foreign policy is to channel disputes to an alternative forum. The fact the FSIA itself does not impose any exhaustion requirement for expropriation claims under § 1605(a)(3) does not foreclose dismissal on international comity grounds.

"International comity is a doctrine of prudential abstention, one that 'counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law.'" *Mujica v. AirScan Inc.*, 771 F.3d 580, 598 (9th Cir. 2014) (quoting *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8 (1st Cir. 1997)). One strain of the doctrine, adjudicatory comity, applies when one country's court declines "to exercise jurisdiction in a case properly adjudicated in a foreign state." *Mujica*, 771 F.3d at 599 (quoting *In re Maxwell Commc'n Corp. PLC by Homan*, 93 F.3d 1036, 1047 (2d Cir. 1996)).

In deciding whether to decline to exercise jurisdiction on adjudicatory comity grounds in deference to a foreign forum, a U.S. court "evaluate[s] several factors, including the strength of the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum." *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004). The Ninth Circuit, elaborating on those factors in *Mujica*, set out a non-exclusive list of considerations in applying the doctrine of international comity. The Court explained that relevant factors to be considered in assessing U.S. interests included "(1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) the foreign policy interests of the United States, and (5) any public policy interests." *Mujica*, 771 F.3d at 604.

Comity is closely tied to territoriality, and a court should give less weight to U.S. interests where the activity at issue occurred in a foreign country and involved harms to foreign nationals. Conversely, the analysis of foreign interests, which "essentially mirrors the consideration of U.S. interests," gives weight to a foreign state's "interests in regulating conduct that occurs within their borders" and "involves their nationals." *Mujica*, 771 F.3d at 607; see also, e.g., *Republic of Philippines*, 553 U.S. at 866 (recognizing that a foreign state has "a unique interest" in resolving in its own courts a dispute involving claims arising from "events of historical and political significance for [that state] and its people"); cf. U.S. Amicus Br. Supporting Panel Reh'g or Reh'g En Banc, at 27-28, *Sarei v. Rio Tinto*, PLC, Nos. 02-56256 & -56390 (9th Cir. 2006) ("To reject a principle of exhaustion and to proceed to resolve a dispute arising in another country, centered upon a foreign government's treatment of its own citizens, when a competent foreign court is ready and able to resolve the dispute, is the opposite of the model of 'judicial caution' and restraint contemplated by" *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).).

One critical factor to be considered in determining whether to dismiss on international comity grounds is the foreign policy interests of the United States. In circumstances in which the United States has expressed its foreign policy interests in connection with a particular subject matter or litigation, a court should give substantial weight to the United States' views that those interests support (or weigh against) abstention in favor of a foreign forum that can resolve the dispute. See *Ungaro-Benages*, 379 F.3d at 1236, 1239; *Mujica*, 771 F.3d at 609-10 (giving serious weight to United States' statement that foreign policy interests support dismissal on international comity grounds); cf. *Republic of Austria v. Altmann*, 541 U.S. 677, 701-02 (2004) (recognizing that, where the State Department has suggested that the court should decline to exercise jurisdiction "over particular petitioners in connection with their alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy" (footnote omitted)). Dismissal on international comity grounds can ensure that litigation in U.S. courts does not cause substantial harm to our foreign relations or otherwise conflict with federal foreign policy. Cf. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-20 (2003).

Finally, while the district court did not resolve the outstanding questions relating to its subject matter jurisdiction in this case, we note that the fact a district court has jurisdiction under the FSIA's expropriation exception does not foreclose dismissal on the grounds of international comity. International comity, like *forum non conveniens*, is a federal common-law doctrine of abstention in deference to an alternative forum. Nothing in the text or history of the FSIA suggests that it was intended to foreclose application of those doctrines, or to require a court to exercise jurisdiction in every case. See *Price*, 294 F.3d at 100; *Proyecfin de Venezuela*, 760 F.2d at 394; see also *Millen Indus.*, 855 F.2d at 881-82 (recognizing with approval the "continuing involvement by the Executive" in cases brought under the FSIA); cf. *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 950-51 (D.C. Cir. 2008) (reviewing the merits of the district court's refusal to dismiss expropriation claim on *forum non conveniens* grounds).

Nor, contrary to plaintiffs' arguments, are all relevant considerations relating to international comity incorporated in the terms of the FSIA's expropriation exception. In appropriate, case-specific circumstances, dismissal on the basis of international comity may be appropriate in claims over which a court has jurisdiction under § 1605(a)(3). In *Scalin v. Societe Nationale des Chemins de Fer Francais*, No. 15-cv-3362 (N.D. Ill.), for example, the United States supported dismissal of an action filed by Holocaust victims against the French national railroad not only on jurisdictional grounds but also on grounds of, *inter alia*, international comity. See Statement of Interest of the United States, Dkt. 63 (Dec. 18, 2015). The United States explained that the U.S. Government had supported the French government's efforts to compensate Holocaust victims and their families, including France's development of an administrative compensation scheme for certain property-related claims of nationals of any country as well as an Executive Agreement between France and the United States that expanded a French pension program for surviving Holocaust deportees and surviving spouses of deportees to cover U.S. citizens and other foreign nationals not previously eligible to receive compensation. The United States explained that it would be in the interests of the United States and France to resolve the plaintiffs' Holocaust-related claims through the commission and programs established by France rather than through litigation in U.S. courts. The United States urged international comity as an independent justification for dismissing the action in deference to the French compensation schemes, and the district court agreed. Mem. Op., Dkt. 83, *Scalin v. Societe Nationale des Chemins de Fer Francais*, No. 15-cv-3362 (N.D. Ill. Mar. 26, 2018). The

case-specific considerations supporting dismissal in that case are not factors that are incorporated into the elements of the FSIA's expropriation exception.

In arguing that the district court erred in recognizing a doctrine of international comity, plaintiffs rely on two district court cases rejecting prudential exhaustion in cases brought under the FSIA's expropriation exception. Appellants Br. 22 (citing *de Csepel v. Republic of Hungary*, 169 F. Supp. 3d 143, 169 (D.D.C. 2016), and *Philipp v. Federal Republic of Germany*, 248 F. Supp. 3d 59, 82-83 (D.D.C. 2017)). Those courts, however, viewed the doctrine of prudential exhaustion recognized by the Seventh Circuit in *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015), as being based solely on an international-law rule. As the district court here correctly recognized, *Fischer* can properly be understood to refer to international-law practice not in order to require exhaustion as a binding norm of international law, but by analogy to infer a broader principle of international comity supporting abstention under domestic law. Mem. Op., Dkt. 132, at 16-17.

Indeed, the fact that the defendant in a case brought under the FSIA's expropriation exception is a foreign state may itself be a valid consideration in an international comity analysis, as a suit brought directly against a foreign state can cause more international friction than a suit brought against a state-owned commercial entity. See U.S. Amicus Br., at 15-16, *Kingdom of Spain v. Cassirer*, No. 10-786 (S. Ct. May 27, 2011) (noting that, where a foreign state itself is not a defendant in an action under the FSIA's expropriation exception, the potential foreign relations impact of a suit may be significantly diminished). The FSIA's expropriation exception is unusual in that it provides jurisdiction in cases involving international-law violations almost always committed in a foreign state rather than the types of purely private-law disputes ordinarily brought under the FSIA's other exceptions to sovereign immunity, where the relevant action or at least the gravamen of the claim took place in the United States (aside from the terrorism exception, which itself requires exhaustion of certain other remedies, 28 U.S.C. § 1605A(a)(2)(A)(iii)). Where the contacts between foreign state defendants and the United States are attenuated, that may also be a basis for a court to resolve its own subject matter jurisdiction in a particular case before dismissing claims on international comity grounds. The district court's exhaustion analysis envisioned that plaintiffs could return to U.S. court following litigation in Hungarian courts, and assert the right to pursue claims on the basis that Hungarian remedies were unreasonably withheld. That would extend even further the duration of this litigation, which has already been pending for over seven years. Mem. Op., Dkt. 132, at 17.

It is far from clear, however, that the district court has jurisdiction under the FSIA's expropriation exception. The FSIA's exceptions to immunity were intended by Congress to incorporate "[t]he requirements of minimum jurisdictional contacts" that were generally thought sufficient to support exercise of personal jurisdiction over an out-of-state defendant. H.R. Rep. No. 94-1487, at 13 (1976). Each of Section 1605(a)'s exceptions to immunity "requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction," thereby "prescrib[ing] the necessary contacts which must exist before our courts can exercise personal jurisdiction." *Id.* The commercial activity nexus requirement in the FSIA's expropriation exception should, if applied with appropriate rigor, screen out many cases that would raise significant comity concerns.

In order for the Republic of Hungary to be subject to the district court's subject matter jurisdiction, plaintiffs must establish that expropriated property or any property exchanged for such property is "present in the United States in connection with a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(3). Only the first clause of

§ 1605(a)(3) can be the basis for jurisdiction over the foreign state. See *de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1106-08 (D.C. Cir. 2017). This Court previously recognized that the allegations in the first amended complaint were insufficient to exercise subject matter jurisdiction over the Republic of Hungary. *Simon*, 812 F.3d at 148.

Requiring a showing that expropriated property or identifiable property exchanged for such property is present in the United States in connection with the foreign state's commercial activity in this country is consistent with the historic backdrop of the FSIA. Prior to the statute's enactment, foreign states enjoyed immunity from suit arising out of the expropriation of property within their own territory, see, e.g., *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971), with the possible exception of in rem cases in which U.S. courts took jurisdiction to determine rights to property actually situated in the United States. E.g., *Stephen v. Zivnostenska Banka Nat'l Corp.*, 15 A.D.2d 111, 119 (N.Y. App. Div. 1961), *aff'd*, 186 N.E.2d 676 (N.Y. 1962). In enacting the FSIA and creating for the first time an exception to the *in personam* immunity of a foreign state in certain expropriation cases, Congress adopted an incremental approach that paralleled those few cases in which title to property in the United States had been in issue. In contrast, deeming allegations that the Republic of Hungary seized and liquidated property abroad and commingled it with general revenues in its treasury abroad many decades ago to be sufficient to treat any state-owned property in the United States as "exchanged" for expropriated property would expand the expropriation exception far beyond its intended limits—limits that were also intended to ensure that any exercise of personal jurisdiction over a foreign state defendant would satisfy minimum contacts requirements. See H.R. Rep. No. 94-1487, at 13-14.

Similar concerns are raised by application of a rationale that allegations that a foreign state agency or instrumentality has historically commingled the proceeds of seized and liquidated assets among its assets are sufficient to establish jurisdiction over the agency or instrumentality if it does unrelated business in the United States.

Particularly in light of the underlying purposes of foreign sovereign immunity, it would have been preferable for the district court to resolve its jurisdiction over defendants before dismissing plaintiffs' claims without prejudice on grounds that might not end definitively the litigation in U.S. courts. Cf. *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000) (recognizing that foreign sovereign immunity protects the foreign state from "trial and the attendant burdens of litigation," not simply "liability on the merits"); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987) ("A foreign government should not be put to the expense of defending what may be a protracted lawsuit without an opportunity to obtain an authoritative determination of its amenability to suit at the earliest possible opportunity.").

#### **B. A District Court May Also Abstain From Exercising Jurisdiction Under The FSIA Under The *Forum Non Conveniens* Doctrine.**

For similar reasons, although the United States does not take a position an application of *forum non conveniens* to the particular facts and circumstances of this case, it is clear that a district court may decline to adjudicate claims on that basis even where it has or may have subject matter jurisdiction under the FSIA. Under the *forum non conveniens* doctrine, relevant considerations include a range of public and private factors, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981), including the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; and other practical problems relating to trial of the case; administrative burdens on a

court; and the court’s familiarity with the law to be applied. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947). The public interest factors can also include considerations of the foreign relations consequences of adjudication for the United States and the foreign government. See *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1312-13 (11th Cir. 2002). Indeed, because the applicable legal standard for the *forum non conveniens* doctrine is so well established and there is a sizable body of law in which the standard is applied—unlike in the international comity context—it may be advisable for a district court to address *forum non conveniens* first before reaching the question of international comity.

Furthermore, *forum non conveniens* can play an additional, and critical, role in a case brought against a foreign state defendant. The inquiry into jurisdiction under the FSIA can often be time-consuming and difficult. As the Supreme Court recognized in *Verlinden*, a court’s application of *forum non conveniens* can help to identify and resolve at the threshold stage cases with only a weak nexus to the United States. 461 U.S. at 490 n.15; see also, e.g., *Proyecfin*, 760 F.2d at 394 (reasoning that *forum non conveniens* will help prevent U.S. courts from becoming “international courts of claims” for “local disputes between foreign plaintiffs and foreign sovereign defendants). Application of the *forum non conveniens* doctrine can assist in identifying cases in which an alternative foreign forum has a closer connection to the underlying parties and/or dispute, thereby avoiding years of litigation over jurisdictional issues, potentially involving intrusive jurisdictional discovery, which can impose substantial burdens on foreign states. *Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, (2007) (a district court “may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant.”).

\* \* \* \*

### c. **Philipp v. Germany**

On September 4, 2018, the United States filed an amicus brief in support of rehearing en banc in *Philipp v. Germany*, No 17-7064, in the D.C. Circuit. Plaintiffs’ claims in this case relate to cultural assets seized by the Nazi regime. The U.S. brief in *Philipp*, like the U.S. brief in *Simon*, discussed *supra*, argues that courts may abstain from exercising jurisdiction in a case brought pursuant to the FSIA’s expropriation exception based on the doctrine of international comity. The brief is available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

\* \* \* \*

United States courts have long recognized the doctrine of international comity, which permits courts to recognize the “legislative, executive or judicial acts of another nation” giving “due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.” *Hilton v. Guyot*, 159 U.S. 113, 164 (1895); see also *id.* at 164-65 (citing Joseph Story, *Commentaries on the Conflict of Laws* §§ 33-38 (1834) (describing international comity as a doctrine of “beneficence, humanity, and charity,”

which “arise[s] from mutual interest and utility”)); *Emory v. Grenough*, 3 U.S. (3 Dall.) 369, 370, n.\* (1798) (referring to the doctrine of comity of nations).

International comity discourages a U.S. court from second-guessing a foreign government’s judicial or administrative resolution of a dispute (or provision for its resolution), or otherwise sitting in judgment of a foreign government’s official acts. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918) (“To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations.”). One strand of comity is “adjudicatory comity,” pursuant to which a U.S. court may abstain from exercising jurisdiction in deference to adjudication in a foreign forum. *Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014). This doctrine is one of “prudential abstention,” applied “when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law.” *Id.* at 598 (quotations omitted).

In enacting the FSIA, Congress established a comprehensive legal framework governing the immunity of foreign states from the jurisdiction of U.S. courts. *See Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014). But the Act was not meant to affect substantive liability or other areas of law. *See Owens v. Republic of Sudan*, 864 F.3d 751, 763 (D.C. Cir. 2017) (“[T]he FSIA \* \* \* grant[ed] jurisdiction yet le[ft] the underlying substantive law unchanged.” (citing *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983))).

Along these lines, “the doctrine of *forum non conveniens* remains fully applicable in FSIA cases.” *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 100 (D.C. Cir. 2002). And this Court has recognized that other common-law principles continue to apply in cases against foreign states following the FSIA’s enactment. *See, e.g., Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 951 (D.C. Cir. 2008) (*forum non conveniens* and act-of-state doctrine); *Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005) (political question doctrine).

This Court has also observed that litigation under the FSIA may involve sensitive questions of foreign affairs that “obviously occasion a continuing involvement by the Executive \* \* \* in matters relating to the application of the act of state doctrine and giving appropriate weight to those views.” *Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879, 881 (D.C. Cir. 1988) (citations omitted).

Abstention on the basis of international comity, like *forum non conveniens*, is not a jurisdictional doctrine but instead a federal common-law doctrine of abstention in deference to an alternative forum. *See In re Papandreou*, 139 F.3d 247, 255-56 (D.C. Cir. 1998) (“*Forum non conveniens* does not raise a jurisdictional bar but instead involves a deliberate abstention from the exercise of jurisdiction.”). And like the act-of-state doctrine, adjudicatory comity is grounded in concerns that a court’s adjudication of a claim may improperly impinge on the sovereignty of a foreign nation. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-39 (1964) (distinguishing between court’s jurisdiction over claim against foreign state for expropriation, and the court’s application of the act-of-state doctrine to decline to examine the merits). Nothing in the text or history of the FSIA suggests that it was intended to foreclose application of those longstanding common-law doctrines.

Significantly, abstention on adjudicatory comity grounds is akin to other common-law abstention principles applied by federal courts. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (recognizing that a federal court may decline to exercise jurisdiction in deference to predominant State interests under various abstention doctrines, including *Pullman* and *Younger* abstention); see also *id.* at 723 (noting that comity-based abstention stems from a similar premise as *forum non conveniens*). Just as the “longstanding application of [federalism-based abstention] doctrines reflects the common-law background against which the statutes conferring jurisdiction were enacted,” *Id.* at 717—that Congress should not be presumed to have intended to override absent clear evidence to the contrary, *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991)—a court should not presume from statutory silence that the FSIA’s immunity provisions were intended to abrogate comity-based abstention. The panel offered no explanation why federal courts should be able to abstain from exercising jurisdiction in deference to a State’s interests, but not in deference to the interests of a foreign sovereign.

Notably, the Supreme Court has explicitly left open the possibility that the United States could suggest that “courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity,” *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004)—abstention based on international comity could be such a basis. See *id.* at 702 (explaining that the Court would give deference to the Executive Branch’s foreign policy views in deciding whether to exercise jurisdiction under the FSIA).

Jurisdiction under the FSIA’s expropriation exception, 28 U.S.C. § 1605(a)(3), is unusual in that it typically involves claims alleging international-law violations committed in a foreign state, rather than purely private-law disputes ordinarily brought under the FSIA’s other exceptions to sovereign immunity, in which the relevant action (or at least the gravamen of the claim) took place in the United States. This exception thus contemplates particular solicitude for international comity and consideration for whether a plaintiff had exhausted remedies in the country where the alleged expropriation took place. At the very least, the text and history of the FSIA afford no reason to foreclose a court from abstaining as a matter of comity.

**B.** The Supreme Court’s decision in *NML Capital*, 134 S. Ct. 2250, does not preclude a court from abstaining based on adjudicatory comity in a case in which the court has jurisdiction under the FSIA. In *NML Capital*, the Court addressed “[t]he single, narrow question \* \* \* whether the [FSIA] specifies a different rule [for post-judgment execution discovery] when the judgment debtor is a foreign state.” 134 S. Ct. at 2255. The Court held that “any sort of immunity defense made by a foreign sovereign in an American court must stand or fall on the Act’s text,” and that the FSIA does not “forbid[] or limit[] discovery in aid of execution of a foreign-sovereign judgment debtor’s assets.” *Id.* at 2256. The Court noted the concerns raised by Argentina and the United States in arguing for a contrary statutory interpretation regarding the potential affront to foreign states’ sovereignty and to international comity resulting from sweeping discovery orders, but held that only Congress could amend the statute to address those concerns. *Id.* at 2258.

The panel relied on *NML Capital* to conclude that, if a court has jurisdiction under the FSIA, it may not abstain from exercising that jurisdiction on comity grounds. Slip Op. 16-17. To be sure, *NML Capital* held that a foreign state’s immunity is governed by the FSIA. But the Supreme Court also expressly recognized that, even where a court has jurisdiction under the FSIA, comity might be relevant to other non-immunity determinations in the litigation. *NML Capital*, 134 S. Ct. at 2258 n.6 (“[W]e have no reason to doubt that [a court] may appropriately consider comity interests” in determining the appropriate scope of discovery.).

A court that declines to exercise jurisdiction on international comity grounds is not treating a foreign state as immune. *See, e.g., Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 859 (7th Cir. 2015) (explaining that comity is not “a special immunity defense found in the FSIA”); *cf. Republic of Philippines v. Pimentel*, 553 U.S. 851, 865-66 (2008) (distinguishing between foreign state’s claim to sovereign immunity under the FSIA and its “unique interest in resolving the ownership of or claims to” assets wrongfully taken). The panel thus erred by reading *NML Capital* to resolve an issue not addressed in that case to foreclose application of a long-recognized abstention doctrine.

C. The panel also relied on two provisions of the FSIA in holding that the statute precludes abstention on comity grounds. Neither supports the panel’s conclusion.

First, the panel pointed to the FSIA’s terrorism exception, which requires a plaintiff in some circumstances to “afford[] [a] foreign state a reasonable opportunity to arbitrate” before bringing suit. 28 U.S.C. § 1605A(a)(2)(A)(iii). The panel reasoned by negative implication that, because a district court *must* dismiss such a claim brought under the FSIA’s terrorism exception if the claim is not appropriately exhausted, a district court *cannot* dismiss a claim for failure to exhaust in a foreign forum. Slip Op. 15.

There is no evidence, however, that in enacting the terrorism exception some twenty years after the FSIA was originally enacted, Congress intended to foreclose the possibility that a court might abstain from exercising jurisdiction under other exceptions based on common-law abstention. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1241. The Act’s expropriation exception does not require exhaustion, but neither does it forbid a court from abstaining in deference to an alternative forum. The panel’s reasoning would also appear to foreclose dismissal on *forum non conveniens* grounds, despite binding circuit precedent to the contrary. *Price*, 294 F.3d at 100.

Furthermore, abstention on comity grounds is not, as the panel seemed to understand it, an exhaustion requirement. Rather, it reflects the principle that, in an appropriate case, a foreign sovereign may have a greater interest in resolving a particular dispute than does the United States, and U.S. interests are better served by deferring to that sovereign’s interests. That may mean deferring to an alternative forum, *e.g., Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237-38 (11th Cir. 2004); deferring to a foreign law that strips plaintiffs of standing to bring suit, *e.g., Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 586 (2d Cir. 1993); or giving conclusive weight to the foreign state’s resolution of a dispute, *e.g., Mujica*, 771 F.3d at 614-15. The FSIA requirement to arbitrate terrorism claims before bringing suit does not suggest that Congress intended to prohibit a court from deferring to the foreign state’s interests in a claim brought under a different provision of the Act.

The panel also erred in claiming support for its position from 28 U.S.C. § 1606, which provides that, “[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under [28 U.S.C. §§ 1605, 1607], the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances,” with the exception of punitive damages. Slip Op. 15-16. The panel appeared to believe that provision requires a court to treat foreign states the same as private defendants. Slip Op. 16 (“[Section 1606] permits only defenses \* \* \* that are equally available to private individuals”).

Even under the panel’s reasoning, its conclusion was erroneous. Just as private individuals may invoke *forum non conveniens* as a basis for a court to abstain from exercising jurisdiction, *see* Slip Op. 16, private parties may similarly seek abstention on the basis of adjudicatory comity. *See, e.g., Mujica*, 771 F.3d at 615; *Ungaro-Benages*, 379 F.3d at 1238. In

asserting that a private individual cannot invoke a sovereign's right to resolve disputes against it, the panel construed comity far more narrowly than the doctrine has been applied.

The panel erred in ruling that a court may not abstain, on international comity grounds, from adjudicating a claim over which the court has jurisdiction under the FSIA.

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**d. Scalin v. SNCF**

On November 13, 2018, the United States filed an amicus brief in the U.S. Court of Appeals for the Seventh Circuit in *Scalin v. SNCF*, No. 18-1887. The case involves claims by heirs of French Holocaust victims transported by French railroad SNCF to Nazi concentration camps for SNCF's alleged expropriation of property. The United States filed a statement of interest in the case at the district court level. See *Digest 2015* at 311-15. The statement of interest explained the U.S. policy supporting resolution of Holocaust-related claims through mechanisms established by foreign states, such as France's "Commission for the Compensation of Victims of Acts of Despoilment Committed Pursuant to Anti-Semitic Laws in Force during the Occupation" (known as "CIVS," its French acronym). The district court dismissed the case due to the failure to exhaust administrative remedies in France. See Chapter 8 for discussion of the court's opinion. Excerpts below from the U.S. amicus brief in the Seventh Circuit discuss the applicability of requirements such as exhaustion and the doctrine of *forum non conveniens* in the context of the FSIA. The section from the brief on international comity is discussed in Chapter 5. The brief is available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

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Plaintiffs also argue that a recent decision of the D.C. Circuit demonstrates that exhaustion is not a condition for the exercise of jurisdiction under the FSIA's expropriation exception. Br. 13-15 (discussing *Philipp v. Federal Republic of Germany*, 894 F.3d 406, 415-16 (D.C. Cir. 2018)). As an initial matter, the district court did not hold that the FSIA requires exhaustion. App'x A5 ("[T]he FSIA does not itself impose a statutory exhaustion requirement."). *Philipp* held that Congress's regulation of suits against foreign states through the enactment of the FSIA abrogated case-by-case application of foreign sovereign-specific, common-law doctrines such as international comity. 894 F.3d at 413-15. On that basis, the D.C. Circuit disagreed with this Court's application of the exhaustion requirement to claims under the expropriation exception. *Id.* at 416 ("[The FSIA] leaves no room for a common-law exhaustion doctrine based on the very same considerations of comity."). A D.C. Circuit decision does not, of course, overrule Seventh Circuit precedent.

In any event, as the United States has explained in an amicus brief supporting rehearing en banc in *Philipp*, the D.C. Circuit's holding is based on a mistaken inference. See Brief for the United States as Amicus Curiae in Support of Rehearing En Banc, *Philipp v. Federal Republic of*

*Germany*, 894 F.3d 406, 2018 WL 4385105 (D.C. Cir. Sept. 14, 2018) (No. 17-7064). Congress comprehensively codified the principles governing foreign state immunity and district court jurisdiction over suits against foreign states. But nothing in the text or history of the FSIA suggests that Congress intended to abrogate prudential doctrines unrelated to jurisdiction. *See, e.g.*, H.R. Rep. No. 94-1487, at 20 (1976) (“Since, however, [the expropriation exception] deals solely with issues of immunity, it in no way affects existing law on the extent to which, if at all, the ‘act of state’ doctrine may be applicable.”). Indeed, *Philipp* itself acknowledges (894 F.3d at 416) the continuing applicability of the *forum non conveniens* doctrine, which requires consideration of factors that overlap extensively with those relevant to international comity.

*Philipp* relied on the Supreme Court’s decision in *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014), in holding that the FSIA supplants common-law doctrines like international comity. 894 F.3d at 415. But *NML Capital* addressed “[t]he single, narrow question \* \* \* whether the [FSIA] specifies a different rule” for post-judgment execution discovery “when the judgment debtor is a foreign state” than when the debtor is a private party. 134 S. Ct. at 2255. The Court held that “any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act’s text. Or it must fall.” *Id.* at 2256; *see id.* (holding that the FSIA does not limit post-judgment discovery). *NML Capital* thus focused solely on whether courts may rely on extra-statutory doctrines in resolving disputes concerning a foreign state’s immunity. To the limited extent it addressed whether courts may rely on common-law doctrines such as international comity to address matters not bearing on immunity, it recognized that such reliance is appropriate. *See id.* at 2258 n.6 (“[W]e have no reason to doubt that” a court “may appropriately consider comity interests” in determining the appropriate scope of discovery.).

The Supreme Court’s recognition that courts may properly apply international-comity principles in suits under the FSIA is not surprising. A district court’s decision to abstain from exercising FSIA jurisdiction on adjudicatory comity grounds is akin to other common-law abstention principles applied by federal courts under other jurisdictional statutes. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (recognizing abstention doctrines under which U.S. courts decline to exercise jurisdiction in deference to U.S. State proceedings). Like international comity, domestic abstention doctrines are rooted in “deference to the paramount interests of another sovereign.” *Id.* And like the FSIA, other statutes granting jurisdiction are enacted against “the common-law background” in which courts exercised equitable discretion to decline to adjudicate certain classes of cases. *Id.* at 717. There is no reason to think that, in enacting the FSIA, Congress intended to divest the courts of their historic power to dismiss suits on international comity grounds. *See Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (stating that, in the absence of an evident “statutory purpose to the contrary,” Congress legislates with an expectation that courts will apply well-established common-law principles).

## **II. Dismissal Also Is Appropriate Under the *Forum Non Conveniens* Doctrine**

In the alternative, this Court may affirm the district court’s dismissal of plaintiffs’ claims under the *forum non conveniens* doctrine. *See Locke*, 788 F.3d at 666 (court of appeals may affirm on any basis supported by the record). “[T]he focus [of the inquiry] is the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality.” *Fischer*, 777 F.3d at 866 (quotation marks omitted). The analysis begins with a presumption in favor of the plaintiffs’ choice of forum. *Id.* at 871. That presumption is rebuttable if the alternative forum is adequate (*id.* at 867), and if private and public interests support resolution of the claims in the alternative forum (*id.* at 867). *See id.* at 871. Private interests

include such things as the relative ease of access to sources of proof; the availability of effective administrative procedures for presenting evidence to the adjudicator; and ease of enforcement. *Id.* at 868. Public interests include the interest in having local disputes decided locally; application of local law by a local forum; and avoidance of problems stemming from conflicts of law or application of foreign law. *Id.*

For the reasons provided above, and as the district court determined, CIVS provides an adequate forum for resolution of plaintiffs' claims. The private and public interest factors also support dismissal.

The only consideration that supports adjudication of plaintiffs' suit in the district court is the preference given to a plaintiff's chosen forum. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007). "When the plaintiff's choice is not its home forum, however, the presumption in the plaintiff's favor applies with less force, for the assumption that the chosen forum is appropriate is in such cases less reasonable." *Id.* (quotation marks omitted). In this case, two of the three plaintiffs are French citizens who reside in France, lessening the preference given to plaintiffs' chosen forum. *See, e.g., Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 154 (2d Cir. 2005) ("[T]he degree of deference to be given to a plaintiff's choice of forum moves on a sliding scale depending on the degree of convenience reflected by the choice in a given case.") (quotation marks omitted).

Moreover, the private- and public-interest factors rebut any preference that would otherwise be given to plaintiffs' choice of forum. *See Fischer*, 777 F.3d at 871. With respect to the private interests: sources of proof are in France; CIVS provides assistance in searching for relevant evidence; and awards, when granted, are made without the need for compulsory process. Similarly, the relevant public interest factors support resolution by CIVS. France has a significant and longstanding interest in providing compensation, using its own procedures, for the Nazi atrocities committed in its territory. And a judgment in plaintiffs' favor would conflict with the United States' longstanding policy favoring resolution of Holocaust-related claims through remedies, including administrative remedies, provided by the foreign state, rather than litigation in U.S. courts.

### **III. Plaintiffs Failed to Allege Facts Supporting Jurisdiction Under the Expropriation Exception**

Finally, this Court may affirm the judgment because the district court lacked jurisdiction over plaintiffs' suit. As this Court has explained, the FSIA's expropriation exception applies "only where (1) rights in property are in issue; (2) the property was taken; (3) the taking was in violation of international law; and (4) at least one of the two nexus requirements is satisfied." *Fischer*, 777 F.3d at 854. Plaintiffs' complaint fails adequately to plead a factual claim necessary for the second element: that SNCF took the property of plaintiffs' relatives.

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Scalin, like the other two plaintiffs, alleges that she "believes that her grandparents, like all the victims, had Property with them and that Property was taken." Dkt. No. 1, ¶ 16 (Compl.). Plaintiffs' conclusory statements are the sort of "naked assertion[s] devoid of further factual enhancement," and a "formulaic recitation of [an] element[]" of the expropriation exception, *Iqbal*, 556 U.S. at 678 (first alteration in original), that is insufficient to satisfy the plausibility standard.

Plaintiffs therefore failed to adequately allege facts that would support jurisdiction under the expropriation exception.

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### 3. Service of Process

#### a. Harrison v. Sudan

As discussed in *Digest 2015* at 386-89, *Digest 2016* at 420, and *Digest 2017* at 419-20, the United States consistently argued, in the district court and the U.S. Court of Appeals for the Second Circuit in *Harrison v. Sudan*, that service on a foreign sovereign through delivery of a summons and complaint to the Foreign Minister, via its embassy in the United States, does not fulfill the requirements of the FSIA. In 2017, the Republic of Sudan filed a petition in the U.S. Supreme Court for a writ of certiorari and the Supreme Court invited the views of the United States. *Sudan v. Harrison*, No. 16-1094. On May 22, 2018, the United States filed its brief in the U.S. Supreme Court. The brief urges the Court to first consider the petition for certiorari in *Kumar v. Sudan*, No. 17-1269, or to consolidate the case with *Kumar* for consideration of the merits.\* The U.S. brief is excerpted below.

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...[T]he court of appeals erred by holding that the FSIA, 28 U.S.C. 1608(a)(3), permits service on a foreign state “via” or in “care of” the foreign state’s diplomatic mission in the United States. Pet. App. 13a. That decision contravenes the most natural reading of the statutory text, treaty obligations, and the FSIA’s legislative history, and it threatens harm to the United States’ foreign relations and its treatment in courts abroad. The decision below also squarely conflicts with a recent decision of the Fourth Circuit, *Kumar v. Republic of Sudan*, 880 F.3d 144, 158 (2018), petition for cert. pending, No. 17-1269 (filed Mar. 9, 2018), and is in significant tension with decisions of the Seventh and D.C. Circuits. As the parties in both this case and *Kumar* now recognize, the question presented warrants this Court’s review. See Resps. Supp. Br. 1-2; Resp. to Pet. at 1-2, *Kumar*, *supra* (No. 17-1269).

This case, however, has potential vehicle problems that could complicate the Court’s consideration. Because *Kumar* appears to present a more suitable vehicle for addressing the question presented, the petition for a writ of certiorari in this case should be held pending the Court’s consideration of the petition in *Kumar*, and then disposed of as appropriate. In the alternative, this Court may wish to grant certiorari in both cases and consolidate them for review.

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\* Editor’s Note: The Supreme Court issued its decision on March 26, 2019, holding that the FSIA requires civil service of process by mail to be completed by mail directly to the foreign minister’s office in the foreign state.

### **A. The Foreign Sovereign Immunities Act Does Not Permit A Litigant To Serve A Foreign State By Requesting That Process Directed To The Foreign Minister Be Mailed To The State's Embassy In The United States**

The FSIA's text, the United States' treaty obligations, and the statute's legislative history all demonstrate that Section 1608(a)(3) does not permit a litigant to serve a foreign state by requesting that process directed to the state's minister of foreign affairs be mailed to the state's embassy in the United States.

1. a. Section 1608(a) provides four exclusive, hierarchical means for serving "a foreign state or political subdivision of a foreign state" in civil litigation. 28 U.S.C. 1608(a). The provision at issue here, Section 1608(a)(3), permits a litigant to serve a foreign state "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. 1608(a)(3).

Although Section 1608(a)(3) does not expressly identify the location of service, the most natural understanding of the text is that it requires delivery to the ministry of foreign affairs at the foreign state's seat of government. The statute mandates that service be "addressed and dispatched \* \* \* to the head of the ministry of foreign affairs." 28 U.S.C. 1608(a)(3). It is logical to conclude that delivery should be made to that official's principal place of business, *i.e.*, the ministry of foreign affairs in the foreign state's seat of government. See *Kumar*, 880 F.3d at 155 (Section 1608(a)(3) "reinforce[s] that the location must be related to the intended recipient."). A state's foreign minister does not work in the state's embassies throughout the world, and nothing in the statute suggests that Congress expected foreign ministers to be served at locations removed from their principal place of performance of their official duties. See *ibid.*

If Congress had intended to permit service "via" a foreign embassy in the United States, *e.g.*, Pet. App. 101a, it would have provided that service be addressed to the foreign state's ambassador, or to an agent, rather than "addressed and dispatched \* \* \* to the head of the ministry of foreign affairs." 28 U.S.C. 1608(a)(3). Indeed, the neighboring provision, Section 1608(b), which governs service on a foreign state agency or instrumentality, expressly provides for service by "delivery \* \* \* to an officer, a managing or general agent, or to any other [authorized] agent." 28 U.S.C. 1608(b)(2). Congress's failure to include similar language in Section 1608(a) underscores that it did not envision that service would be sent to a foreign state's embassy, with embassy personnel effectively functioning as agents for forwarding service to the head of the ministry of foreign affairs. See *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets and citation omitted).

b. The court of appeals drew different inferences from the statutory text. It noted that in contrast to Section 1608(a)(3), Section 1608(a)(4) specifies that papers may be mailed "to the Secretary of State *in Washington, District of Columbia.*" Pet. App. 99a. As the Fourth Circuit explained, however, reliance on Section 1608(a)(4) is unpersuasive: Unlike Section 1608(a)(3), Section 1608(a)(4) "directs attention to one known location for one country—the United States—and so can be easily identified." *Kumar*, 880 F.3d at 159.

The court of appeals also was of the view that "[a] mailing addressed to the minister of foreign affairs via Sudan's embassy in Washington, D.C. \* \* \* could reasonably be expected to result in delivery to the intended person." Pet. App. 98a. But Section 1608(a)'s exclusive methods of service require "strict compliance." *Kumar*, 880 F.3d at 154; *Magness v. Russian*

*Fed'n*, 247 F.3d 609, 615 (5th Cir.), cert. denied, 534 U.S. 892 (2001); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994), cert. denied, 513 U.S. 1150 (1995). But see *Peterson v. Islamic Republic Of Iran*, 627 F.3d 1117, 1129 (9th Cir. 2010) (upholding defective service based on substantial compliance with Section 1608(a)). By contrast, where Congress envisioned an actual-notice standard, it said so expressly: Section 1608(b) contains a “catchall \* \* \* expressly allowing service by any method ‘reasonably calculated to give actual notice.’ ” *Kumar*, 880 F.3d at 154 (quoting 28 U.S.C. 1608(b)(3)); see also, e.g., *Transaero*, 30 F.3d at 154.

2. The United States’ treaty obligations further demonstrate that Section 1608(a)(3) does not permit a litigant to serve a foreign state by having process mailed to the foreign state’s embassy in the United States.

a. The [Vienna Convention on Diplomatic Relations or] VCDR, which the United States signed in 1961 and ratified in 1972, and which “codified longstanding principles of customary international law with respect to diplomatic relations,” 767 *Third Ave. Assocs. v. Permanent Mission of The Republic of Zaire to the United Nations*, 988 F.2d 295, 300 (2d Cir.), cert. denied, 510 U.S. 819 (1993), establishes certain obligations of the United States with respect to foreign diplomats and diplomatic premises in this country. See *Boos v. Barry*, 485 U.S. 312, 322 (1988). Article 22, Section 1 of the VCDR provides that “[t]he premises of ” a foreign state’s “mission shall be inviolable,” and “[t]he agents of the receiving State may not enter them, except with the consent of the head of the mission.” VCDR, art. 22, sec. 1, 23 U.S.T. 3237, 500 U.N.T.S. 106. Mission inviolability means, among other things, that “the receiving State \* \* \* is under a duty to abstain from exercising any sovereign rights, in particular law enforcement rights, in respect of inviolable premises.” Eileen Denza, *Diplomatic Law* 110 (4th ed. 2016) (Denza).

Section 1608(a)(3) should be interpreted in a manner that is consistent with the United States’ treaty obligations. See, e.g., *Cook v. United States*, 288 U.S. 102, 120 (1933); 1 Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987) (“Where fairly possible, a United States statute is to be construed so as not to conflict \* \* \* with an international agreement of the United States.”). Construing Section 1608(a)(3) to require that process be mailed to the ministry of foreign affairs in the foreign state ensures that the inviolability of foreign embassies within the United States is maintained.

By contrast, the court of appeals’ determination that a litigant may serve a foreign state by directing process to be mailed to the foreign state’s embassy in the United States is inconsistent with the inviolability of mission premises recognized by the VCDR. The Executive Branch has long interpreted Article 22 and the customary international law it codifies to preclude a litigant from serving a foreign state with process by mail or personal delivery to the state’s embassy. See *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 982 (D.C. Cir. 1965) (Washington, J., concurring) (“The establishment by one country of a diplomatic mission in the territory of another does not \* \* \* empower that mission to act as agent of the sending state for the purpose of accepting service of process.”) (quoting Letter from Leonard C. Meeker, Acting Legal Adviser, U.S. Dep’t of State, to John W. Douglas, Assistant Att’y Gen., U.S. Dep’t of Justice (Aug. 10, 1964)). This interpretation of the VCDR “is entitled to great weight,” *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (citation omitted), in light of “the Constitution’s grant to the Executive Branch \* \* \* of broad oversight over foreign affairs,” *Kumar*, 880 F.3d at 157. See *id.* at 158 (the Executive Branch’s “longstanding policy and interpretation” of Article 22 is “authoritative, reasoned, and entitled to great weight”).

The Executive Branch's interpretation also reflects the prevailing understanding of Article 22. As a leading treatise explains, it is "generally accepted" that "service by post on mission premises is prohibited." Denza 124. Other treatises are in accord. See James Crawford, *Brownlie's Principles of Public International Law* 403 (8th ed. 2012) ("It follows from Article 22 that writs cannot be served, even by post, within the premises of a mission but only through the Ministry for Foreign Affairs."); Ludwik Dembinski, *The Modern Law of Diplomacy* 193 (1988) (Article 22 "protects the mission from receiving by messenger or by mail any notification from the judicial or other authorities of the receiving State."). Other countries also share this understanding. See, e.g., Pet. Supp. Br. App. 2a (Note Verbale from the Republic of Austria to the State Department); Kingdom of Saudi Arabia Amicus Br. 12-14. And domestically, the Fourth and Seventh Circuits have recognized that attempting to serve a party in a foreign country "through an embassy [in the United States] is expressly banned \* \* \* by [the VCDR]." *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir. 2007), cert. denied, 552 U.S. 1231 (2008); see *Kumar*, 880 F.3d at 157.

The Convention's drafting history is to the same effect. See *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1511 (2017) (considering treaty drafting history); *Medellin v. Texas*, 552 U.S. 491, 507-508 (2008) (same). In a report accompanying a preliminary draft of the VCDR, the United Nations International Law Commission explained:

[N]o writ shall be served within the premises of the mission, nor shall any summons to appear before a court be served in the premises by a process server. Even if process servers do not enter the premises but carry out their duty at the door, such an act would constitute an infringement of the respect due to the mission. All judicial notices of this nature must be delivered through the Ministry for Foreign Affairs of the receiving State.

U.N. Int'l L. Comm'n, *Report of the Commission to the General Assembly, Doc. A/3623*, 2 Y.B. Int'l L. Comm'n 131, 137 (1957).

b. In light of this prevailing understanding, this Office is informed that the United States routinely refuses to recognize the propriety of service through mail or personal delivery by a private party or foreign court to a United States embassy. When a foreign litigant or court officer purports to serve the United States through an embassy, the embassy sends a diplomatic note to the foreign ministry in the forum state, explaining that the United States does not consider itself to have been served consistent with international law and thus will not appear in the litigation or honor any judgment that may be entered against it. See 2 U.S. Dep't of State, *Foreign Affairs Manual* § 284.3(c) (2013). The United States has a strong interest in ensuring that its courts afford foreign states the same treatment to which the United States believes it is entitled under customary international law and the VCDR. See, e.g., *Kumar*, 880 F.3d at 158 (recognizing importance of reciprocity interest); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984) (United States' interest in reciprocal treatment "throw[s] light on congressional intent").

c. Although the court of appeals acknowledged that the Executive Branch's treaty interpretation "is to be afforded 'great weight,' it summarily rejected [the government's] position." *Kumar*, 880 F.3d at 159 n.11 (citation omitted); see Pet. App. 109a. The court acknowledged that "service on an embassy or consular official would be improper" under the VCDR, Pet. App. 106a, but it believed "[t]here is a significant difference between *servicing* process on an embassy, and mailing papers to a country's foreign ministry *via* the embassy," *id.*

at 101a; see *id.* at 14a. But as the Fourth Circuit stated, that is an “artificial” and “non-textual” distinction. *Kumar*, 880 F.3d at 159 n.11; see *id.* at 157 (distinction arises from “meaningless semantic[s]”). In either case, the suit is against the foreign state. See 28 U.S.C. 1603(a); *El-Hadad v. United Arab Emirates*, 216 F.3d 29, 31-32 (D.C. Cir. 2000) (treating suit against foreign embassy as suit against the state); *Gray v. Permanent Mission of the People’s Republic of the Congo to the United Nations*, 443 F. Supp. 816, 820 (S.D.N.Y.) (holding that permanent mission of foreign country to the United Nations is a “foreign state” under the FSIA), *aff’d*, 580 F.3d 1044 (2d Cir. 1978). And in either case, mailing service to the embassy treats it as the state’s “de facto agent for service of process,” in violation of the VCDR’s principle of mission inviolability. *Kumar*, 880 F.3d at 159 n.11.

The court below also suggested that service “via” petitioner’s embassy complied with the VCDR because the embassy consented to service by “accept[ing]” the papers. Pet. App. 107a. But the VCDR provides that “agents of [a] receiving State may not enter [a mission], *except with the consent of the head of the mission.*” Art. 22, sec. 1, 23 U.S.T. 3237, 500 U.N.T.S. 106 (emphasis added). “Simple acceptance of the certified mailing from the clerk of court [by an embassy employee] does not demonstrate a waiver [of the VCDR].” *Kumar*, 880 F.3d at 157 n.9. And no record evidence suggests that petitioner’s Ambassador to the United States—the head of the mission—was aware of, much less consented to receive, respondents’ service of process.

3. The FSIA’s legislative history confirms that Congress intended the statute to bar service by mail to a foreign state’s embassy.

a. An early draft of the FSIA permitted service on a foreign state by “registered or certified mail \* \* \* to the ambassador or chief of mission of the foreign state” in the United States. S. 566, Sec. 1(1) [§ 1608], 93d Cong., 1st Sess. (1973). The State Department recommended removing that method based on its view that it would violate Article 22 of the VCDR. See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 26 (1976) (House Report); *Service of Legal Process by Mail on Foreign Governments in the U.S.*, 71 Dep’t St. Bull., No. 1840, at 458, 458-459 (Sept. 30, 1974). A subsequent version of the bill eliminated that method of service. H.R. 11315, Sec. 4(a) [§ 1608], 94th Cong., 1st Sess. (1975).

In addition, the House Report accompanying the bill that became the FSIA explained that some litigants had previously attempted to serve foreign states by “mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state.” House Report 26. The Report described this practice as having “questionable validity” and stated that “Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the [VCDR].” *Ibid.* Thus, “[s]ervice on an embassy by mail would be precluded under th[e] bill.” *Ibid.*; see *Kumar*, 880 F.3d at 156 (relying on this legislative history); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983) (same).

b. The court of appeals disregarded this legislative history because the House Report “fail[ed] to” distinguish “between ‘[s]ervice on an embassy by mail,’ and service on a minister [of ] foreign affairs via or care of an embassy.” Pet. App. 102a (citation and emphases omitted). But as discussed above, see p. 15, *supra*, that distinction is merely “semantic.” *Kumar*, 880 F.3d at 157.

In any event, the court of appeals misread the legislative history. The House Report disapproved of “attempting to commence litigation against a foreign state” by “mailing \* \* \* a copy of the summons and complaint *to* a diplomatic mission of the foreign state.” House Report 26 (emphasis added). Congress thus sought to prevent parties from completing service by mailing process papers to an embassy, regardless of whether the papers are directed to the

ambassador—which the court of appeals agreed would violate the statute and the VCDR, see Pet. App. 106a—or to the foreign minister, as occurred here.

### **B. Certiorari Is Warranted, But *Kumar* Presents A Better Vehicle For The Court’s Review**

1. As all parties now recognize, the question presented warrants this Court’s review.

a. The decision below squarely conflicts with the Fourth Circuit’s decision in *Kumar*, *supra*. In both cases, a group of victims of the USS *Cole* bombing allege that petitioner provided material support for the attack. And in both cases, the victims attempted to effect service by requesting that the clerk send documents, directed to the Minister of Foreign Affairs, to the Embassy of the Republic of Sudan in Washington, D.C. The Second Circuit upheld that method of service, while the Fourth Circuit determined that it fails to satisfy 28 U.S.C. 1608(a)(3). See *Kumar*, 880 F.3d at 159 (acknowledging split). Such disparate results on similar facts warrant this Court’s review. See Resp. to Pet. at 4, *Kumar*, *supra* (No. 17-1269).

Moreover, the court of appeals’ decision is in significant tension with decisions of the Seventh and D.C. Circuits. Although those courts have not directly addressed the method of service respondents attempted here, they have considered closely related questions.

In *Barot v. Embassy of The Republic of Zambia*, 785 F.3d 26 (2015), the D.C. Circuit recounted that the plaintiff’s first effort to serve her former employer, the Zambian Embassy, had failed to comply with the FSIA because service was “attempted \* \* \* at the Embassy in Washington, D.C., rather than at the Ministry of Foreign Affairs in Lusaka, Zambia, as the Act required.” *Id.* at 28. After describing the plaintiff’s further failed attempts at service, the court determined that she should be “afford[ed] \* \* \* the opportunity to effect service pursuant to 28 U.S.C. 1608(a)(3),” which “requires serving a summons, complaint, and notice of suit, \* \* \* that are ‘dispatched by the clerk of the court,’ and sent to the ‘head of the ministry of foreign affairs’ in Lusaka, Zambia, whether identified by name or title, and not to any other official or agency.” 785 F.3d at 29-30 (citation omitted); see *Gates v. Syrian Arab Republic*, 646 F.3d 1, 4 (D.C. Cir.) (litigant complied with Section 1608(a)(3) by addressing service to the Syrian Ministry of Foreign Affairs), cert. denied, 565 U.S. 945 (2011); *Transaero*, 30 F.3d at 154 (Section 1608(a)(3) “mandates service of the Ministry of Foreign Affairs.”).

The Seventh Circuit has similarly rejected the idea that service through an embassy comports with the FSIA. In considering attempted service of a motion on a foreign instrumentality, the court explained that “service through an embassy is expressly banned both by an international treaty to which the United States is a party and by U.S. statutory law.” *Autotech*, 499 F.3d at 748; see *Alberti*, 705 F.2d at 253 (service on the ambassador is “simply inadequate” under Section 1608(a)(3)).

b. The decision below also threatens harm to the United States’ foreign relations. The United States has substantial interests in ensuring that foreign states are served properly before they are required to appear in U.S. courts, and in preserving the inviolability of diplomatic missions under the VCDR. Moreover, the United States routinely objects to attempts by foreign courts and litigants to serve the United States by delivery to U.S. embassies, and thus has a significant reciprocity interest in the treatment of U.S. missions abroad. At the same time, if this Court grants certiorari and holds that respondents’ method of service was improper, respondents may be able to correct the deficient service by requesting that the clerk of court send “a copy of the summons and complaint and a notice of suit \* \* \* to the head of the ministry of foreign affairs” of the Republic of Sudan in Khartoum, Sudan. 28 U.S.C. 1608(a)(3); cf. *Kumar*, 880

F.3d at 160 (remanding to the district court “with instructions to allow Kumar to perfect service of process in a manner consistent with this opinion”).

2. Although the question presented warrants this Court’s review, this case could prove to be a problematic vehicle for resolving it.

Petitioner first challenged respondents’ method of service on appeal from the entry of turnover orders filed in the District Court for the Southern District of New York to execute on the default judgment issued by the District Court for the District of Columbia. Petitioner has filed a motion to vacate the underlying default judgment, which remains pending. See 10-cv-1689 D. Ct. Doc. 55 (June 14, 2015); Pet. 11; Pet. App. 96a n.1; Fed. R. Civ. P. 60(b). Petitioner has not asked the district court to hold its proceedings in abeyance pending this Court’s review of the petition for a writ of certiorari. Thus, the district court could vacate or amend its judgment at any time, calling into question the continued validity of the turnover orders at issue here and perhaps mooted this case. See *Walker v. Turner*, 22 U.S. (9 Wheat.) 541, 549 (1824).

For example, petitioner’s motion to vacate argues, *inter alia*, that the award of punitive damages—which comprise 75% of the judgment, see Pet. App. 22a—is impermissibly retroactive. See 10-cv-1689 D. Ct. Doc. 55-1, at 33-34. The bombing of the USS *Cole* occurred in October 2000, but the statutory provision authorizing punitive damages, 28 U.S.C. 1605A, was enacted in 2008, see National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, Div. A, Tit. X, § 1083(a)(1), 122 Stat. 338. Petitioner’s motion to vacate therefore contends that the award of punitive damages was improper because Congress did not clearly indicate its intent for the punitive-damages provision to apply retroactively. 10-cv-1689 D. Ct. Doc. 55-1, at 31-34; see generally *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994).

In *Owens v. Republic of Sudan*, 864 F.3d 751 (2017), petitions for cert. pending, No. 17-1236 and No. 17-1268 (filed Mar. 2, 2018), the D.C. Circuit accepted petitioner’s argument (which in that case supported petitioner’s challenge to damages arising from another incident, see *id.* at 762). The court held that Section 1605A operates retroactively, but that Congress did not make “a clear statement authorizing punitive damages for past conduct,” and it therefore vacated the punitive damages award under the FSIA. *Id.* at 816; see *id.* at 815-817. In light of the change in controlling circuit precedent, the district court may amend the underlying judgment in this case, which could in turn raise questions about the turnover orders’ continued validity.

3. The petition for a writ of certiorari in *Kumar* presents the same question as does this case. See Pet. at i, *Kumar v. Republic of Sudan*, No. 17-1269 (filed Mar. 9, 2018). *Kumar*, which arises on direct review of a motion to vacate a default judgment, appears to present a better vehicle for this Court’s consideration. *Id.* at 16-17.

The Republic of Sudan, petitioner here and respondent in *Kumar*, states that it is “indifferent” as to which petition this Court grants, but it suggests that *Kumar* presents its own vehicle problems. Resp. to Pet. at 4, 7, *Kumar*, *supra* (No. 17-1269); see generally *id.* at 4-7. Those issues do not appear to present significant vehicle problems. For example, respondent in *Kumar* notes, *id.* at 5, that petitioners there have been granted time to effect proper service on remand from the Fourth Circuit’s decision, and that respondent in *Kumar* will then move to dismiss the complaint on other bases. But no such motion has been filed. And even if litigation of such a motion proceeds in the district court, that would not foreclose this Court from deciding the question presented, which would determine whether the default judgment in that case should have been set aside and thus whether the proceedings on remand should have occurred in the first place.

Because the question presented warrants review, and because *Kumar* provides a better vehicle for this Court’s consideration, this Court should grant the petition for a writ of certiorari in *Kumar*, and hold this petition pending its disposition of that case. In the alternative, to ensure that the Court may decide the question presented, the Court may wish to grant certiorari in both cases and consolidate them for review.

\* \* \* \*

**b. Kumar v. Sudan**

As discussed in *Digest 2017* at 420-25, the United States filed an amicus brief in *Kumar v. Sudan*, No. 16-2267, in the U.S. Court of Appeals for the Fourth Circuit, in support of reversal of the district court decision construing the FSIA as authorizing service on a foreign state by mail addressed to the foreign minister at the state’s embassy in the United States. On January 19, 2018, the Fourth Circuit issued its decision adopting the Department’s view that the FSIA’s service provisions do not permit service of process on a foreign state by mail sent to the foreign state’s embassy in the United States addressed to the foreign minister. The panel agreed that this method of service is not consistent with the statute’s legislative history, the VDCR, or the Department’s considered views. The decision rejects the reasoning of the Second Circuit in *Harrison v. Republic of Sudan*, which reached the opposite result (as discussed, *supra*). Excerpts follow from the Fourth Circuit opinion. A petition for certiorari has been filed in *Kumar*, as discussed, *supra*.

\* \* \* \*

For over a decade, family members of United States sailors killed in the bombing of the *U.S.S. Cole* have pursued litigation in federal court against the Republic of Sudan for its alleged support of Al Qaeda, which was responsible for the bombing. This appeal arises from the latest suit wherein the district court denied Sudan’s motion to vacate the default judgments entered against it. Because the Appellees’ method of serving process did not comport with the statutory requirements of 28 U.S.C. § 1608(a)(3), we hold the district court lacked personal jurisdiction over Sudan. Accordingly, we reverse the district court’s order denying Sudan’s motion to vacate, vacate the judgments, and remand with instructions.

\* \* \* \*

## II.

Sudan contends the district court lacked personal jurisdiction over it because *Kumar* did not properly effectuate service of process as required under the FSIA. Specifically, it contends that mailing service to the Sudanese embassy in Washington, D.C., does not satisfy 28 U.S.C. § 1608(a)(3) and contravenes the 1961 Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes (“Vienna Convention”), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, which provides that a foreign state’s diplomatic mission is inviolable. If the district court lacked

personal jurisdiction, then the judgment against Sudan is void. *Koehler v. Dodwell*, 152 F.3d 304, 306–07 (4th Cir. 1998) (“[A]ny judgment entered against a defendant over whom the court does not have personal jurisdiction is void.”).

Because the issue before us is one of statutory interpretation, we review de novo the district court’s conclusion that Kumar’s method of serving process satisfied § 1608(a)(3). *Broughman v. Carver*, 624 F.3d 670, 674 (4th Cir. 2010).

A.

The Federal Rule of Civil Procedure governing service of process provides that “[a] foreign state ... must be served in accordance with 28 U.S.C. § 1608,” *i.e.*, the FSIA. Fed. R. Civ. P. 4(j)(1). That statute, in turn, describes four methods of serving process on a foreign state, listed in hierarchical order. § 1608(a).

\* \* \* \*

The question before the Court, then, is limited to whether Kumar satisfied § 1608(a)(3), which allows service by mail “requiring a signed receipt[] to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state.” Specifically, we must decide whether Kumar satisfied the “addressed and dispatched to” requirement when he submitted the packet to be mailed by the clerk of court to the Sudanese embassy in Washington, D.C. Sudan does not contest compliance with the other components of service under subsection (a)(3) and the record shows Kumar instructed the clerk of court to send the requisite documents via the United States Postal Service’s certified mail system, which is “a[] form of mail requiring a signed receipt.” Consequently, our review is limited to whether delivering process to a foreign nation’s embassy and identifying the head of that nation’s ministry of foreign affairs as the recipient satisfies subsection (a)(3)’s requirement that the mailing is “addressed and dispatched to the head of the ministry of foreign affairs of the foreign state.”

B.

As always, our duty in a case involving statutory interpretation is “to ascertain and implement the intent of Congress.” *Broughman*, 624 F.3d at 674. We begin with the statute’s text. *Ross v. R.A. North Dev., Inc. (In re Total Realty Mgmt., LLC)*, 706 F.3d 245, 254 (4th Cir. 2013). ...

We begin with a general observation: based on § 1608(a)’s four precise methods for service of process and how that language contrasts with § 1608(b), subsection (a) requires strict compliance. Subsection (b), which applies in suits against “an agency or instrumentality of a foreign state,” contains both specific methods of serving process, § 1608(b)(1)–(2), and a catchall provision expressly allowing service by any method “reasonably calculated to give actual notice,” § 1608(b)(3). Although Congress authorized an array of specific and general service options under subsection (b), it did not include a similar catchall provision in subsection (a). This contrast between two subsections of the same statute suggests that Congress intended that the four methods authorized under subsection (a) be the exclusive and explicit means of effectuating service of process against foreign states. *Russello v. United States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”). In other words, had Congress intended for a non-delineated method or actual notice to satisfy the requirements for serving process on a

foreign state, it would have indicated as much by including a similar “reasonably calculated” provision in subsection (a). It did not do so.

Thus, a court cannot excuse noncompliance with the specific requirements of § 1608(a). *See Magness v. Russ. Federation*, 247 F.3d 609, 612–617 (5th Cir. 2001) (“Based on [other decisions], the express language of section 1608(a), and the United States’ interest in ensuring that the proper officials of a foreign state are notified when a suit is instituted, we hold that plaintiffs must strictly comply with the statutory service of process provisions when suing a foreign state . . . under section 1608(a.)”); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153–54 (D.C. Cir. 1994) (“We hold that strict adherence to the terms of 1608(a) is required.”). In short, “[I]niciency” when applying § 1608(a) “would disorder the statutory scheme” Congress enacted. *Transaero*, 30 F.3d at 154.

We now turn to what, specifically, subsection (a)(3) requires of a plaintiff. First, we note the text does not specify a geographic location for the service of process. Instead, subsection (a)(3) requires that the mailing of process be “addressed and dispatched” to the head of the ministry of foreign affairs. This phrase does not meaningfully limit the geographic location where service is to be made, though it does reinforce that the location must be related to the intended recipient. *See* address, *Oxford English Dictionary* (defining the verb “address” as “[t]o send in a particular direction or towards a particular location” or “[t]o direct (a written communication) to a specific person or destination,” “[t]o direct to the attention of, communicate to”); dispatch, *Oxford English Dictionary* (defining the verb “dispatch” as “[t]o send off post-haste or with expedition or promptitude (a messenger, message, etc., having an express destination). The word regularly used for the sending of official messengers, and messages, of couriers, troops, mails, telegrams, parcels, express trains, packet-boats, etc.”). As we discuss below, our sister circuits have held that subsection (a)(3) is satisfied where process is mailed to the head of the ministry of foreign affairs at the ministry of foreign affairs’ address in the foreign state. *See, e.g., Gates v. Syrian Arab Republic*, 646 F.3d 1, 4–5 (D.C. Cir. 2011); *Peterson*, 627 F.3d at 1129. But Kumar contends that subsection (a)(3)’s silence as to geographic location for the mailing means that the statute does not *require* service to be sent to the foreign state *and* that it allows service delivered to the foreign state’s embassy in the United States.

Although Kumar does not advocate such an extreme position, the view that subsection (a)(3) only requires a particular recipient, and not a particular location, would allow the clerk of court to send service to *any* geographic location so long as the head of the ministry of foreign affairs of the defendant foreign state is identified as the intended recipient. That view cannot be consistent with Congress’ intent: otherwise, service via General Delivery in Peoria, Illinois could be argued as sufficient.

While it is true that subsection (a)(3) does not specify delivery only at the foreign ministry in the foreign state’s capital, Kumar’s premise that subsection (a)(3) does not require service to be sent there does not lead to his conclusion that service at the embassy satisfies the obligation under subsection (a)(3). The statute is simply ambiguous as to whether delivery at the foreign state’s embassy meets subsection (a)(3) given that while the head of a ministry of foreign affairs generally oversees a foreign state’s embassies, the foreign minister is rarely—if ever—present there. Serving the foreign minister at a location removed from where he or she actually works is at least in tension with Congress’ objective, even if it is not strictly prohibited by the statutory language.

Because the plain language of subsection (a)(3) does not fully resolve the issue before us, we turn elsewhere for guidance as to Congress' intent. *See Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 631 (4th Cir. 2015) (“[I]f the text of a statute is ambiguous, we look to other indicia of congressional intent such as the legislative history to interpret the statute.”). Here, the FSIA's legislative history, coupled with the United States' obligations under the Vienna Convention, as well as the “great weight” accorded the State Department's interpretation of such foreign treaty matters, lead us to the conclusion that subsection (a)(3) is not satisfied by delivery of process to a foreign state's embassy.

To understand this interplay, we first observe the obligation under the Vienna Convention that “[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.” Vienna Convention, *supra* art. 22, ¶ 1. Elsewhere, the Vienna Convention protects the inviolability of diplomatic agents. *See id.* art. 29.

The House Judiciary Committee Report regarding the enactment of § 1608(a) shows that the statute is meant to account for the United States' rights and obligations under the Vienna Convention. *See* H.R. Rep. No. 94–1487 (1977), *as reprinted in* 1976 U.S.C.C.A.N. 6604. The FSIA—including § 1608 in its present form—was first enacted in 1976, four years after the Vienna Convention entered into force for the United States. *See Tabion v. Mufti*, 73 F.3d 535, 538 n.5 (4th Cir. 1996). Congress knew and considered the Convention's obligations in drafting the FSIA. Specifically, the first draft of the bill allowed for service on a foreign state by “registered or certified mail... to the ambassador or chief of mission of the foreign state.” S. 566, 93d Cong. § 1608 (2d Sess. 1973). The Department of State recommended removing that option based on its view that this method of service would violate Article 22 of the Vienna Convention. *See* H.R. Rep. No. 94–1487, at 26, *as reprinted in* 1976 U.S.C.C.A.N., at 6625; 71 Dep't of State Bull. 458, 458–59 (1974).

The House Report also took “[s]pecial note” of a “means... currently in use in attempting to commence litigation against a foreign state.” H.R. Rep. No. 94–1487, at 26, *as reprinted in* 1976 U.S.C.C.A.N., at 6625. Describing “the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state” as a means of serving process that was “*of questionable validity*,” the House Report states that “[s]ection 1608 *precludes this method [of service]* so as to *avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations[.]*” *Id.* (emphases added). The Report then reiterates “[s]ervice on an embassy by mail would be precluded under this bill.” *Id.* (emphasis added). Thus, the House Report confirms that Congress did not intend § 1608 to allow for the mailing of service “to” or “on” a diplomatic mission as such a method would transgress the treaty obligations of the United States under the Vienna Convention.

\* \* \* \*

In foreign affairs matters such as we consider here, we afford the view of the Department of State “substantial deference.” *See Abbott v. Abbott*, 560 U.S. 1, 130 S. Ct. 1983, 1993 (2010) .... This judicial deference stems in part from the Constitution's grant to the Executive Branch—not the Judicial Branch—of broad oversight over foreign affairs. *Compare* U.S. Const. art. 2, § 2, cl. 2, *and* § 3 (reserving to the Executive Branch the ability to “make Treaties” and “receive Ambassadors and other public Ministers”), *with* U.S. Const. art. 3 (containing no similar oversight of foreign affairs). In this case, the State Department contends that service at an embassy does not satisfy subsection (a)(3) and is inconsistent with the United States' obligations

under the Vienna Convention. *See* Br. for the United States as Amicus Curiae in Supp. of Reversal 11 (“There is an international consensus that a litigant’s service of process through mail or personal delivery to a foreign mission is inconsistent with the inviolability of the mission enshrined in” Article 22 of the Vienna Convention).

Relatedly, the Court properly considers the diplomatic interests of the United States when construing the Vienna Convention and the FSIA. *See Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984) (noting that, in construing the FSIA, courts should consider the United States’ interest in reciprocal treatment abroad). The United States has represented that it routinely “refuses to recognize the propriety of a private party’s service through mail or personal delivery to a United States embassy.” Br. for the United States as Amicus Curiae in Supp. of Reversal 13. The following example illustrates the wisdom of deferring to the State Department’s interpretation in this area: As noted, citing the Vienna Convention’s provisions, the Secretary of State “routinely refuses to recognize” attempts to serve process on the United States by mail sent to U.S. embassies in foreign states. *See* Br. for the United States as Amicus Curiae in Supp. of Reversal 13–14. The legitimacy and sustainability of that position would be compromised were we to countenance Kumar’s method of serving process to the Sudanese embassy. Why would a foreign judiciary recognize the United States’ interpretation of the Vienna Convention when it comes to rejecting service of process via its own embassies if that same method for purposes of serving process on foreign states were permitted in the United States? Clearly, the United States cannot expect to receive treatment under the Vienna Convention that its own courts do not recognize in similar circumstances involving foreign states. This dilemma is avoided by the construction of subsection (a)(3) urged by the State Department. We find its longstanding policy and interpretation of these provisions authoritative, reasoned, and entitled to great weight.

In view of the ambiguity in § 1608(a)(3) as to the place of service, we conclude the legislative history, the Vienna Convention, and the State Department’s considered view to mean that the statute does not authorize delivery of service to a foreign state’s embassy even if it correctly identifies the intended recipient as the head of the ministry of foreign affairs. Put another way, process is not properly “addressed and dispatched to” the head of the ministry of foreign affairs as required under § 1608(a)(3) when it is delivered to the foreign state’s embassy in Washington, D.C.

\* \* \* \*

Our holding conflicts with the view of the Second Circuit, which has held that serving Sudan’s head of the ministry of foreign affairs in a package that was delivered by certified mail to the Sudanese embassy in Washington, D.C., satisfies § 1608(a)(3). *Harrison v. Republic of Sudan (Harrison I)*, 802 F.3d 399, 402–06 (2d Cir. 2015), *reh’g denied*, 838 F.3d 86 (*Harrison II*) (2d Cir. 2016) ... For the reasons we’ve already explained, we find the Second Circuit’s reasoning weak and unconvincing.

\* \* \* \*

**c. Fontaine v. Chile**

The United States filed a statement of interest in *Fontaine v. Chile* in federal district court on March 30, 2018. The U.S. statement, filed before the Supreme Court had issued a decision in *Sudan v. Harrison*, asserts that attempted service of process by mail on a foreign mission in the United States is invalid. The plaintiff, Carolina Fontaine, brought the action *pro se* against the Permanent Mission of Chile to the UN and three current or former staff of the Mission, alleging inappropriate conduct toward her as an employee. Excerpts follow from the U.S. statement of interest, which is available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

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**A. The FSIA, Which Provides the Exclusive Means for Service on a Foreign State, Does Not Authorize Service by Mail on a Foreign State’s Mission to the United Nations**

The FSIA, which provides the exclusive means of serving a foreign state, does not permit a foreign state to be served by mail to a state’s mission to the United Nations. Consequently, the Mission has not been properly served, and the Court lacks personal jurisdiction over the Mission.

The FSIA provides the exclusive basis for jurisdiction over foreign states in federal and state courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Section 1608 of the FSIA provides the exclusive means for effecting service of process on a foreign state or an agency or instrumentality of a foreign state. *See* 28 U.S.C. § 1608; *Harrison v. Republic of Sudan*, 802 F.3d 399, 403 (2d Cir. 2015) (“*Harrison I*”), *adhered to on denial of reh’g*, 838 F.3d 86 (2d Cir. 2016) (“*Harrison II*”). The FSIA demands “strict adherence to [the FSIA’s] terms, not merely substantial compliance” when seeking service on a foreign state. *Finamar Investors, Inc. v. Republic of Tadjikistan*, 889 F. Supp. 114, 117 (S.D.N.Y. 1995); *see also Magness v. Russian Fed’n*, 247 F.3d 609, 615 (5th Cir. 2001); *Transaero, Inc. v. La Fuerza Boliviano*, 30 F.3d 148, 154 (D.C. Cir. 1994). Unless a foreign sovereign is properly served under Section 1608, a court lacks personal jurisdiction over it. 28 U.S.C. § 1330(b); *see also Chettri v. Nepal Rastra Bank*, 834 F.3d 50, 55 (2d Cir. 2016).

A foreign state’s mission to the United Nations is properly considered to be the foreign state itself, rather than an agency or instrumentality of the state, for purposes of the FSIA. *Lewis & Kennedy, Inc. v. Permanent Mission of Republic of Botswana to U.N.*, No. 05 Civ. 2591 (HB), 2005 WL 1621342, at \*3 (S.D.N.Y. July 12, 2005) (“It is well settled that a country’s permanent mission to the United Nations is a foreign state for the purposes of § 1608.”); *Gray v. Permanent Mission of People’s Republic of Congo to U.N.*, 443 F. Supp. 816, 820 (S.D.N.Y. 1978), *aff’d*, 580 F.2d 1044 (2d Cir. 1978). Thus, the relevant service requirements are provided by section 1608(a), which governs service on a foreign state itself, not 1608(b), which governs service on an agency or instrumentality of a state.

Section 1608(a) prescribes four methods of service in descending order of preference, meaning that a plaintiff must attempt service by the first method or determine that it is unavailable before attempting the next method. *See, e.g., Harrison I*, 802 F.3d at 403; *Magness*, 247 F.3d at 613. In order, these methods are: (1) a preexisting special arrangement for service between the parties; (2) an applicable international convention on service of judicial documents;

(3) service sent to the head of the state's foreign affairs ministry by mail requiring signed receipt, dispatched by the clerk of court, and accompanied by a translation of the summons, the complaint, and a notice of suit into the official language of the defendant; or (4) service provided by the Department of State via diplomatic channels to the foreign state. *See* 28 U.S.C. § 1608(a). Delivery by mail of a summons and complaint to a foreign state's mission to the United Nations is not on this list, and therefore is not an effective means of service. The Court therefore lacks personal jurisdiction over the Mission.

**B. The FSIA Requires a Foreign State Be Given 60 Days to Respond to a Complaint**

Separately, the summons issued to the Mission failed to comply with FSIA § 1608(d), which requires that a properly served foreign state (or its agency or instrumentality) be given 60 days after service to answer or otherwise respond to the complaint. 28 U.S.C. § 1608(d). Therefore, the 21-day deadline set forth in the summons issued to the Mission is not valid.

**C. Because the Mission's Premises Are Inviolable, Process May Not Be Served on Any Defendant by Sending Mail to the Mission**

In addition, the attempted service of all four defendants by mail sent to the Mission was improper because it contravenes the inviolability of the premises of a foreign state's mission to the United Nations, as established by several treaties to which the United States is a party. The United States' interpretation of these obligations is owed deference given the Government's strong interests in conducting foreign policy. Three treaties to which the United States is a party provide that diplomats accredited to the United Nations (and, by extension, the permanent missions through which they operate) receive the same protections as diplomats and embassies under the Vienna Convention on Diplomatic Relations ("VCDR"), to which both the United States and Chile are parties. *See Tachiona v. United States*, 386 F.3d 205, 221-24 (2d Cir. 2004); *767 Third Avenue Assocs.*, 988 F.2d 295, 297-99 (2d Cir. 1993). The VCDR in turn obligates "the United States, in its role as a receiving state of foreign missions, ... to protect and respect the premises of any foreign mission located within its sovereign territory." *Bennett v. Islamic Republic of Iran*, 604 F. Supp. 2d 152, 159 (D.D.C. 2009), *aff'd*, 618 F.3d 19 (D.C. Cir. 2010). Specifically, it provides that "[t]he premises of the mission shall be inviolable." VCDR, art. 22, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, T.I.A.S. 7502. A foreign state's mission to the United Nations enjoys this protection. *767 Third Avenue Assocs.*, 988 F.2d at 297 ("Applicable treaties ... establish that Zaire's Permanent Mission [to the United Nations] is inviolable." (internal citations omitted)).

Although the VCDR does not define the term "inviolable," it is broadly construed internationally. The principle of inviolability is understood to preclude, among other things, service of process on an embassy, diplomatic mission, or consulate general—whether on the inviolable diplomat or mission for itself or as an agent for the foreign government or a private, non-immune party. The drafters' commentary on Article 22 confirms this understanding:

[a] special application of this principle [of the inviolability of the premises of the mission] is that no writ shall be served within the premises of the mission, nor shall any summons to appear before a court be served in the premises by a process server. Even if process servers do not enter the premises but carry out their duty at the door, such an act would constitute an infringement of the respect due to the mission. All judicial notices of this nature must be delivered through the Ministry for Foreign Affairs of the receiving State.

Int'l L. Comm'n, Report of the Commission to the General Assembly, U.N. GAOR, 12th Sess., Supp. 9, U.N. Doc. A/3623 (1957), *reprinted in* [1957] 2 Y.B. Int'l L. Comm'n 131, 137, U.N. Doc. A/CN.4/SER.A/1957/Add.1, <https://goo.gl/26RrG3> (Commission Report). U.S. courts have similarly understood the principle. *See, e.g., Tachiona*, 386 F.3d at 222, 224 (holding that the VCDR's "inviolability principle precludes service of process on a diplomat as an agent of a foreign government"); *767 Third Ave. Assocs.*, 988 F.2d at 301 (noting that "process servers may not even serve papers without entering at the door of a mission because that would constitute an infringement of the respect due to the mission"); *Sikhs for Justice v. Nath*, 850 F. Supp. 2d 435, 441 (S.D.N.Y. 2012) ("Under the Vienna [Convention on Consular Relations], '[s]ervice of process at...consular premises is prohibited.'" (quoting Restatement (Third) of Foreign Relations § 466 n.2 (1987))); *40 D 6262 Realty Corp. v. United Arab Emirates Government*, 447 F. Supp. 710, 711 (S.D.N.Y. 1978) (holding that the plaintiff's attempted service on foreign government by affixing notice to premises in question and mailing notice to permanent mission was improper, and court therefore lacked jurisdiction).

The Second Circuit's recent decisions in *Harrison I* and *Harrison II* do not affect this analysis. In *Harrison*, the plaintiffs sued Sudan and attempted to serve the foreign government by mailing a copy of the summons and complaint to Sudan's Minister of Foreign Affairs at the address of the Sudanese Embassy in Washington, D.C., rather than to the ministry of foreign affairs in Khartoum. *Harrison I*, 802 F.3d at 401. Relying on the FSIA provision that permits foreign states to be served by mailing the summons and complaint "to the head of the ministry of foreign affairs of the foreign state concerned," 28 U.S.C. § 1608(a)(3), the Second Circuit held that service was effected properly. 802 F.3d at 406.

The United States respectfully disagrees with the Second Circuit's holdings in *Harrison*, but in any event, the decisions are factually distinguishable. In contrast to *Harrison*, the summons directed to the foreign state here was not addressed to the minister of foreign affairs of Chile, nor did it purport to be sent via Chile's embassy. And the decision in *Harrison II* denying rehearing expressly stated that its holding did not authorize service on a foreign state via a foreign state's mission to the United Nations, which is what occurred here. *See Harrison II*, 838 F.3d at 94 & n3. Furthermore, the Court emphasized its view that under the particular facts of the case before it, Sudan had consented to the entry into its premises by accepting the mailed service package without promptly rejecting or returning it. *Id.* at 95. Here, in contrast, Chile immediately sent a diplomatic note to the United States Department of State objecting to service at its mission, requesting its assistance and invoking the protections of the VCDR and the United Nations Headquarters Agreement.

Finally, even if there were uncertainty about whether treaties oblige the United States to ensure the inviolability of foreign states' missions to the United Nations, the Court owes deference to the United States' interpretation. *See Medellín v. Texas*, 552 U.S. 491, 513 (2008) (the United States' interpretation of a treaty is "entitled to great weight"). The United States has strong interests in ensuring that foreign sovereigns are not required to respond or appear in U.S. courts unless properly served under the FSIA. The United States has long maintained that it may only be served abroad through diplomatic channels or in accordance with an applicable international convention or other agreed-upon method. Thus, the United States consistently rejects attempted service via direct delivery to a U.S. embassy, consulate, or other mission abroad. When a foreign court or litigant purports to serve the United States through an embassy, consulate, or other mission, the United States sends a diplomatic note to the foreign government indicating that the United States does not consider itself to have been served properly and thus

will not appear in the case or honor any judgment that may be entered. Moreover, when foreign courts attempt to serve U.S. diplomats or other mission personnel through delivery of papers to our embassies overseas, the United States regularly objects based on the inviolability of our embassies and on the ground that neither our embassies nor the U.S. government can be treated as agents for service of process upon individuals. Any disturbance in American courts of the strict service rules set out in the FSIA and principles of inviolability set forth in the VCDR and the U.N. agreements discussed above would undermine the Government's longstanding interpretations of those legal instruments, and runs the risk of exposing U.S. diplomatic premises to similar treatment. *See Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1295 (11th Cir. 1995) (FSIA's purposes include "according foreign sovereigns treatment in U.S. courts that is similar to the treatment the United States would prefer to receive in foreign courts").

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#### 4. Execution of Judgments against Foreign States: *Rubin v. Iran*

As discussed in *Digest 2017* at 429-44, *Digest 2016* at 435-36, and *Digest 2015* at 396-400, the United States has argued that section 1610(g) of the FSIA should not be interpreted as a freestanding exception to the immunity of state property. Section 1610(g) provides that, for individuals holding judgments against a foreign state under section 1605A of the FSIA, "the property of a foreign state," as well as the "property of" its agency or instrumentality, "is subject to attachment in aid of execution, and execution, ...as provided in this section." In 2017, the United States filed amicus briefs in *Bank Melli v. Bennett*, No 16-334, and *Rubin v. Iran*, No. 16-534, urging the Supreme Court to grant certiorari in *Rubin* on the question of whether 1610(g) creates a freestanding exception to attachment immunity. The Supreme Court granted the petition for certiorari in *Rubin*, limited to that one question.

On February 21, 2018, the Supreme Court issued its opinion, holding that Section 1610(g) does not provide a freestanding basis for parties holding a judgment to attach and execute against the property of a foreign state, but that the immunity of the property must be considered under provisions within §1610 to allow for execution. The Supreme Court opinion in *Rubin*, which is consistent with the U.S. view, is excerpted below (with footnotes omitted). On March 5, 2018, the Supreme Court denied the petition for certiorari in *Bennett*.

\* \* \* \*

On September 4, 1997, Hamas carried out three suicide bombings on a crowded pedestrian mall in Jerusalem, resulting in the deaths of 5 people and injuring nearly 200 others. Petitioners are United States citizens who were either wounded in the attack or are the close relatives of those who were injured. In an attempt to recover for their harm, petitioners sued Iran in the District Court for the District of Columbia, alleging that Iran was responsible for the bombing because it

provided material support and training to Hamas. At the time of that action, Iran was subject to the jurisdiction of the federal courts pursuant to 28 U. S. C. §1605(a)(7) (1994 ed., Supp. II), which rescinded the immunity of foreign states designated as state sponsors of terrorism with respect to claims arising out of acts of terrorism. Iran did not appear in the action, and the District Court entered a default judgment in favor of petitioners in the amount of \$71.5 million.

When Iran did not pay the judgment, petitioners brought this action in the District Court for the Northern District of Illinois to attach and execute against certain Iranian assets located in the United States in satisfaction of their judgment. Those assets—a collection of approximately 30,000 clay tablets and fragments containing ancient writings, known as the Persepolis Collection—are in the possession of the University of Chicago, housed at its Oriental Institute. University archeologists recovered the artifacts during an excavation of the old city of Persepolis in the 1930’s. In 1937, Iran loaned the collection to the Oriental Institute for research, translation, and cataloging.

Petitioners maintained in the District Court, *inter alia*, that §1610(g) of the FSIA renders the Persepolis Collection subject to attachment and execution. The District Court concluded otherwise and held that §1610(g) does not deprive the Persepolis Collection of the immunity typically afforded the property of a foreign sovereign. The Court of Appeals for the Seventh Circuit affirmed. 830 F. 3d 470 (2016). As relevant, the Seventh Circuit held that the text of §1610(g) demonstrates that the provision serves to identify the property of a foreign state or its agencies or instrumentalities that are subject to attachment and execution, but it does not in itself divest that property of immunity. The Court granted certiorari to resolve a split among the Courts of Appeals regarding the effect of §1610(g). 582 U. S. \_\_\_\_ (2017). We agree with the conclusion of the Seventh Circuit, and therefore affirm.

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## II

We turn first to the text of the statute. Section 1610(g)(1) provides that certain property will be “subject to attachment in aid of execution, and execution, upon [a §1605A] judgment *as provided in this section.*” (Emphasis added.) The most natural reading is that “this section” refers to §1610 as a whole, so that §1610(g)(1) will govern the attachment and execution of property that is exempted from the grant of immunity as provided elsewhere in §1610. Cf. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 487 (1999) (noting that the phrase “[e]xcept as provided in this section” in one subsection serves to incorporate “the rest of” the section in which the subsection appears).

Other provisions of §1610 unambiguously revoke the immunity of property of a foreign state, including specifically where a plaintiff holds a judgment under §1605A, provided certain express conditions are satisfied. For example, subsection (a) provides that “property in the United States ... used for a commercial activity in the United States ... shall not be immune” from attachment and execution in seven enumerated circumstances, including when “the judgment relates to a claim for which the foreign state is not immune under section 1605A ... .” §1610(a)(7). Subsections (b), (d), and (e) similarly set out circumstances in which certain property of a foreign state “shall not be immune.” And two other provisions within §1610 specifically allow §1605A judgment holders to attach and execute against property of a foreign state, “[n]otwithstanding any other provision of law,” including those provisions otherwise granting immunity, but only with respect to assets associated with certain regulated and

prohibited financial transactions. See §1610(f)(1)(A); Terrorism Risk Insurance Act of 2002 (TRIA), §201(a), 116 Stat. 2337, note following 28 U. S. C. §1610.

Section 1610(g) conspicuously lacks the textual markers, “shall not be immune” or “notwithstanding any other provision of law,” that would have shown that it serves as an independent avenue for abrogation of immunity. In fact, its use of the phrase “as provided in this section” signals the opposite: A judgment holder seeking to take advantage of §1610(g)(1) must identify a basis under one of §1610’s express immunity-abrogating provisions to attach and execute against a relevant property.

Reading §1610(g) in this way still provides relief to judgment holders who previously would not have been able to attach and execute against property of an agency or instrumentality of a foreign state in light of this Court’s decision in *Bancec*. Suppose, for instance, that plaintiffs obtain a §1605A judgment against a foreign state and seek to collect against the assets located in the United States of a state-owned telecommunications company. Cf. *Alejandre v. Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277 (CA11 1999). Prior to the enactment of §1610(g), the plaintiffs would have had to establish that the *Bancec* factors favor holding the agency or instrumentality liable for the foreign state’s misconduct. With §1610(g), however, the plaintiffs could attach and execute against the property of the state-owned entity regardless of the *Bancec* factors, so long as the plaintiffs can establish that the property is otherwise not immune (e.g., pursuant to §1610(a)(7) because it is used in commercial activity in the United States).

Moreover, our reading of §1610(g)(1) is consistent “with one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.” *Corley v. United States*, 556 U. S. 303, 314 (2009) (internal quotation marks omitted). Section 1610 expressly references §1605A judgments in its immunity-abrogating provisions, such as 28 U.S.C. §§1610(a)(7), (b)(3), (f)(1), and §201 of the TRIA, showing that those provisions extend to §1605A judgment holders’ ability to attach and execute against property. If the Court were to conclude that §1610(g) establishes a basis for the withdrawal of property immunity any time a plaintiff holds a judgment under §1605A, each of those provisions would be rendered superfluous because a judgment holder could always turn to §1610(g), regardless of whether the conditions of any other provision were met.

The Court’s interpretation of §1610(g) is also consistent with the historical practice of rescinding attachment and execution immunity primarily in the context of a foreign state’s commercial acts. See *Verlinden*, 461 U. S., at 487–488. Indeed, the FSIA expressly provides in its findings and declaration of purpose that

“[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.” §1602.

This focus of the FSIA is reflected within §1610, as subsections (a), (b), and (d) all outline exceptions to immunity of property when that property is used for commercial activity. The Court’s reading of §1610(g) means that individuals with §1605A judgments against a foreign state must primarily invoke other provisions revoking the grant of immunity for property related to commercial activity, including §1610(a)(7), unless the property is expressly carved out in an

exception that applies “[n]otwithstanding any other provision of law,” §1610(f)(1)(A); §201(a) of the TRIA. That result is consistent with the history and structure of the FSIA.

Throughout the FSIA, special avenues of relief to victims of terrorism exist, even absent a nexus to commercial activity. Where the FSIA goes so far as to divest a foreign state or property of immunity in relation to terrorism-related judgments, however, it does so expressly. See §§1605A, 1610(a)(7), (b)(3), (f)(1)(A); §201(a) of the TRIA. Out of respect for the delicate balance that Congress struck in enacting the FSIA, we decline to read into the statute a blanket abrogation of attachment and execution immunity for §1605A judgment holders absent a clearer indication of Congress’ intent.

### III A

Petitioners resist that the phrase “as provided in this section” refers to §1610 as a whole and contend that Congress more likely was referencing a specific provision within §1610 or a section in the NDAA. That explanation is unpersuasive.

Petitioners first assert that “this section” might refer to procedures contained in §1610(f). Section 1610(f) permits §1605A judgment holders to attach and execute against property associated with certain regulated and prohibited financial transactions, §1610(f)(1), and it provides that the United States Secretary of State and Secretary of the Treasury will make every effort to assist in “identifying, locating, and executing against the property of [a] foreign state or any agency or instrumentality of such state,” §1610(f)(2). Petitioners point out that paragraph (1) of subsection (f) has never come into effect because it was immediately waived by the President after it was enacted, pursuant to §1610(f)(3). So, the argument goes, it would make sense that Congress created §1610(g) as an alternative mechanism to achieve a similar result.

This is a strained and unnatural reading of the phrase “as provided in this section.” In enacting §201(a) of the TRIA, which, similar to 28 U. S. C. §1610(f), permits attachment and execution against blocked assets, Congress signaled that it was rescinding immunity by permitting attachment and execution “[n]otwithstanding any other provision of law.” See §201(a) of the TRIA. Had Congress likewise intended §1610(g) to have such an effect, it knew how to say so. Cf. *Bank Markazi v. Peterson*, 578 U. S. \_\_\_, \_\_\_, n. 2 (2016) (slip op., at 4, n. 2) (noting that “[s]ection 1610(g) does not take precedence over ‘any other provision of law,’ as the TRIA does”).

Petitioners fare no better in arguing that Congress may have intended “this section” to refer only to the instruction in §1610(f)(2) that the United States Government assist in identifying assets. Section 1610(f)(2) does not provide for attachment or execution at all, so petitioners’ argument does not account for the lack of textual indicators that exist in provisions like §§1610(a)(7) and (f)(1) that unambiguously abrogate immunity and permit attachment and execution.

Finally, petitioners assert that “this section” could possibly reflect a drafting error that was intended to actually refer to §1083 of the NDAA, the Public Law in which §1610(g) was enacted. This interpretation would require not only a stark deviation from the plain text of §1610(g), but also a departure from the clear text of the NDAA. Section 1083(b)(3) of the NDAA provides that “Section 1610 of title 28, United States Code, is amended... by adding at the end” the new subsection “(g).” 122 Stat. 341. The language “this section” within (g), then, clearly and expressly incorporates the NDAA’s reference to “Section 1610” as a whole. There is no basis to conclude that Congress’ failure to change “this section” in §1610(g) was the result of a mere drafting error.

## B

In an effort to show that §1610(g) does much more than simply abrogate the *Bancec* factors, petitioners argue that the words “property of a foreign state,” which appear in the first substantive clause of §1610(g), would otherwise be rendered superfluous because the property of a foreign state will never be subject to a *Bancec* inquiry. By its plain text, §1610(g)(1) permits enforcement of a §1605A judgment against both the property of a foreign state and the property of the agencies or instrumentalities of that foreign state. Because the *Bancec* factors would never have applied to the property of a foreign state, petitioners contend, those words must signal something else: that §1610(g) provides an independent basis for the withdrawal of immunity.

The words “property of a foreign state” accomplish at least two things, however, that are consistent with the Court’s understanding of the effect of §1610(g). First, §1610(g) serves to identify in one place all the categories of property that will be available to §1605A judgment holders for attachment and execution, whether it is “property of the foreign state” or property of its agencies or instrumentalities, and commands that the availability of such property will not be limited by the *Bancec* factors. So long as the property is deprived of its immunity “as provided in [§1610],” all of the types of property identified in §1610(g) will be available to §1605A judgment holders.

Second, in the context of the entire phrase, “the property of a foreign state against which a judgment is entered under section 1605A,” the words “foreign state” identify the type of judgment that will invoke application of §1610(g); specifically, a judgment held against a foreign state and entered under §1605A. Without this opening phrase, §1610(g) would abrogate the *Bancec* presumption of separateness in all cases, not just those involving terrorism judgments under §1605A. The words, “property of a foreign state,” thus, are not rendered superfluous under the Court’s reading because they do not merely identify a category of property that is subject to §1610(g) but also help inform when §1610(g) will apply in the first place. Indeed, §1610(g) would make no sense if those words were removed.

\* \* \* \*

## B. HEAD OF STATE AND OTHER FOREIGN OFFICIAL IMMUNITY

### President of the Democratic Republic of the Congo

On December 3, 2018, the United States filed a suggestion of immunity on behalf of the then-president of the Democratic Republic of the Congo, Joseph Kabila.\*\* The suggestion of immunity is excerpted below, omitting lengthy footnotes. The full text is available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

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\*\* Editor’s note: In January 2019, the court dismissed the claims against Kabila.

The United States respectfully submits this Suggestion of Immunity in response to this Court's request for its views, see Dkt. 141, and to inform the Court that President Joseph Kabila, the sitting head of state of the Democratic Republic of the Congo, is immune from this suit. In support of its Suggestion of Immunity, the United States sets forth as follows:

1. The United States has an interest in this action because President Kabila is the sitting head of a foreign state, thus raising the question of President Kabila's immunity from the Court's jurisdiction while in office. The Constitution assigns to the U.S. President alone the responsibility to represent the Nation in its foreign relations. As an incident of that power, the Executive Branch has authority to determine the immunity from suit of sitting heads of state and government. The interest of the United States in this matter arises from a determination by the Executive Branch of the Government of the United States, in consideration of the relevant principles of customary international law, and in the implementation of its foreign policy and in the conduct of its international relations, to recognize President Kabila's immunity from this suit. As discussed below, this determination is controlling and is not subject to judicial review. Thus, no court has ever subjected a sitting head of state to suit once the Executive Branch has determined that he or she is immune.

2. The Office of the Legal Adviser of the U.S. Department of State has informed the Department of Justice that the Democratic Republic of the Congo has formally requested the Government of the United States to determine that President Kabila is immune from this lawsuit. The Office of the Legal Adviser has further informed the Department of Justice that the "Department of State recognizes and allows the immunity of President Kabila as a sitting head of state from the jurisdiction of the United States District Court in this suit." Letter from Jennifer G. Newstead to Joseph H. Hunt (copy attached as Exhibit A).

3. For many years, the immunity of both foreign states and foreign officials was determined exclusively by the Executive Branch, and courts deferred completely to the Executive's foreign sovereign immunity determinations. See, e.g., *Republic of Mexico v. Hoffmann*, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."). In 1976, Congress codified the standards governing suit against foreign states in the Foreign Sovereign Immunities Act, transferring to the courts the responsibility for determining whether a foreign state is subject to suit. 28 U.S.C. §§ 1602 *et seq.*; see *id.* § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.").

4. As the Supreme Court has explained, however, Congress has not similarly codified standards governing the immunity of foreign officials from suit in our courts. *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) ("Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity."). Instead, when it codified the principles governing the immunity of foreign states, Congress left in place the practice of judicial deference to Executive Branch immunity determinations with respect to foreign officials. See *id.* at 323 ("We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity."). Thus, the Executive Branch retains its historic authority to determine a foreign official's immunity from suit, including the immunity of

foreign heads of state and heads of government. See *id.* at 311 & n.6 (noting the Executive Branch’s role in determining head of state immunity).

5. The doctrine of head of state immunity is well established in customary international law. See Satow’s Guide to Diplomatic Practice 9 (Lord Gore-Booth ed., 5th ed. 1979). Although the doctrine is referred to as “head of state immunity,” it applies to heads of government and foreign ministers as well. See, e.g., *The Schooner Exchange v. M’Faddon*, 11 U.S. (7 Cranch) 116, 138–39 (1812) (discussing generally the immunity of foreign ministers in U.S. courts); Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belgium), 2002 I.C.J. 3, 20–21 (Feb. 14) (Merits) (heads of state, heads of government, and ministers of foreign affairs enjoy immunity from the jurisdiction of foreign states); Restatement (Second) of Foreign Relations Law §§ 65, 66 (1965) (noting that head of state immunity includes heads of government).

6. In the United States, head of state immunity determinations are made by the Department of State, incident to the Executive Branch’s authority in the field of foreign affairs. The Supreme Court has held that the courts of the United States are bound by Suggestions of Immunity submitted by the Executive Branch. See *Hoffman*, 324 U.S. at 35–36; *Ex parte Peru*, 318 U.S. 578, 588–89 (1943). In *Ex parte Peru*, in the context of pre-FSIA foreign state immunity, the Supreme Court, without further review of the Executive Branch’s immunity determination, declared that such a determination “must be accepted by the courts as a conclusive determination by the political arm of the Government.” 318 U.S. at 589. After a Suggestion of Immunity is filed, it is the “court’s duty” to surrender jurisdiction. *Id.* at 588. The courts’ deference to Executive Branch determinations of foreign state immunity is compelled by the separation of powers. See, e.g., *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974).

7. For the same reason, courts also have routinely deferred to the Executive Branch’s immunity determinations concerning sitting heads of state and heads of government. See *Habyarimana v. Kagame*, 696 F.3d 1029, 1032 (10th Cir. 2012) (“We must accept the United States’ suggestion that a foreign head of state is immune from suit—even for acts committed prior to assuming office—as a conclusive determination by the political arm of the Government that the continued [exercise of jurisdiction] interferes with the proper conduct of our foreign relations.” (quotation omitted)); *Ye v. Jiang Zemin*, 383 F.3d 620, 626 (7th Cir. 2004) (“The obligation of the Judicial Branch is clear—a determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff.”); *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) (“[I]n the constitutional framework, the judicial branch is not the most appropriate one to define the scope of immunity for heads-of-state. . . . [F]lexibility to react quickly to the sensitive problems created by conflict between individual private rights and interests of international comity are better resolved by the executive, rather than by judicial decision.”); *Howland v. Resteiner*, No. 07-CV-2332, ECF No. 27, at 5 n.2 (E.D.N.Y. Dec. 5, 2007) (noting “there is no doubt that [the sitting Prime Minister of Grenada] is entitled to immunity from th[e] Court’s jurisdiction” after Executive Branch filed Suggestion of Immunity); *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 110 (D.D.C. 2005) (“When the Executive Branch concludes that a recognized leader of a foreign sovereign [in this case, Prime Minister Ariel Sharon of Israel] should be immune from the jurisdiction of American courts, that conclusion is determinative.”); *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988) (holding that the determination of Prime Minister Thatcher’s immunity was conclusive in dismissing a suit that alleged British complicity in U.S. air strikes against Libya), *aff’d in part and rev’d in part on other grounds*, 886 F.2d 438 (D.C. Cir. 1989). When the Executive Branch determines that a

sitting head of state or head of government is immune from suit, judicial deference to that determination is predicated on compelling considerations arising out of the Executive Branch's authority to conduct foreign affairs under the Constitution. See *Ye*, 383 F.3d at 626 (citing *Spacil*, 489 F.2d at 618). Judicial deference to the Executive Branch in these matters, the Seventh Circuit noted, is "motivated by the caution we believe appropriate of the Judicial Branch when the conduct of foreign affairs is involved." *Id.*; see also *Spacil*, 489 F.2d at 619 ("Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." (citing *United States v. Lee*, 106 U.S. 196, 209 (1882))); *Ex parte Peru*, 318 U.S. at 588. As noted above, in no case has a court subjected a sitting head of state or head of government to suit after the Executive Branch has determined that the head of state or head of government is immune.

8. Under the customary international law principles accepted by the Executive Branch, head of state immunity attaches to a head of state's or head of government's status as the current holder of the office. After a head of state or head of government leaves office, however, that individual generally retains residual immunity only for acts taken in an official capacity while in that position. See 1 Oppenheim's International Law 1043–44 (Robert Jennings & Arthur Watts eds., 9th ed. 1996). In this case, because the Executive Branch has determined that President Kabila, as the sitting head of a foreign state, enjoys head of state immunity from the jurisdiction of U.S. courts in light of his current status, President Kabila is entitled to immunity from the jurisdiction of this Court over this suit.

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## **C. DIPLOMATIC, CONSULAR, AND OTHER PRIVILEGES AND IMMUNITIES**

### **1. Determination under the Foreign Missions Act**

#### ***a. Closure of Seattle Consulate of the Russian Federation***

By Foreign Missions Act determination dated April 19, 2018, the State Department restricted entry or access to 3726 East Madison Street, Seattle, Washington, effective April 24, 2018. The determination was made pursuant to section 204(b) of the Foreign Missions Act (22 U.S.C. § 4304(b)). 83 Fed. Reg. 19,393 (May 2, 2018). The location had served as a consulate for the Government of the Russian Federation. As discussed in Chapter 9, the closure of the Seattle consulate was one of several U.S. measures taken to hold Russia accountable for destabilizing actions it has taken in other countries, including the use of a nerve agent on a British citizen and his daughter.

As discussed in *Digest 2016* at 462-63, and *Digest 2017* at 456-59, the State Department previously restricted entry or access to other Russian facilities in the United States in response to Russia's interference in the 2016 U.S. election and a pattern of harassment of U.S. diplomats overseas and to achieve parity in the number of consulates.

**b. Closure of PLO office**

See Chapter 17 for discussion of the U.S. determination under, among other authorities, the Foreign Missions Act, that the Office of the General Delegation of the Palestine Liberation Organization located in Washington, D.C., must cease all public operations.

**2. Venezuela**

On May 23, 2018, the Department of State declared the Chargé d’Affaires of the Venezuelan embassy and the Deputy Consul General of the Venezuelan consulate in Houston *persona non grata*. See Department press statement, available at <https://www.state.gov/responding-to-unjustified-diplomatic-actions-in-venezuela/>. The action was taken pursuant to Article 9 of the Vienna Convention on Diplomatic Relations and Article 23 of the Vienna Convention on Consular Relations. The two officials were directed to leave the United States within 48 hours. The press statement provides the reason for the action:

This action is to reciprocate the Maduro regime’s decision to declare the Chargé d’Affaires and Deputy Chief of Mission of the U.S. Embassy in Caracas *persona non grata*. The accusations behind the Maduro regime’s decision are unjustified; our Embassy officers have carried out their official duties responsibly and consistent with diplomatic practice and applicable provisions of the Vienna Convention on Diplomatic Relations. We reject any suggestion to the contrary.

**3. Enhanced Consular Immunities**

As discussed in *Digest 2016* at 463, Section 501 of the Department of State Authorities Act, Fiscal Year 2017, P.L. 114-323, codified at 22 U.S.C. §254c, amended the Diplomatic Relations Act (22 U.S.C. §254c) to include permanent authority for the Secretary of State to extend enhanced privileges and immunities to consular posts and their personnel. See also *Digest 2015* at 436-37.

The “Agreement Between the United States of America and the Portuguese Republic Regarding Consular Privileges and Immunities,” signed on December 14, 2017, entered into force on October 4, 2018. Under that agreement the United States and Portugal reciprocally extend enhanced protections for consular posts, consular officers and consular employees and their family members. The agreement entered into force after an exchange of diplomatic notes between the parties, informing each other that they had completed internal procedures for entry into force. The exchange of notes and the full text of the Agreement are available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

#### 4. Protection of Diplomatic and Consular Missions and Representatives

On October 18, 2018, Julian Simcock, Deputy Legal Adviser for the U.S. Mission to the United Nations, delivered remarks at a meeting of the Sixth Committee on “Consideration of Effective Measures to Enhance the Protection, Security, and Safety of Diplomatic and Consular Missions and Representatives.” Mr. Simcock’s remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-84-consideration-of-effective-measures-to-enhance-the-protection-security-and-safety-of-diplomatic-and-consular-missions-and-representative/>.

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It is essential for the normal conduct of relations among states that the rules protecting the sanctity of ambassadors, other diplomats, and consular officials are respected. These rules enable such officials to carry out their vital functions.

It is also crucial to protect diplomats from harmful acts by non-state actors. In recent years, we have seen increasing attacks on diplomatic and consular officials, and more often, such attacks have involved non-state armed groups and have become more brazen. In October 2017, a fourteen-year-old suicide bomber detonated a vest inside Kabul’s International zone on a busy public street, approximately 425 meters from the U.S. Embassy. Several people were killed, including a contractor working for the U.S. government. ISIS-K claimed responsibility for the attack. In 2016, U.S. embassy and consulate facilities faced attacks, shots, or blast from improvised explosive devices in Yemen, Turkey, Pakistan, Bangladesh, and Haiti, among other places. There have been a number of other attacks on our facilities and personnel around the world. The United States is, of course, not alone in this regard. We must be unequivocal in universally condemning such brutal acts by armed groups.

As the nature and circumstances of attacks on diplomatic and consular personnel have evolved, so too must our preventive and protective measures. Any steps that are necessary and appropriate to protect a mission, and thus that would be required of the receiving state, will depend on the potential threats to a particular mission in that state. The United States seeks to ensure that all U.S. diplomats and consular officials benefit from enhanced security training and good personal security practices to help mitigate the risks our personnel face every day. Moreover, we rely on the collaboration of our partners in the receiving state to facilitate such protection and prevention. Thus, our missions overseas often work with local law enforcement and other authorities to prepare for eventualities, for instance by conducting drills and sharing information when appropriate.

Mr. Chairman, we appreciate the opportunity that this discussion affords to reemphasize the importance of these issues. The international community has a vital stake in the protection of diplomats, because diplomacy is the foundation of international relations. We must stand together, united against those forces in this world that wish harm to our diplomats. This partnership is strengthened by continuing to develop means to prevent violence before it occurs and responding to it as appropriate.

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**D. INTERNATIONAL ORGANIZATIONS****1. International Organizations Immunities Act: *Jam v. IFC***

On July 31, 2018, the United States filed a brief as amicus curiae in the U.S. Supreme Court in a case involving the International Organizations Immunities Act (“IOIA”). *Jam v. Int’l Finance Corp.*, No. 17-1011. Excerpts follow from the U.S. amicus brief.\*\*\*

\* \* \* \*

The United States’ participation in international organizations is a critical component of the Nation’s foreign relations and reflects an understanding that robust multilateral engagement is a crucial tool in advancing national interests. The United States participates in or supports nearly 200 international organizations and other multilateral entities, including major international financial institutions such as the International Monetary Fund (IMF) and the World Bank. The United States contributes billions of dollars annually to those organizations and entities. In recognition of the United States’ leadership role, nearly 20 international organizations are headquartered in the United States, and many others have offices here. For these reasons, the United States has a substantial interest in the proper interpretation of the provisions of the International Organizations Immunities Act (IOIA or Act), 22 U.S.C. 288 *et seq.*, that define international organizations’ amenability to suit in the United States.

**STATEMENT**

1. a. Congress enacted the IOIA in 1945 to provide certain privileges and immunities to international organizations, their officers, and employees. See Pub. L. No. 79-291, 59 Stat. 669 (22 U.S.C. 288, *et seq.*). The Act defines “international organization” as “a public international organization in which the United States participates” pursuant to a treaty or an Act of Congress, and which is designated by the President in an Executive Order “as being entitled to enjoy the privileges, exemptions, and immunities” provided by the Act. 22 U.S.C. 288; see, *e.g.*, Exec. Order No. (EO) 9698, 11 Fed. Reg. 1809 (1946) (designating, among others, the United Nations and the Pan American Union). The Act then grants such international organizations the capacity to contract, to acquire and dispose of real and personal property, and to sue “to the extent consistent with the instrument creating them,” 22 U.S.C. 288a(a), as well as a series of privileges, exemptions, and immunities. See 22 U.S.C. 288a-288e.

Some of these privileges, exemptions, and immunities are provided by reference to comparable privileges, exemptions, and immunities enjoyed by foreign states. Of greatest relevance here, the Act provides:

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\*\*\* Editor’s note: On February 27, 2019, the Supreme Court issued its discussion, holding that the IOIA grants international organizations the same immunity from suit as foreign governments receive under the FSIA.

International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.

22 U.S.C. 288a(b). With respect to customs duties and taxes imposed on imported items, the registration of foreign agents, and the treatment of official communications, the IOIA likewise grants international organizations the “privileges, exemptions, and immunities \* \* \* accorded under similar circumstances to foreign governments.” 22 U.S.C. 288a(d). And the IOIA similarly affords the representatives of foreign governments to international organizations, the officers and employees of such organizations, and immediate family residing with such individuals “the same privileges, exemptions, and immunities” under immigration law “as are accorded under similar circumstances to officers and employees, respectively, of foreign governments, and members of their families.” 22 U.S.C. 288d(a).

Other privileges, exemptions, and immunities are provided without reference to those enjoyed by foreign governments. The property and assets of international organizations, for example, are “immune from search, unless such immunity [is] expressly waived, and from confiscation.” 22 U.S.C. 288a(c). Similarly, international organizations are “exempt” from all federal property taxes. 22 U.S.C. 288c. Representatives of foreign governments to international organizations, as well as officers and employees of such organizations, are “immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions,” absent waiver by the foreign government or the international organization. 22 U.S.C. 288d(b). And the “baggage and effects” of those persons and their families are admitted into the United States “free of customs duties” or importation taxes. 22 U.S.C. 288b.

Finally, the IOIA authorizes the President to “withhold or withdraw,” or to “condition or limit,” any of the privileges, exemptions, and immunities provided by the Act “in the light of the functions performed by any [designated] international organization.” 22 U.S.C. 288. It further authorizes the President to revoke an entity’s designation as an international organization if the President determines that the organization or its personnel have “abuse[d] \* \* \* the privileges, exemptions, and immunities provided [by the Act] or for any other reason.” *Ibid.*

b. When Congress enacted the IOIA in 1945, the immunity of foreign states was determined by a “two-step procedure.” *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). First, a foreign state “could request a ‘suggestion of immunity’ from the State Department.” *Ibid.* (citation omitted). “If the request was granted, the district court surrendered its jurisdiction.” *Ibid.* Second, if the State Department did not inform the court of its views concerning the foreign state’s immunity, the court “had authority to decide for itself whether all the requisites for such immunity existed,” *i.e.*, “whether the ground of immunity is one which it is the established policy of the [State Department] to recognize.” *Id.* at 311-312 (citations omitted).

\* \* \* \*

c. Congress subsequently enacted the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, codifying, “as a matter of federal law, the restrictive theory of sovereign immunity.” *Verlinden*, 461 U.S. at 488. The FSIA now provides the sole basis for obtaining jurisdiction over a foreign state in a civil case brought in a U.S. court. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 (1989). Under the FSIA, foreign states

and their agencies and instrumentalities are immune unless a claim falls within one of the statute's specified exceptions. 28 U.S.C. 1604. The exceptions permit, *inter alia*, certain actions against a foreign state that arise out of its commercial activities, 28 U.S.C. 1605(a)(2), and certain torts committed in the United States, 28 U.S.C. 1605(a)(5).

2. a. Respondent International Finance Corporation (IFC) is an international organization established by an international agreement to which the United States is a party. See Articles of Agreement of the International Finance Corporation, *entered into force* July 20, 1956, 7 U.S.T. 2197, T.I.A.S. No. 3620 (Articles of Agreement). The IFC's purpose is "to further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas," by among other things, making investments in cases "where sufficient private capital is not available on reasonable terms." *Id.* art. I, I(i). The Articles of Agreement provide that "[a]ctions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office" or other specified connection. *Id.* art. VI, § 3. Actions "brought by members" of the IFC "or persons acting for or deriving claims from members" are prohibited. *Ibid.* The Articles of Agreement further provide for the immunity of IFC property from "seizure, attachment or execution before the delivery of final judgment against Corporation." *Ibid.*

Shortly after the United States signed the Articles of Agreement, Congress enacted the International Finance Corporation Act, authorizing the President "to accept membership for the United States" in the IFC. Pub. L. No. 84-350, § 2, 69 Stat. 669 (1955) (22 U.S.C. 282). The statute also provides for original jurisdiction in United States district courts over any suit brought against the IFC "in accordance with the Articles of Agreement." *Id.* § 8 (22 U.S.C. 282f). And it provides "full force and effect in the United States" to, among other provisions, article VI, § 3 of the Articles of Agreement, relating to the IFC's amenability to suit. *Id.* § 9 (22 U.S.C. 282g). The President subsequently designated the IFC as an international organization "entitled to enjoy the privileges, exemptions, and immunities conferred by" the IOIA. EO 10,680, 21 Fed. Reg. 7647 (1956).

b. Petitioners are residents of India who live near the Tata Mundra Power Plant in Gujarat. Pet. App. 2a. The IFC provided a loan of \$450 million to the owner of the plant for its construction and operation. *Id.* at 3a. In accordance with IFC policy, the loan agreement contained provisions designed to protect local communities, requiring the loan recipient to manage environmental and social risks posed by the financed project. *Id.* at 3a, 25a. The IFC retained supervisory authority over the plant owner's compliance with the environmental and social risks provisions and could revoke financial support for noncompliance. *Id.* at 3a. According to an audit conducted by the IFC's ombudsman, the owner of the plant did not comply with the environmental and social risks provisions; the IFC, however, did not revoke the plant's financing. *Ibid.*

Petitioners sued the IFC, asserting claims that "are almost entirely based on tort," but raising one claim as alleged third-party beneficiaries of the environmental and social risks provisions of the loan agreement. Pet. App. 3a. The district court dismissed petitioners' suit, concluding that it was barred by the court of appeals' decision in *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335 (D.C. Cir. 1998). Pet. App. 29a-30a, 37a-38a.

In *Atkinson*, the court of appeals held that, in providing international organizations with the "same immunity \* \* \* as is enjoyed by foreign governments," 22 U.S.C. 288a(b), Congress intended to adopt foreign sovereign immunity law "only as it existed in 1945— when immunity of foreign sovereigns was absolute." 156 F.3d at 1341. The court reasoned that the statutory text

lacked “a clear instruction as to whether Congress meant to incorporate into the IOIA subsequent changes to the law of immunity of foreign sovereigns.” *Ibid.* But it believed that by authorizing the President to modify a designated organization’s immunities for abuse or other reasons under 22 U.S.C. 288, Congress “delegate[d] to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances.” *Atkinson*, 156 F.3d at 1341. The court also found telling a statement in the Senate Report explaining that the President could restrict an international organization’s immunity if it engaged in “activities of a commercial nature.” *Ibid.* (quoting S. Rep. No. 861, 79th Cong., 1st Sess., 2 (1945) (Senate Report)).

Noting that it was bound by *Atkinson*’s interpretation, the court of appeals in this case affirmed the district court’s dismissal of petitioners’ suit. Pet. App. 4a- 7a.2 Judge Pillard concurred for the same reason, but wrote separately to express the view that *Atkinson* was wrongly decided. *Id.* at 12a-22a. Judge Pillard reasoned that “[w]hen a statute incorporates existing law by reference, the incorporation is generally treated as dynamic, not static,” and incorporates changes to the incorporated body of law. *Id.* at 12a-13a. She concluded that *Atkinson* was mistaken in relying on the President’s ability under the IOIA to restrict international organizations’ immunity, because, in her view, that authority is “organization- and function-specific” and does not authorize the President generally to modify the applicable standard. *Id.* at 13a-14a. And she noted that Congress had considered and rejected a provision that would have expressly granted absolute immunity to international organizations. *Id.* at 14a-15a (discussing H.R. 4489, 79th Cong., 1st Sess. § 2(b)). Judge Pillard further explained that *Atkinson*’s static interpretation conflicted with the “considered view” of the State Department that international organizations are subject to suit for commercial activities by virtue of the FSIA’s enactment. *Id.* at 15a. Finally, Judge Pillard stated that it made no sense to permit commercial suits against a foreign state acting alone, but not when states act in concert through an international organization. *Id.* at 16a.

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## ARGUMENT

### THE INTERNATIONAL ORGANIZATIONS IMMUNITIES ACT AFFORDS DESIGNATED INTERNATIONAL ORGANIZATIONS THE SAME JURISDICTIONAL IMMUNITY AS IS CURRENTLY ENJOYED BY FOREIGN STATES

The IOIA provides that international organizations “enjoy the same immunity from suit \* \* \* as is enjoyed by foreign governments.” 22 U.S.C. 288a(b). The text, structure, and history of the Act, as well as Executive Branch practice and related congressional enactments, all confirm that the jurisdictional immunity afforded by the Act is the jurisdictional immunity currently enjoyed by foreign states and as it might be modified over time, not as it existed when the Act was enacted in 1945. The court of appeals’ contrary determination is incorrect, would present practical difficulties for federal courts, and is not justified by the policy concerns that respondents invoke.

#### **A. The Text, Structure, And History Of The IOIA Support Application Of The Same Immunity Enjoyed By Foreign States To International Organizations**

1. In construing Section 288a(b), this Court should “begin, as always, with the text of the statute.” *Permanent Mission of India to the U.N. v. City of N.Y.*, 551 U.S. 193, 197 (2007). Section 288a(b) provides simply that “[i]nternational organizations \* \* \* shall enjoy the same

immunity from suit and every form of judicial process as is enjoyed by foreign governments.” 22 U.S.C. 288a(b). On its face, the plain text of this provision strongly suggests that the Act affords international organizations the immunity that is enjoyed by foreign governments today, not the immunity enjoyed by foreign governments in 1945.

a. To begin, Congress’s use of the present tense—“as is enjoyed”—supports that interpretation. . . . Here, because Section 288a employs the present tense to make the comparison to foreign sovereign immunity, the statute is most naturally read to refer to the immunity granted to foreign sovereigns at the time that the statute is applied, not some 70 years in the past. “Congress could have phrased its requirement in language that looked to the past”—here, by referring to a foreign government’s immunity on the IOIA’s enactment date—“but it did not choose this readily available option.” *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987). “[R]espect for Congress’s prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of [the Court’s] own.” *Murphy v. Smith*, 138 S. Ct. 784, 788 (2018).

b. Congress’s choice of words is particularly instructive here, in light of background principles of statutory interpretation for references of this sort. As one prominent treatise explains, “[w]hen a statute adopts the general law on a given subject, the reference is construed to mean that the law is as it reads thereafter at any given time including amendments subsequent to the time of adoption.” 2B Norman J. Singer, et al., *Sutherland Statutes & Statutory Construction* § 51:7 (7th ed. rev. 2012) (citation omitted); see, e.g., *El Encanto, Inc. v. Hatch Chile Co.*, 825 F.3d 1161, 1164 (10th Cir. 2016); *United States v. Rodriguez-Rodriguez*, 863 F.2d 830, 831 (11th Cir. 1989); cf. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 7, at 90 (2012) (“A legal text referring to a statutorily defined term is understood to have a silent gloss, ‘as the definition may be amended from time to time.’”).

This proposition well pre-dates the IOIA’s enactment. See 2 J.G. Sutherland, *Sutherland Statutes & Statutory Construction* § 405, at 789 (John Lewis ed. 1904) (citing, e.g., *Culver v. People*, 43 N.E. 812, 814 (Ill. 1896)). And it reaffirms the most natural reading of the text. See *Gaston v. Lamkin*, 21 S.W. 1100, 1103 (Mo. 1893) (describing the typical statute to which this principle applies as one that refers “generally to the established law, by some such expression as ‘the same as is provided for by law’ in given cases”) (citation omitted).

2. This interpretation of Section 288a(b) is further supported by the structure of the IOIA. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (“In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”).

While Congress defined some privileges and immunities of international organizations and their officers and employees by reference to the immunity of foreign governments, it defined other privileges and immunities under a specific substantive standard. Compare 22 U.S.C. 288a(b) and (d), 288d, with 22 U.S.C. 288a(c), 288c, and 288d(b); see pp. 2-4, *supra*. This distinction suggests that, if Congress had intended to adopt a particular fixed standard for international organizations’ immunity from suit, it would have done so expressly. See *Sebelius v. Cloer*, 133 S. Ct. 1886, 1894 (2013) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (citation omitted).

That is especially so here, given that in the international community at the time of the IOIA's enactment, there were "two conflicting concepts of sovereign immunity, each widely held and firmly established." *Tate Letter*, 425 U.S. at 711. Although the State Department still subscribed to the absolute theory of immunity in 1945, international consensus had been trending towards the restrictive theory. *Id.* at 712-713. And, when the State Department formally adopted the restrictive theory just seven years later, it explained that it had been considering the change "for some time." *Id.* at 711; pp. 4-6, *supra*; see *Leo Sheep Co. v. United States*, 440 U.S. 668, 669 (1979) ("[C]ourts, in construing a statute, may with propriety recur to the history of the times when it was passed \* \* \* to ascertain the reason as well as the meaning of particular provisions in it.") (citation omitted).

In fact, in suits filed not directly against foreign sovereigns, but instead in *in rem* suits against foreign state-owned merchant vessels, the State Department by 1945 had declined to recognize immunity. *The Pesaro*, for example, was an admiralty suit brought against an Italian state-owned vessel operated by employees of a government ministry "engaged in commercial trade carrying passengers and goods for hire." 277 F. 473, 473-474 (S.D.N.Y. 1921). The State Department informed the court that "government-owned merchant vessels" or privately owned vessels requisitioned by foreign states and "employed in commerce" are not "entitled to the immunities accorded public vessels of war." *Id.* at 479 n.3; 3 see 2 Green Haywood Hackworth, *Digest of International Law* § 173, at 438-439 (1941) (reproducing letter from Fred K. Nielsen, Solicitor for Department of State, to Julian W. Mack, U.S. District Judge (Aug. 2, 1921)); see also *id.* at 423-465 (discussing State Department practice between 1914 and 1938 concerning immunity of state-owned merchant vessels).

Then, just months before Congress enacted the IOIA, this Court deferred to the State Department's decision to refrain from suggesting immunity for a vessel that was owned by the Republic of Mexico, but in the possession of a private corporation that had contracted with Mexico to use the vessel for commercial purposes, with a share of the profits paid to Mexico. *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945). The State Department "certified that it recognize[d]" Mexico's ownership, but "refrained from certifying that it allow[ed] the immunity." *Id.* at 36. Relying heavily on the State Department's statement, the Court held that the suit could proceed. *Id.* at 38; see *ibid.* ("[I]t is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize.").

When the State Department adopted the restrictive theory in 1952, it noted "the importance played by cases involving public vessels in the field of sovereign immunity." *Tate Letter*, 425 U.S. at 713; see, e.g., *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) (noting that "[a]lthough the narrow holding of *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) was only that the courts of the United States lack jurisdiction over an armed ship of a foreign state found in our port, that opinion came to be regarded as extending virtually absolute immunity to foreign sovereigns"). In light of the State Department's own practice in such cases leading up to enactment of the IOIA, developments in foreign sovereign immunity law could be expected. Congress therefore would have had reason to directly enact a standard of absolute immunity for international organizations, if that is what it sought to afford regardless of any future developments in the law.

3. Finally, the drafting history of the IOIA also supports an interpretation of Section 288a(b) that ties an international organization's jurisdictional immunity to that accorded foreign states at the time of suit.

a. As originally passed by the House of Representatives, what is now Section 288a(b) expressly defined the immunity standard for international organizations. The bill provided: "International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy immunity from suit and every form of judicial process [unless waived]." H.R. 4489, 79th Cong. § 2(b) (passed by the House of Representatives, Nov. 20, 1945); see 91 Cong. Rec. 10,867 (1945). If the House's version had been enacted, there could be no question that such organizations would be entitled to absolute immunity from suit, regardless of any departure from such immunity for foreign governments. But, of course, that did not occur. Instead, the Senate amended Section 288a(b), stripping the grant of absolute immunity and replacing it with a reference to "the same immunity \* \* \* as is enjoyed by foreign governments." H.R. 4489, 79th Cong. § 2(b) (passed by the Senate, Dec. 20, 1945); see 91 Cong. Rec. 12,432 (1945). The House accepted the Senate amendment without objection. 91 Cong. Rec. 12,532 (1945).

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–443 (1987); accord *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001). There is no sound basis for departing from that principle here.

b. Indeed, other aspects of the legislative history confirm the significance of that change. By contrast to Section 288a(b), the Senate left unchanged other provisions that expressly define certain privileges and immunities. Compare H.R. 4489, 79th Cong. §§ 2(c), 3, 6, and 7(b) (passed by the House, Nov. 20 1945), with IOIA §§ 2(c), 3, 6, and 7(b), 59 Stat. 669, 671, 672; see Pet. App. 14a-15a (Pillard, J., concurring) (noting comparison). The Senate Report explained that, "[i]n general," the amended bill would provide "privileges and immunities \* \* \* similar to those granted by the United States to foreign governments and their officials," except that, in some circumstances, it would confer "somewhat more limited" protections. Senate Report 3. The examples of the more limited privileges and immunities identified by the Senate Report are those for which Congress expressly identified the applicable standard. *Ibid*.

The Senate Report thus reflects Congress's intent that international organizations' immunity track the immunity of foreign states, except where Congress specified a lower standard. See also 91 Cong. Rec. at 12,531 (explaining that "all of th[e Senate's] amendments limited provisions that were unanimously passed by the House"). Nothing in the legislative history suggests that Congress intended for international organizations to have greater immunity than that enjoyed by foreign states, as would be the case under the court of appeals' view.

4. Despite the text, structure, and history of Section 288a(b), the court of appeals reiterated its conclusion from *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335 (1998), that Section 288a grants international organizations "complete immunity" from suit, "unless it is waived or the President intervene[s]." Pet. App. 6a. For that conclusion, the *Atkinson* court relied on two observations, neither of which supports its interpretation of Section 288a(b). See 156 F.3d at 1341.

a. First, the *Atkinson* court reasoned that, in authorizing the President to “modify, condition, limit, and even revoke” what the court believed was “the otherwise absolute immunity of a designated organization,” Congress created “an explicit mechanism for monitoring the immunities of designated international organizations.” 156 F.3d at 1341 (citing 22 U.S.C. 288). According to the court, Congress’s choice “to delegate to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances” is incompatible with the view that Congress intended international organizations’ immunity to track developments in foreign sovereign immunity. *Ibid.* The court of appeals erred.

The IOIA authorizes the President to restrict the immunities provided to international organizations in two ways: (1) it gives the President authority to “revoke the designation of any international organization” if the President determines that the international organization has “abuse[d]” the privileges, exemptions, or immunities conferred by the IOIA or “for any other reason”; and (2) it permits the President “to withhold or withdraw from any [international] organization or its officers or employees any of the privileges, exemptions, and immunities provided for” by the IOIA, or to “condition or limit” such protections, “in the light of the functions performed by any such international organization.” 22 U.S.C. 288.

The statutory authority to revoke a specific organization’s status for abuse or other reason does not address the immunity standard applicable to international organizations generally. And the authority to modify the immunities afforded to “any such organizations or its officers or employees,” “in light of the functions performed by any such organization,” is not inconsistent with the prospect that the immunity afforded international organizations, as a class, may be altered through other means. As Judge Pillard observed (Pet. App. 13a), the President’s authority under Section 288 is most naturally read as focusing on the need for discretion to adjust a *specific* organization’s immunity, if the extension of the full immunities provided by the statute would be inappropriate in light of the *specific* purposes of the organization. Indeed, that is how the President has exercised his Section 288 authority in the past. But assuming that Section 288 would also permit the President to modify certain immunities afforded to international organizations on a more categorical basis, the provision’s focus on the functions performed and immunities enjoyed by specific organizations does not suggest that Section 288 was intended to exclude all other means—including future legislation—of broadly altering the immunity principles applicable to foreign governments and therefore to international organizations generally.

b. Second, the *Atkinson* court found support for its reading of Section 288a(b) in a passage from the Senate Report observing that the authority given to the President in Section 288 would permit “the adjustment or limitation of the privileges in the event that any international organization should engage, for example, in activities of a commercial nature.” 156 F.3d at 1341 (quoting Senate Report 2). In the court’s view, that reference indicated that the “concerns that motivated the State Department to adopt the restrictive immunity approach” in the *Tate Letter* “(and Congress to codify those principles in the FSIA in 1976) were apparently taken into account by the 1945 Congress.” *Ibid.*

The court’s reading of the legislative history, however, is mistaken. The Senate Report was responding to a concern that particular organizations might abuse the immunities provided by the bill. As Representative Robertson explained, the amendment ensured that, “if some organization starts functioning here and goes beyond the scope for which it was created, let us say [it] starts into business over here,” Section 288 would allow the President to appropriately respond. 91 Cong. Rec. at 12,530; see *ibid.* (noting the “very hypothetical case” that a foreign

representative to the United Nations “would open up a shipping business”); see also 91 Cong. Rec. at 12,432 (explaining that the Senate’s amendments, including authorizing the President to withdraw immunities, were for the “purpose of safeguarding against the possibility of abuse of privilege”). The legislative history does not suggest that Section 288a was intended to lock in the scope of immunity that organizations received as a general matter.

Moreover, even if Congress did expect Section 288 to provide the President a mechanism for adjusting the privileges and immunities of all international organizations in the event such organizations began to be formed with the purpose of participating in commercial activities, that would not support the court of appeals’ interpretation of Section 288a(b). As discussed above, there is no indication from the text or legislative history that Congress intended Section 288 to provide the *sole* mechanism for addressing such developments. In any event, preventing foreign sovereigns from claiming immunity for commercial activities was not the only motivation for adopting the restrictive theory. See *Tate Letter*, 425 U.S. at 714 (noting that the restrictive theory was most consistent with the United States’ “subjecting itself to suit in [U.S.] courts in both contract and tort”); 28 U.S.C. 1605(a)(1)-(6) (providing exceptions to jurisdictional immunity unrelated to commercial activities, *e.g.*, for certain domestic torts).

### **B. The Conduct Of The Political Branches Following Enactment Of The IOIA Supports Affording International Organizations The Jurisdictional Immunity Currently Enjoyed By Foreign Sovereigns**

The conduct of the Executive Branch under the IOIA and subsequent congressional enactments further support the view that the standard set out in Section 288a(b) follows changes in foreign sovereign immunity law. See *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 385-386 (2000) (while this Court “do[es] not unquestioningly defer to the legal judgments expressed in Executive Branch statements when” interpreting a federal statute, it has “consistently acknowledged that the ‘nuances’ of ‘the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court’ ”) (citation omitted).

1. The cooperative process followed by the Executive Branch and Congress in recognizing immunity for international organizations demonstrates that the political Branches have long followed this interpretation of the immunities afforded by Section 288a(b). The privileges and immunities in the IOIA are typically provided to international organizations through a three-part process. The Executive Branch enters into an agreement with one or more foreign governments to form an international organization. See, *e.g.*, Articles of Agreement of the International Development Association, *entered into force*, Sept. 24, 1960, 11 U.S.T. 2284, T.I.A.S. No. 4607. Congress (or the Senate through its consent to a treaty) authorizes participation by the United States in the international organization. See, *e.g.*, 22 U.S.C. 284 (authorizing the President “to accept membership” in the International Development Association). And the President issues an Executive Order recognizing the organization as an international organization within the meaning of the IOIA, entitled to the protections that Act affords. See, *e.g.*, EO 11,966, 42 Fed. Reg. 4331 (1977) (designating the International Development Association as a “public international organization entitled to enjoy the privileges, exemptions, and immunities conferred by the [IOIA]”).

Some agreements creating international organizations, however, require the member states to afford the organization specific immunities beyond those expressly provided by the IOIA. The agreement establishing the World Trade Organization (WTO), for example, requires member states to afford it absolute immunity from suit in their courts, unless waived by the

WTO. See Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), art. VIII(4), *entered into force* Jan. 1, 1995, 1867 U.N.T.S. 154 (requiring members to provide the privileges and immunities provided by the Convention on the Privileges and Immunities of the Specialized Agencies (Specialized Agencies Convention), *entered into force* Dec. 2, 1948, 33 U.N.T.S. 261); Specialized Agencies Convention, art. III, § 4 (affording UN specialized agencies “immunity from every form of legal process,” unless waived).

For such organizations, mere designation under the IOIA would not fulfill the United States’ international commitment precisely because the IOIA does not confer absolute immunity from suit. In those circumstances, where the agreement was not a self-executing treaty, Congress has either (1) authorized the President to implement the immunity provisions in the applicable agreement, see, *e.g.*, 19 U.S.C. 3511(b) (authorizing the President to implement the WTO Agreement’s immunity provisions); or (2) provided such immunity by separate legislation, see, *e.g.*, 22 U.S.C. 286h (giving “full force and effect in the United States” to immunity provisions of the Articles of Agreement of the IMF, *entered into force* Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39).

Such legislation ensures that, notwithstanding the United States’ adoption of the restrictive theory or any future developments in foreign sovereign immunity, the United States fulfills its obligations to the international organization. But, under the court of appeals’ interpretation of Section 288a, such legislation would be redundant.

2. The provision of privileges and immunities for the Organization of American States (OAS) is similarly instructive. The OAS was formed in 1951 in its current structure through a multilateral treaty that provided that the organization would enjoy “such legal capacity, privileges and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes.” Charter of the Organization of American States, art. 103, *entered into force*, Dec. 13, 1951, 2 U.S.T. 2394, T.I.A.S. No. 2361. After the Charter was ratified by the United States, the President designated the OAS as an international organization “entitled to enjoy the privileges, exemptions, and immunities conferred by the [IOIA].” EO 10,533, 19 Fed. Reg. 3289 (1954).

Forty years later, the United States agreed to afford the OAS more extensive immunity. In 1994, the Senate gave its advice and consent to the ratification of the Headquarters Agreement Between the Government of the United States of America and the Organization of American States, *signed at Washington* May 14, 1992, S. Treaty Doc. No. 40, 102d Cong., 2d Sess. (1992); 140 Cong. Rec. 28,361 (1994). In contrast to the OAS Charter, the Headquarters Agreement provides the OAS with absolute immunity from suit. See art. IV, § 1 (“The Organization shall enjoy immunity from suit and every form of judicial process [absent waiver].”).

Because the Headquarters Agreement was self-executing, see S. Treaty Doc. No. 40, at III, no Act of Congress was needed to afford the OAS the absolute immunity it now required. But in submitting the Headquarters Agreement to the President, the State Department made clear that by affording the OAS “full immunity from judicial process,” the agreement went “beyond the usual United States practice of affording restrictive immunity,” “[i]n exchange” for requiring the organization to “make provision for appropriate modes of settlement of those disputes for which jurisdiction would exist against a foreign government under the Foreign Sovereign Immunities Act.” *Id.* at VI.

3. Indeed, the State Department has repeatedly expressed the same view about the scope of jurisdictional immunity afforded to international organizations under the IOIA since the United States' adoption of the restrictive theory of foreign sovereign immunity. See Letter from Roberts B. Owen, Legal Adviser, to Leroy D. Clark, Gen. Counsel, Equal Emp't Opportunity Comm'n 2 (June 24, 1980) ("By virtue of the FSIA, and unless otherwise specified in their constitutive agreements, international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities, while retaining immunity for their acts of a public character."); Letter from Detlev F. Vagts, Office of the Legal Adviser, to Robert M. Carswell, Jr., OAS 2 (Mar. 24, 1977) (*Vagts Letter*) (stating that the IOIA "links" the jurisdictional immunity of international organizations and that of foreign sovereigns), available at D. Ct. Doc. No. 22-7, at 41-42 (Sept. 18, 2015); Pet. Br. 8-9 (collecting additional Executive Branch statements).

This longstanding interpretation—evinced by actions of both political Branches—of the privileges and immunities afforded by the IOIA in order to fulfill the United States' international obligations deserves deference.

### **C. The Court of Appeals' View Of International Organization Immunity Would Present Practical Problems And Is Not Required By Respondent's Policy Concerns**

Adopting the court of appeals' view of the jurisdictional immunities afforded international organizations under Section 288a(b) would present practical difficulties and is not justified by the policy concerns asserted by respondent.

1. As an initial matter, if Section 288a(b) were interpreted to incorporate the law of foreign sovereign immunity as it existed in 1945, courts would then need to decide whether Congress intended to incorporate the substantive rules of foreign sovereign immunity applicable in 1945 or the procedural ones. As noted above, in 1945, federal courts followed a "two-step procedure" for determining the immunity of a foreign state from a particular suit. *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). The foreign state first could ask the State Department for a "suggestion of immunity." *Ibid.* (citation omitted). If the State Department obliged, "the district court surrendered its jurisdiction." *Ibid.* Otherwise, the court would generally "decide for itself whether all the requisites for such immunity existed," applying the "established policy" of the State Department. *Id.* at 311-312 (citation omitted).

The court of appeals and respondent have both assumed that, if Section 288a(b) incorporates foreign sovereign immunity law as it existed in 1945, it incorporates only the *substantive* standards—the then—"established policy," *Samantar*, 560 U.S. at 312, of the State Department—not the two-step procedure. See *Atkinson*, 156 F.3d at 1341; Br. in Opp. 14. But neither the court nor respondent explains why that would be so. See *Vagts Letter* 1 (indicating that the State Department initially filed suggestions of immunity for international organizations following the enactment of the IOIA).

Moreover, even if the static view of Section 288a(b) would incorporate only the substantive standards that prevailed in 1945, there could remain some uncertainty in determining the contours. Section 288a(b) affords "international organizations, their property and their assets \* \* \* the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. 288a. Although the State Department generally afforded "virtually absolute immunity" from suit to foreign governments in 1945, *Verlinden*, 461 U.S. at 486, there was some uncertainty regarding the immunity of state-owned merchant vessels. Compare *The Pesaro*, 277 F. at 479 n.3 (noting the State Department's view that no immunity should be provided "government-owned merchant vessels \* \* \* employed in commerce"), with *Berizzi*

*Bros. Co. v. Steamship Pesaro*, 271 U.S. 562, 570 (1926) (affording immunity to the same ship, despite the State Department's views); cf. *Hoffman*, 324 U.S. at 35 n.1 (criticizing without expressly overruling *Berizzi Bros.*). And the State Department had also expressed the view that "agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoyed no privileges or immunities not appertaining to other foreign corporations, agencies, or individuals doing business here." *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 200 (S.D.N.Y. 1929).

Under the court of appeals' view, courts would therefore have to determine any disputed metes and bounds of foreign sovereign immunity, as they existed in the policies of the State Department and in federal courts some 70 years in the past—and perhaps in circumstances that neither ever faced or that did not closely fit the situation of a particular international organization. Cf. *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004) (refusing to adopt an interpretation of the FSIA that would require courts, in some cases, "to follow the same ambiguous and politically charged standards that the FSIA replaced") (internal quotation marks and citation omitted).

2. In their response to the certiorari petition, respondent raised policy concerns about an interpretation of Section 288a(b) under which an international organization's immunity would conform to that of a foreign state at the time of suit. "The role of this Court," however, "is to apply the statute as it is written," regardless whether it thinks "some other approach might 'accor[d] with good policy.'" *Burrage v. United States*, 571 U.S. 204, 218 (2014) (citation omitted; brackets in original). In any event, respondent's concerns are misplaced.

a. Respondent contends that such an interpretation would be "inconsistent with the principles animating international-organization immunity," which, respondent suggests, include that an individual member "ought not be able to exercise power, through its national courts, over the execution of the Organization's functions" that are "determined \* \* \* collectively." Br. in Opp. 22 (citation omitted). But when member states determine that the functions of an international organization require a particular level of immunity, they are free to specify as much in the agreement establishing the organization—and they have done so. See pp. 25-28, *supra*; see also, e.g., Agreement Establishing the Asian Development Bank, art. 50, *entered into force* Aug. 22, 1996, 17 U.S.T. 1418, T.I.A.S. No. 6103 (providing Asian Development Bank "immunity from every form of legal process, except in cases arising out of or in connexion with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities"); 22 U.S.C. 285g (giving "full force and effect" to Article 50 "in the United States"). The scope of the immunity afforded by the IOIA will have no effect on the United States' fulfillment of these international obligations. See *Bzrak v. United Nations*, 597 F.3d 107, 112 (2d Cir.) (declining to determine the scope of immunity afforded the United Nations under the IOIA, because the Convention on Privileges and Immunities of the United Nations, *entered into force* Apr. 29, 1970, 21 U.S.T. 1418, T.I.A.S. No. 6900, directly granted the UN absolute immunity), cert. denied, 562 U.S. 948 (2010).

b. Respondent also expresses concern (Br. in Opp. 22) that, under the restrictive theory of immunity, "nearly all of the[] activities" of some international organizations might be subject to lawsuits in U.S. courts. But the FSIA's commercial-activity exception is not an authorization of just any commercial suit. Rather, it imposes a number of requirements including, for example, that the action be "based upon a commercial activity carried on *in the United States*," 28 U.S.C. 1605(a)(2) (emphasis added). This Court has construed that language to permit suit only when the "particular conduct" that constitutes the 'gravamen' of the suit" is commercial activity

occurring in the United States. *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015) (citation omitted). When the gravamen of a complaint is conduct that was either not of a commercial nature or occurred abroad, the commercial-activity exception does not apply, even if the suit is otherwise related to the defendant’s domestic commercial activities. *Id.* at 396-397. Incorporating the FSIA standard of immunity for international organizations is therefore unlikely to open the floodgates of litigation, even against international organizations, like the IFC, that “focus on financial transactions.” Br. in Opp. 22.

Moreover, international organizations can further reduce their exposure to litigation in other ways by, for example, clarifying whether commercial agreements are intended to create third-party-beneficiary rights. Cf. Pet. App. 9a & n.4 (noting that petitioners raise a “third party beneficiary claim” based on environmental and social risks provisions in the loan agreement). Other defenses, such as *forum non conveniens*, may also be available. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

In any event, there is no indication that, when Congress enacted the IOIA, such policy concerns led it to provide international organizations greater immunity from suit than that conferred on foreign states. To the contrary, the legislative history is replete with statements reflecting a commitment to put international organizations’ immunity on par with that afforded to foreign sovereigns. See, e.g., Senate Report 1 (“The basic purpose of this title is to confer upon international organizations \* \* \* privileges and immunities of a governmental nature.”); *id.* at 2 (“[I]n cases where th[e] Government associates itself with one or more foreign governments in an international organization, there exists at the present time no law \* \* \* extend[ing] privileges of a governmental character.”); *id.* at 4 (Section 288a extends to international organizations the privileges and immunities “accorded foreign governments under similar circumstances”). And Congress enacted text precisely crafted to that purpose. Foreign governments engaged in commercial activities within the United States are subject to suit in U.S. courts. 28 U.S.C. 1605(a)(2). That the IOIA leaves respondent also subject to suit in similar circumstances is consistent with Congress’s judgment in Section 288a(b).

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## 2. *Laventure v. United Nations*

As discussed in *Digest 2017* at 462-74, in *Laventure v. UN*, No. 14-1611 (E.D.N.Y.), the United States asserted immunity for the UN and UN officials and the district court dismissed. Plaintiffs appealed to the U.S. Court of Appeals for the Second Circuit. The United States filed an amicus brief in support of affirmance on February 5, 2018. The U.S. brief is excerpted below and available in its entirety at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>. On December 28, the Second Circuit issued its opinion affirming the dismissal, concluding that “the United Nations enjoys absolute immunity from the instant suit and that the UN has not expressly waived its immunity.” *Laventure v. UN*, No. 17-2908 (2d. Cir.). The Court also reasoned that, “because we have rejected that argument [of waiver], we conclude that MINUSTAH and the individual defendants are similarly immune from this suit.” *Id.*

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The member states of the UN conferred absolute immunity on the UN in order to allow it to perform its vital missions without facing the threat of lawsuits in multiple countries; contradictory court orders issued by tribunals around the world; judicial intervention in sensitive policy and operational matters; and the diversion of resources (provided by the member states) to the burdens and expenses of litigation.

The United States has regularly asserted the absolute immunity of the UN with respect to lawsuits filed against that organization in domestic courts, and courts, including this Court, have consistently upheld the immunity of the UN and its integral component, defendant-appellee the United Nations Stabilization Mission in Haiti (“MINUSTAH”). The same is true when individual officials and employees of the UN are sued for activities performed in their official capacity, as is the case here for defendants-appellees ... Because the UN and its officials are immune from suit, this Court should affirm the district court’s judgment dismissing this action for lack of subject matter jurisdiction.

#### **STATEMENT OF THE CASE**

##### **A. International Treaty Background**

On June 26, 1945, representatives from fifty nations, including the United States, signed the Charter of the United Nations (“UN Charter”). *See* U.N. Charter, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153. ... The UN Charter further specifies that the UN “shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions” and “such privileges and immunities as are necessary for the fulfillment of its purposes.” *Id.* arts. 104, 105.

The day after the UN Charter was signed, the UN’s Preparatory Committee, consisting of one representative from each of the UN Charter signatories, began meeting to propose recommendations as to the UN’s organization and the type of “legal capacity” and “immunities” that the UN Charter conferred upon the UN. *See* Report of the Preparatory Commission of the United Nations, U.N. Doc. PC/20, at 5, Chapter VII (1945). Based on those recommendations, on February 13, 1946, the UN General Assembly adopted the Convention on the Privileges and Immunities of the United Nations (cited herein as “CPIUN” though it is sometimes referred to as the “General Convention”), Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16, *entered into force with respect to the United States* Apr. 29, 1970, 21 U.S.T. 1418.

Article II of the CPIUN addresses the UN’s property, funds, and assets.<sup>[1]</sup> Article II, Section 2 specifically provides that “[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.” CPIUN, art. II, § 2.

Article VIII of the CPIUN addresses dispute resolution procedures. Article VIII, Section 29 provides: “The United Nations shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law charter to which the United Nations is a party.” CPIUN, art. VIII, § 29.

### B. The UN's Role in Haiti

MINUSTAH was a UN peacekeeping mission established by the UN Security Council. The UN Security Council established MINUSTAH on April 30, 2004, with a mission to, *inter alia*, “ensure a secure and stable environment within which the constitutional and political process in Haiti can take place.” S.C. Res. 1542, para. 7(I)(a) (Apr. 30, 2004). On July 9, 2004, the UN and the Government of Haiti entered into the Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operation in Haiti. A86–98 (“Status of Forces Agreement” or “SOFA”). The Status of Forces Agreement explicitly provides that MINUSTAH “shall enjoy the privileges and immunities ... provided for in the [General] Convention.” SOFA para. 3 (A87). In the aftermath of the devastating earthquake in Haiti in January 2010, the UN Security Council increased MINUSTAH’s authorized force levels to 8,940 troops and 3,711 police to support the country’s recovery, reconstruction, and stability. S.C. Res. 1908 (Jan. 19, 2010). MINUSTAH’s mandate was terminated by the UN Security Council effective October 15, 2017. S.C. Res. 2350 (Apr. 13, 2017), para. 1.

### C. Prior Proceedings

The Laventures (Marie, Maggie, Sane, and Carmen) are Haitian or United States citizens who allege that their parents died in the cholera epidemic that broke out in Haiti in 2010, killing approximately 9,000 Haitians and injuring approximately 700,000 more. The Laventures and 2,641 other named plaintiffs brought this putative class action against the UN, MINUSTAH, and six current or former UN officials.

Plaintiffs allege that the UN, MINUSTAH, and UN officials negligently caused the cholera outbreak in Haiti by failing to screen Nepalese peacekeeping forces who were deployed to Haiti in October 2010, despite a known outbreak of cholera in Nepal, and by failing to use adequate sanitation for the peacekeepers, which allegedly led to the contamination of a major Haitian water supply. A158. Plaintiffs also allege that the UN failed to establish a claims commission to address third-party claims of individuals injured by the cholera epidemic, purportedly in violation of the Status of Forces Agreement and the CPIUN. A162.

The district court initially stayed this case to await this Court’s decision in *Georges v. United Nations*, No. 15-455. That case involved a similar suit brought against the UN, Secretary-General Ban, and former Under Secretary-General Mulet by victims of the Haitian cholera outbreak. See *Georges v. United Nations*, 834 F.3d 88 (2d Cir. 2016). There, as here, the plaintiffs claimed that the UN had an obligation under Section 29 of the CPIUN to create a settlement mechanism to address claims by victims of the cholera outbreak, and that the UN’s failure to do so subjected it to suit in courts of the United States. This Court rejected that challenge and affirmed the district court’s decision to dismiss the case for lack of subject matter jurisdiction. *Id.* at 98 & n.64. Nothing in the CPIUN, this Court explained, suggested that the creation of an alternative dispute resolution mechanism was a “condition precedent” to the UN’s immunity. *Id.* at 97.

\* \* \* \*

The district court dismissed this suit for lack of subject matter jurisdiction, and held that each of the defendants was entitled to immunity from this suit. As that court explained, the CPIUN by its very terms requires courts “to respect the UN’s ‘immunity from every form of legal process’ unless ‘in any particular case’ the UN ‘expressly’ waived its immunity.” ...

## ARGUMENT

### I. The District Court Correctly Dismissed This Case ...

It is well established that the UN and its subsidiary organ MINUSTAH are absolutely immune from suit in domestic courts. *See, e.g. Georges v. United Nations*, 834 F.3d 88 (2d Cir. 2016); *Brzak v. United Nations*, 597 F.3d 107, 112 (2d Cir. 2010). As the district court here appropriately determined, the Convention on the Privileges and Immunities of the United Nations grants the United Nations “immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.” CPIUN art. II, sec. 2. Appellants here have failed to allege any plausible evidence that the UN has expressly waived immunity from suit for itself or its component MINUSTAH in this case.

#### A. The UN and MINUSTAH Enjoy Absolute Immunity from Suit

Absent an express waiver, the UN is absolutely immune from suit and all legal process.

...

The United States understands the CPIUN to mean what it unambiguously says: the UN enjoys absolute immunity from “every form of legal process,” including suit and service of process, unless the UN has “expressly waived” its immunity in a “particular case.” *See Georges*, 834 F.3d at 94; *Medellin v. Texas*, 552 U.S. 491, 513 (2008) (“[T]he United States’ interpretation of a treaty is entitled to great weight.”). This immunity extends to MINUSTAH, which was a UN peacekeeping mission that reported directly to the Secretary-General and the Security Council, and was therefore an integral part of the UN. *See Emmanuel v. United States*, 253 F.3d 755, 756 (1st Cir. 2001). In addition, the Status of Forces Agreement between the UN and Haiti explicitly provides that MINUSTAH “shall enjoy the privileges and immunities ... provided for in the [UN General] Convention.” SOFA, para. 3 (A87). Accordingly, MINUSTAH is entitled to the same immunities established by the CPIUN. *See Emmanuel*, 253 F.3d at 756.

Appellants do not dispute that only an express waiver by the UN of its immunity can be effective. They have further disclaimed any argument that the UN cannot assert its immunity until it has established a binding claims-resolution process, as such an argument is squarely foreclosed by *Georges*. Instead, Appellants argue that the UN issued a general waiver of immunity for all torts arising out of peacekeeping operations. In doing so, however, the Appellants do not point to any statement by the UN or any of its constituent parts that expressly states that the organization will be subject to the legal processes of its member states, nor any statement that the UN will be liable to plaintiffs bringing claims in domestic courts arising out of peacekeeping operations in Haiti. Appellants rely chiefly on two reports of the Secretary-General from the 1990s that discuss the organization’s procedures for settling third-party claims that arise from the UN’s peacekeeping operations, and a General Assembly resolution adopting the recommendations made in those reports. These documents do not constitute an express waiver of the UN’s immunity from legal processes in courts of the United States.

The first report relied upon by Appellants, Report 51/389, dated September 20, 1996, was submitted “in response to a recommendation of the Advisory Committee on Administrative and Budgetary Questions” that the Secretary-General issue a report analyzing the UN’s “current procedures on settling third-party claims” after the issue was studied by the organization’s Legal Counsel. U.N. Doc. A/51/389, at 3 (A99– 100). As that report explained, a proper evaluation of the UN’s procedures for handling third party claims required a description of “the scope of United Nations liability...in relation to the types of damage most commonly encountered in the practice of United Nations operations.” *Id.*

In that vein, Report 51/389 began with a description of when the United Nations would be liable—though non-judicial settlement procedures—for damages occurring from its peacekeeping operations. Consistent with the fact that the report was written for the purpose of analyzing the UN’s settlement procedures, the report goes on to describe the organization’s current procedures and the problems encountered by it. And the report concludes with several proposals to change those procedures that the General Assembly might wish to consider, including creating a type of statute of limitations on claims, as well as placing a cap on payment awards for economic and non-economic losses.

Though Report 51/389 states that the UN “has, since the inception of peacekeeping operations, assumed its liability for damage caused by members of its forces in the performance of their duties,” U.N. Doc. A/51/389, at 4 (A101), nothing in the report states that the UN intends for such claims to be resolved in domestic courts. On the contrary, the report makes clear that UN-created standing claims commissions must address claims “resulting from damage caused by members of the [UN] force in the performance of their ...official duties” because such claims “could not have been submitted to local courts” “for reasons of immunity of the Organization and its Members.” *Id.*

The second report, Report 51/903, dated May 21, 1997, was issued as a supplement to Report 51/389 in response to a request by the Advisory Committee on Administrative and Budgetary Questions for the Secretary-General to make specific recommendations for implementing the proposals recommended in Report 389.<sup>11</sup> U.N. Doc. A/51/903 (A113–131). Like Report 51/389, this later report expressly recognized that the UN is immune from suit in domestic courts. *Id.* at 4 (A116). Again, this immunity was cited as the rationale for proposing the establishment of standing claims commissions to adjudicate disputes and serve “as a mechanism for the settlement of disputes of a private law character to which the United Nations peacekeeping operation or any member thereof is a party and over which the local courts *have no jurisdiction because of the immunity* of the Organization or its members.” *Id.* (emphasis added).

Accordingly, both reports, and the 1998 General Assembly resolution that adopted them, G.A. Res. 52/247 (July 17, 1998) (A132–35), are consistent with the basic principle that the UN is *not* subject to legal processes in domestic courts, and that it could only be liable through non-judicial modes of dispute resolution. The plain text of these documents simply does not subject the UN to the legal processes of courts in the United States in *any* case, and surely not to cases arising from peacekeeping operations that began decades after the documents were signed.

Appellants’ arguments to the contrary focus too narrowly on the fact that these documents use the word “liability.” According to Appellants (Br. 20–31), the mere use of this word in the Secretary-General’s reports *requires* the UN to be held accountable in any forum for damages caused by its peacekeeping operations. In making such an argument, however, Appellants entirely ignore the context of the word “liability” within those documents. As explained, the stated purpose of these reports was to “evaluate the current procedures for handling third-party claims and propose new or modified procedures that will simplify and streamline *the settlement* of claims.” U.N. Doc. A/51/389 (A101) (emphasis added). When the excerpts of the documents on which Appellants rely are read in this context, it is abundantly clear that any use of the word “liability” refers to when the UN will pay for third-party claims through internal settlement procedures or standing claims commissions, but not through domestic courts. Section II of Report 51/389, for example, details the situations in which the UN will *not* be liable to third parties through its internal settlement procedures. As that section explains, “[c]laims resulting from the operational necessity of a peacekeeping operation would thus be

excluded from the scope of competence of the standing claims commission.” *Id.* (A103–104). Similarly, Report 51/903, which supplements Report 51/389, sets forth temporal and financial limitations on claims that the UN’s procedures may consider. A117–121.

Indeed, the UN has long taken the position that it can be “liable” for tort claims without waiving its immunity from the jurisdiction of local courts. In 1965, for example, the Secretary-General described the UN’s “liability” for tort claims brought by Belgian citizens (A468) that were resolved by a payment to Belgium that was to be made “without prejudice to the privileges and immunities enjoyed by the United Nations.” A469. Despite Appellants’ claims to the contrary, nothing in either Report 51/389, Report 51/903, or General Assembly Resolution 52/247 suggests that the UN would be liable for tort claims under a judicial process. On the contrary, the documents themselves explain that the reason such procedures are necessary is because the UN and its members are immune from suit in local courts.

Appellants also suggest (Br. 38–39) that these documents’ reference to the UN’s immunity is meaningless, purportedly because they refer to this immunity in the past tense. But the UN has continued to assert its immunity long since these documents were issued, and indeed, the 2004 Status of Forces Agreement with Haiti, which was entered into well after the documents that allegedly waived the UN’s immunity, continues to assert the UN’s immunity, A96–97, and states that “[t]hird- party claims for property loss or damage and for personal injury ... which cannot be settled through the internal procedures of the United Nations,” shall be settled by a standing claims commission.

To be sure, the UN has not established a standing claims commission to resolve claims resulting from the UN’s peacekeeping operations in Haiti. This Court, however, has expressly concluded that the failure to create an adequate dispute-resolution mechanism does not constitute an express waiver of immunity. *See Brzak*, 597 F.3d at 112 (“Although the plaintiffs argue that purported inadequacies with the United Nations’ internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word ‘expressly’ out of the CPIUN.”). And this Court in *Georges* made clear that the UN’s failure to establish a standing claims commission is not a condition precedent to asserting immunity. *Georges*, 834 F.3d at 90, 97. These precedents squarely foreclose Appellants’ attempts to claim that the UN’s use of the word “liability” in the Secretary-General reports opens the organization up to the judicial processes of “any other court of competent jurisdiction” (Br. 20) simply because they have not established any “binding” settlement mechanisms.

Appellants’ arguments also ignore the requirement that waiver of immunity be made in reference to a “particular case.” CPIUN art. II, § 2. The documents on which they rely, of course, were made in the 1990s and make no reference to Appellants’ case or to the Haitian cholera outbreak generally. Appellants claim that this is irrelevant because the reports by the Secretary-General constitute an *a priori* waiver covering the circumstances of this suit, simply because the documents refer to “liability” for damages resulting from UN peacekeeping operations in a general and aspirational sense. The plain import of this argument is that the UN should therefore have been subject to suit in *every* case since the publications of these reports about standing claims commissions, with no geographic limitation. But Appellants point to no case in which any court has found that the UN has submitted itself to the court’s jurisdiction in a tort suit under *any* circumstances, let alone via an advance waiver of immunity. On the contrary, courts have consistently found the UN to have retained its immunity from tort claims, including tort claims arising out of the events in Haiti. *E.g.*, *Georges*, 834 F.3d at 98; *Brzak*, 597 F.3d at 112; *Emmanuel*, 253 F.3d at 757.

In short, there is no plausible reading of these documents that suggests that they were intended to waive the immunity of the UN and its subsidiary organ MINUSTAH and subject them to the conflicting jurisdiction of domestic courts, regardless whether, as Appellants argue, the documents use the word “liability.” As the district court correctly recognized, those documents plainly contemplate that any “liability” against the UN would be resolved through non-judicial means. SPA8.

Such a statement cannot constitute an express waiver of immunity from “any legal process” in the courts of the United States. CPIUN art. II, sec. 2.

### **B. The Individual Defendants Also Enjoy Immunity**

The district court also appropriately concluded that the individual defendants in this case are immune from suit. ...

Under Section 18(a), both current and former UN officials, regardless of rank, enjoy immunity from suit for all acts performed in their official capacity. *See Van Aggelen v. United Nations*, 311 F. App’x 407, 409 (2d Cir. 2009) (applying such immunity to a UN employee who did not enjoy diplomatic immunity). Likewise, former as well as current UN officials enjoy immunity for their official acts under the International Organizations Immunities Act, 22 U.S.C. § 288d(b). *De Luca v. United Nations*, 841 F. Supp. 531, 534 (S.D.N.Y.), *aff’d*, 41 F.3d 1502 (2d Cir. 1994). Consequently, all of the individual defendants enjoy immunity for their official acts under Section 18(a) of the CPIUN and the IOIA. The UN has not waived this immunity, and indeed, has expressly asserted these officials’ immunity in reference to this suit. ...

In addition to immunity for their official acts, Under Secretary-General Soares also enjoys diplomatic agent-level immunity. Article V, Section 19 of the CPIUN provides that, in addition to the immunities specified in Section 18, “the Secretary-General and all Assistant Secretaries-General shall be accorded...the privileges and immunities...accorded to diplomatic envoys, in accordance with international law.” CPIUN art. V, § 19.

In the United States, the privileges and immunities enjoyed by diplomats are governed by the Vienna Convention on Diplomatic Relations, which entered into force with respect to the United States on December 13, 1972. 23 U.S.T. 3227, TIAS No. 7502, 500 U.N.T.S. 95. Article 31 of the Vienna Convention provides that diplomatic agents “enjoy immunity from [the] civil and administrative jurisdiction” of the receiving State—here, the United States—except with respect to: (a) privately-owned real estate; (b) performance in a private capacity as an executor, administrator, heir, or legatee; and (c) professional or commercial activities other than official functions. None of these exceptions are at issue here. 23 U.S.T. at 3240. Accordingly, Under-Secretary Soares enjoys immunity from this suit. *See Georges*, 834 F.3d at 92, 98 n.64 (affirming dismissal of Secretary-General Ban and Assistant Secretary-General Mulet on the grounds of diplomatic immunity).

Appellants’ only argument against this immunity is that it is derivative of the UN’s immunity, which, according to Appellants, has been waived. As already explained *supra* Part I, however, the UN has not waived its immunity, or the immunity of its officials, with respect to this case.

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**Cross References**

Scalin v. SNCF, **Ch. 5.C.1.b**

Scalin v. SNCF, **Ch. 8.A**

*Libya claims litigation (Aviation and Alimanestianu)*, **Ch. 8.D.2**

*Russia*, **Ch. 9.A.5**

*Service of process on foreign government (Micula v. Romania)*, **Ch. 15.C**

*Closure of the PLO office in Washington*, **Ch. 17.A.1**

## CHAPTER 11

### Trade, Commercial Relations, Investment, and Transportation

#### A. TRANSPORTATION BY AIR

##### 1. Air Transport Agreements

Information on U.S. air transport agreements is available at <https://www.state.gov/subjects/air-transport-agreements/>. The United States signed new air transport agreements in 2018 with the Netherlands with regard to Bonaire, St. Eustatius, and Saba; Grenada; Belize; the United Kingdom; and Haiti; and agreed to amend the agreements with Jamaica and Colombia. The United States also reached important understandings with Qatar and the UAE aimed at ensuring a level playing field in the civil aviation sector, while also maintaining the “Open Skies” framework of U.S. international aviation policy.

On January 17, 2018 the United States signed a new bilateral Open Skies Agreement with the Kingdom of the Netherlands, with regard to Bonaire, St. Eustatius, and Saba (“the BES Islands”). See State Department media note, available at <https://www.state.gov/air-transport-agreement-between-the-united-states-and-the-kingdom-of-the-netherlands-in-respect-of-the-caribbean-part-of-the-netherlands-of-january-17-2018/>. As explained in the media note, the dissolution of the Netherland Antilles and the new legal status of the BES Islands as special municipalities of the Netherlands necessitated the new agreement. The media note explains further:

This Agreement replaces in part the 1998 Air Transport Agreement between the United States and the Kingdom of the Netherlands, with respect to the Netherlands Antilles. The new Agreement will enter into force soon after an exchange of diplomatic notes between United States and the Netherlands.

On January 29, 2018, the United States and Qatar reached a set of Understandings on civil aviation. See State Department media note, available at <https://www.state.gov/understandings-with-qatar-seek-level-playing-field/>. As explained in the media note:

On January 29, U.S. and Qatari delegations reached a set of Understandings to address concerns that U.S. carriers have raised with respect to government support of Qatar's flagship carrier, Qatar Airways. Anchored in our two countries' close bilateral economic and strategic relationship, the Understandings represent a set of important, high-level political commitments. They affirm both governments' intention to promote best practices for marketplace participation by their airlines providing scheduled passenger service under the 2001 U.S.-Qatar Air Transport Agreement.

On April 10, 2018, the United States and Grenada signed a new Open Skies Air Transport Agreement. See State Department media note, available at <https://www.state.gov/u-s-grenada-open-skies-agreement-of-april-10-2018/>. As described in the media note, the new agreement:

permits greater opportunities for airlines, travelers, businesses, shippers, airports and localities by allowing unrestricted reciprocal market access for passenger and cargo airlines to fly between the two countries and beyond, and commits both governments to high standards of safety and security. In doing so, the new Agreement will facilitate future travel and commerce between the United States and Grenada. The Agreement entered into force upon signature of both governments on April 10, 2018. This Agreement replaces an older, more restrictive air transport agreement.

On May 10, 2018, representatives of the United States and Jamaica signed an agreement to amend the U.S.-Jamaica Air Transport Agreement of 2008 to include seventh-freedom rights for all-cargo operations, effective as of the date of signing. As explained in the State Department media note, available at <https://www.state.gov/new-all-cargo-rights-added-to-u-s-jamaica-air-transport-agreement/>:

Seventh-freedom rights permit flights between a second and third country without touching the airline's home country. These rights facilitate the efficient and cost-effective movement of goods, strengthen global express delivery cargo networks, enhance connectivity and competitiveness, and promote economic growth.

On May 18, 2018, the U.S. Department of State released the "Record of Discussion" between the United States and the United Arab Emirates ("UAE") affirming their strong commitment to maintain the U.S.-UAE Air Transport Agreement of 2002. See State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2018/05/282253.htm>, and ROD at <https://www.state.gov/record-of-discussion-between-the-united-states-and-the-united-arab-emirates-of-may-11-2018/>. The media note further conveys that

the UAE government informed the U.S. government that its air carriers have no current plans to make any changes to the [f]ifth[-][f]reedom services that they operate in accordance with that Agreement, stipulating that nothing in their communication amends or otherwise changes the 2002 Agreement or any rights therein.

We welcome this positive outcome for the strong and multi-faceted bilateral relationship between the United States and the United Arab Emirates and reaffirm that the Department of State will continue to ensure our Open Skies policy benefits U.S. stakeholders as intended.

On October 16, 2018, the United States and Belize signed a new Air Transport Agreement. See State Department media note, available at <https://www.state.gov/r/pa/prs/ps/2018/10/286672.htm>. The media note states:

This Open Skies Agreement expands the two countries' already strong commercial and economic ties by facilitating greater air travel and commerce. It will benefit airlines, travelers, businesses, shippers, airports, and localities by permitting unrestricted reciprocal market access for passenger and all-cargo airlines to fly between our two countries and beyond. The Agreement further commits both governments to high standards of safety and security. The Agreement entered into force today upon signature, superceding the U.S.-UK Air Services Agreement that has applied to U.S.-Belize air services since 1977.

On November 28, 2018, the United States and the United Kingdom concluded negotiations on a bilateral air transport agreement to take effect when the U.S.-EU Air Transport Agreement ceases to apply to the UK. The text of the agreement is available at <https://www.state.gov/memorandum-of-consultations-of-november-28-2018/>. The November 29, 2018 media note announcing the conclusion of the negotiations is available at <https://www.state.gov/united-states-and-united-kingdom-complete-talks-on-post-brexit-aviation-agreement/>, and includes the following:

The agreement will ensure that the U.S. aviation industry and its workforce will be able to continue providing air services to the United Kingdom uninterrupted in this vital transatlantic market that sees an estimated 20 million passengers and 900,000 tons of cargo transit annually. The agreement also will further open all-cargo service opportunities for both sides and will cover the UK's overseas territories and crown dependencies.

During the week of December 10-14, 2018, an interagency U.S. delegation attended the eleventh annual International Civil Aviation Organization Air Services Negotiation Event ("ICAN 2018") in Nairobi, Kenya. See December 14, 2018 State Department media note, available at <https://www.state.gov/advancing-u-s-interests-at-international-civil-aviation-event-in-kenya/>. As described in the media note:

The delegation negotiated new bilateral Open Skies Agreements, expanded and modernized existing agreements, pressed for fair treatment of U.S. companies, and promoted dialogue on new commercial aviation opportunities worldwide.

On December 12, the U.S. and Haitian delegations agreed, ad referendum, on the text of their first bilateral Open Skies Air Transport Agreement. Such agreements establish fair ground rules to facilitate growth of an efficient, international aviation network.

On December 14, the U.S. and Colombian delegations agreed, ad referendum, to amend the 2011 U.S.-Colombia Air Transport Agreement to permit seventh-freedom rights for all-cargo operations, allowing flights between a second and third country without touching the airline's home country, and to modernize air charter provisions.

## **2. The Downing of Malaysia Airlines Flight MH17 in Ukraine**

As discussed in *Digest 2017* at 485, the State Department expressed support for the Joint Investigative Team ("JIT") report on the downing of Malaysian Airlines flight MH17 in Ukraine, including the recommendation that those responsible be prosecuted in Dutch courts.

On May 24, 2018, the State Department issued a press statement expressing the "complete confidence" of the United States in the JIT's findings, as presented by the Dutch Public Prosecutor, that "the missile launcher used to shoot down Malaysia Airlines Flight MH17 originated from the 53rd Anti-aircraft Brigade of the Russian Federation, stationed in Kursk." The press statement, available at <https://www.state.gov/the-shoot-down-of-malaysia-airlines-flight-mh17/>, goes on to say:

We recall the UN Security Council's demand that "those responsible ... be held to account and that *all States* cooperate fully with efforts to establish accountability." We call upon Russia, in particular, to respect and adhere to UN Security Council Resolution 2166 (2014). It is time for Russia to cease its lies and account for its role in the shoot down.

We remain confident in the ability of the Dutch criminal justice system to prosecute those responsible in a manner that is fair and just.

On May 25, 2018, the Department issued an additional press statement on calling Russia to account for its role in the downing of Flight MH-17. The May 25<sup>th</sup> statement, available at <https://www.state.gov/calling-russia-to-account-for-malaysia-airlines-flight-mh-17/>, includes the following:

We strongly support the decisions by the Netherlands and Australia to call Russia to account for its role in the July 2014 downing of Malaysia Flight #17 (MH-17) over eastern Ukraine and the horrific deaths of 298 civilians. It is time for Russia to acknowledge its role in the shooting down of MH-17 and to cease its callous disinformation campaign.

As the findings of the Joint Investigative Team made clear, the BUK missile launcher used to bring down the passenger aircraft is owned by the Russian Federation and was assigned to the Russian 53<sup>rd</sup> anti-aircraft brigade near Kursk. It was *brought* into sovereign Ukrainian territory from Russia, was *fired* from territory controlled by Russia and Russia-led forces in eastern Ukraine, and was then *returned* to Russian territory. We urge Russia to adhere to UNSCR 2166 and respond to Australia's and the Netherlands' legitimate requests.

Russia's aggression in Ukraine since 2014 has led to more than 10,300 conflict-related deaths, including those lost in the MH-17 tragedy. It is more than time for Russia to end this violence.

## B. INVESTMENT DISPUTE RESOLUTION UNDER FREE TRADE AGREEMENTS

### 1. Non-Disputing Party Submissions under Chapter 11 of the North American Free Trade Agreement: *B-Mex v. Mexico*

Article 1128 of NAFTA allows NAFTA Parties who are not parties to a particular dispute to make submissions to a Tribunal hearing that dispute on questions of interpretation of NAFTA. On February 28, 2018, the United States made an Article 1128 submission in *B-Mex, LLC and others v. Mexico*. Submissions in and further information about the case are available at <https://www.state.gov/b-mex-llc-and-others-v-government-of-mexico/>. Claimants allege that their investments in the gaming industry were harmed due to actions in violation of Article 1102 (National Treatment), Article 1103 (Most Favored Nation), Article 1105 (Minimum Standard of Treatment) and Article 1110 (Expropriation). Excerpts follow (with footnotes omitted) from the first U.S. submission.

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#### **Article 1122(1) (Consent to Arbitration)**

2. A State's consent to arbitration is paramount. Indeed, given that consent is the "cornerstone" of jurisdiction in investor-State arbitration, it is axiomatic that a tribunal lacks jurisdiction in the absence of a disputing party's consent to arbitrate.

3. Article 1122 (Consent to Arbitration), paragraph (1), provides that: "Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement." Thus, the NAFTA State Parties have only consented to arbitrate investor-State disputes under Chapter 11, Section B, where an investor submits a "claim to arbitration in accordance with the procedures set out in this Agreement." And, an agreement to arbitrate is

formed upon the investor's corresponding consent to arbitrate *in accordance with those procedures*. Thus, the NAFTA Parties have explicitly conditioned their consent upon satisfaction of the relevant procedural requirements. All three NAFTA Parties agree on this point.

4. The "procedures set out in this Agreement" required to engage the NAFTA Parties' consent and form the agreement to arbitrate are found principally in Articles 1116-1121. Notably, the *Methanex* tribunal, in examining whether the "necessary consensual base for its jurisdiction [wa]s present" explained that:

In order to establish the necessary consent to arbitration [under Chapter 11], it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that *all pre-conditions and formalities required under Articles 1118-1121 are satisfied*). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.

5. Moreover, by conditioning their consent in Article 1122(1) upon the satisfaction of the "procedures set out in this Agreement", the NAFTA Parties explicitly made the satisfaction of these procedures jurisdictional (not admissibility) requirements.

**Article 1119 (Notice of Intent to Submit a Claim to Arbitration)**

6. Article 1119 (Notice of Intent to Submit a Claim to Arbitration) is another example of a procedural condition which must be satisfied before a NAFTA Party's consent to arbitrate under Article 1122(1) is engaged. Article 1119 provides that:

The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice shall specify:

- (a) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise;
- (b) the provisions of this Agreement alleged to have been breached and any other relevant provisions;
- (c) the issues and the factual basis for the claim; and
- (d) the relief sought and the approximate amount of damages claimed.

7. A disputing investor who does not deliver a Notice of Intent ninety (90) days before it submits a Notice of Arbitration or Request for Arbitration fails to satisfy this procedural requirement and fails to engage the respondent's consent to arbitrate. Under such circumstances, a tribunal will lack jurisdiction *ab initio*. As discussed below with respect to Article 1121(3), a respondent's consent cannot be created retroactively; consent must exist at the time a claim is submitted to arbitration. Unlike the Claimant's consent required by Article 1121(3), however, which must accompany and be in conjunction with a Notice of Arbitration, satisfaction of the requirements of Article 1119 through submission of a valid Notice of Intent must *precede* submission of a Notice of Arbitration by 90 days.

8. The procedural requirements in Article 1119 are not merely technical "niceties" but are explicit treaty requirements (*i.e.*, "shall deliver;" "shall specify") that serve important functions.

These functions include allowing a NAFTA Party time to identify and assess potential disputes, coordinate among relevant national and subnational officials, and to consider, if they so choose, amicable settlement or other courses of action prior to arbitration. Such courses of action may include preservation of evidence and/or the preparation of a defense. As recognized by the tribunal in *Merrill & Ring v. Canada*, rejecting a belated attempt to add a claimant in that case, the safeguards found in Article 1119 (among other requirements) “cannot be regarded as merely procedural niceties. They perform a substantial function which, if not complied with, would deprive the Respondent of the right to be informed beforehand of the grievances against its measures and from pursuing any attempt to defuse the claim [.]”

9. For all of the foregoing reasons, a tribunal cannot simply overlook an investor’s failure to comply with the procedural requirements of Article 1119, including in the context of determining whether the receipt of a Notice of Arbitration constitutes the valid and timely submission of a claim. Articles 1116(2) and 1117(2) provide that investors may not make a claim if more than three years have elapsed from the date on which the investor or enterprise first acquired, or should have first acquired, knowledge of the alleged breach and loss. Because an Article 1119 Notice of Intent must precede a Notice of Arbitration by 90 days, an investor has two years and 275 days to take steps that can lead to the submission of a valid and timely claim to arbitration under Chapter Eleven. Thus, for example, claimants or claims included in a Notice of Arbitration that were not included in a Notice of Intent delivered at least 90 days earlier have not been validly submitted to arbitration, and that Notice of Arbitration cannot toll the period of limitations for those claims or claimants. As the *Grand River* and *Feldman* NAFTA tribunals observed, the time-limitations provisions contained in Articles 1116(2) and 1117(2) are “clear and rigid” and not subject to any “suspension,” “prolongation,” or “other qualification.”

**Article 1121 (Conditions Precedent to Submission of a Claim to Arbitration)**

10. As noted above, some of the procedural requirements upon which the NAFTA Parties have conditioned their consent can be found in Article 1121. Article 1121(1) and (2) provide that a disputing investor may submit a claim to arbitration “*only if*” the investor (or the investor and the enterprise) “consents to arbitration in accordance with the procedures set out in this Agreement.” Further, Article 1121(3) requires that “[a] consent and waiver required by this Article [1] shall be in writing, [2] shall be delivered to the disputing Party and [3] shall be included in the submission of a claim to arbitration.” The three requirements found in Article 1121(3) apply to both the consent and the waiver.

11. Each claimant must satisfy the requirements of Article 1121 for the tribunal to have jurisdiction over the NAFTA Party with respect to that claimant’s putative claims. As the text of Article 1121(3) makes clear, a consent must be “included in the submission.” Article 1137(1)(b) further states that, with respect to arbitrations proceeding under the ICSID Additional Facility Rules, a claim is “submitted to arbitration” when the Notice of Arbitration is received by the ICSID Secretary-General. Thus consent must accompany and take place in conjunction with the Notice of Arbitration. Additionally, the “consent” required by Article 1121 must be “clear, explicit and categorical[.]” If the requirements regarding a claimant’s “consent” have not been satisfied, the NAFTA Party’s consent is not engaged, and the tribunal lacks jurisdiction *ab initio*. A Notice of Arbitration unaccompanied by valid consent does not present a claim that is capable of being submitted to arbitration.

12. A tribunal may determine whether a disputing investor has consented in accordance with the requirements of Article 1121. However, a tribunal itself has no authority to remedy an invalid consent. The discretion whether to permit a claimant either to proceed under or remedy

an ineffective consent lies with the respondent as a function of the respondent's general discretion to consent to arbitration and not with a tribunal. Where a valid consent is filed subsequent to the Notice of Arbitration, the claim will be considered submitted to arbitration on the date on which the valid consent was filed, assuming all other requirements have been satisfied, and not the date of the Notice of Arbitration.

**Article 1139 (Definition of "Investment")**

13. Article 1139 provides an exhaustive, not illustrative, list of what constitutes an investment for purposes of NAFTA Chapter Eleven. Article 1139(g) defines "investment" as "real estate or other property, tangible or intangible, acquitted in the expectation or used for the purpose of economic benefit or other business purposes[.]" In this connection, Chapter Eleven tribunals have consistently declined to recognize as "property" mere contingent "interests." Moreover, it is appropriate to look to the law of the host State for a determination of the definition and scope of the "property right" at issue.

14. In order to bring a claim under Chapter Eleven, a claimant has the burden of proving that its proffered investment or investments fall within one of the enumerated categories of investments listed in Article 1139. In the context of an objection to jurisdiction, the burden is on the claimant to prove the necessary and relevant facts to establish that a tribunal has jurisdiction to hear its claim. Further, it is well-established that where "jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage." As the tribunal in *Bridgestone v. Panama* recently stated when assessing Panama's jurisdictional objections regarding a claimant's purported investments under the U.S.-Panama Trade Promotion Agreement, "[b]ecause the Tribunal is making a final finding on this issue, the burden of proof lies fairly and squarely on [the claimant] to demonstrate that it owns or controls a qualifying investment."

**Article 1117 (Claim by an Investor of a Party on Behalf of an Enterprise)**

15. Article 1117 further authorizes an investor of a Party to bring a claim on behalf of an enterprise that the investor "owns or controls directly or indirectly." The NAFTA does not define "control." The omission of a definition for "control" accords with long-standing U.S. practice, reflecting the fact that determinations as to whether an investor controls an enterprise will involve factual situations that must be evaluated on a case-by-case basis.

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On August 17, 2018, the United States made a further Article 1128 submission in *B-Mex v. Mexico*. Excerpts follow (with footnotes omitted) from the second U.S. submission.

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**Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise**

2. Procedural Order No. 5 asks about the relevant point(s) in time at which an investor of a Party, making a claim under Article 1117 on behalf of an enterprise of another Party, must own or control that enterprise directly or indirectly. Article 1117(1) provides, in pertinent part, that "[a]n investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under" Chapter Eleven, Section A.2

3. An investor of a Party—other than the respondent NAFTA Party—must own or control directly or indirectly the relevant enterprise continuously between three critical dates: the time of the purported breach, the submission of a claim to arbitration, and the resolution of the claim.

*Time of the Purported Breach*

4. As provided in Article 1117, in pertinent part, an investor of a Party may submit to arbitration a claim that “*the other Party has breached*” an obligation under Section A. (Emphasis added.) Article 1101 (Scope and Coverage) clarifies that Chapter Eleven applies to measures adopted or maintained by a Party relating to, *inter alia*, “investors of *another Party*” and “investments of investors of *another Party* in the territory of the Party[.]” “[A]n enterprise is an ‘investment’” as defined in Article 1139. Thus, because the substantive obligations of Section A apply to “investors of *another Party*,” or “investments of investors of *another Party* in the territory of the Party,” an investor of another Party, *i.e.*, a Party other than the respondent Party, must own or control directly or indirectly the investment [*i.e.*, the enterprise] at the time of the purported breach. If the requisite difference in nationality does not exist, there can be no breach, as there was no obligation under Chapter Eleven, Section A at the time of the purported breach. And pursuant to Article 1117, what may be submitted to arbitration under Chapter Eleven, Section B, are claims that the respondent State “*has breached*” an obligation under Section A.6

*Submission of the Claim to Arbitration*

5. An investor of a Party other than the respondent Party must also own or control the enterprise directly or indirectly at the time of submission of the claim to arbitration: “[a]n investor of a Party, on behalf of an enterprise of another Party that... the investor *owns or controls* directly or indirectly, *may submit to arbitration under this Section* a claim that the other Party has breached an obligation under” Chapter Eleven, Section A.7

6. As the use of the present tense of “owns or controls” indicates, an investor of a Party other than the respondent NAFTA Party, must own or control the enterprise directly or indirectly at the time of submission of the claim to arbitration. Indeed, the tribunal in *Loewen v. United States of America* held that it lacked jurisdiction over Raymond Loewen’s Article 1117 claim (premised on indirect ownership or control of a U.S. enterprise through the Loewen Group, Inc., or “TLGI”) because he could not show the requisite ownership or control at the time the claim was submitted to arbitration.

*Date of the Resolution of the Claim*

7. An investor of a Party other than the respondent Party must also own or control the relevant enterprise directly or indirectly through the resolution of the claim. Article 1117’s reference to “this Section” is a reference to Section B, which encompasses relevant dispute settlement procedures leading up to, during, and through the resolution of a claim. In this connection, multiple articles concerned with aspects of the dispute settlement process subsequent to the submission of a claim refer to the “disputing investor” or the “disputing parties.” “Disputing parties” are defined in Article 1139 as a “disputing investor” and the disputing [NAFTA] Party, and a “disputing investor” is further defined as an investor “that makes a claim under Section B” (*i.e.*, “an investor of *another Party*”).

8. Article 1136(5), for example, provides that a “Party whose investor was a party to the arbitration” can invoke the procedures of NAFTA Chapter Twenty and seek a decision from a panel established by the Free Trade Commission enforcing the award against the “disputing Party.” The procedure established by this provision, which is analogous to a traditional espousal claim, assumes a continuing connection between an investor of a Party other than the respondent

Party and such non-disputing Party through the time of the award, so as to allow that non-disputing Party to pursue a State-to-State arbitration on behalf of the investor.

9. The conclusions above are consistent with the well-established principle of international law that an individual or entity cannot maintain an international claim against its own State. As the United States has long maintained with respect to the rule of “continuous nationality,” and as the tribunal in *Loewen v. United States of America* explained: “In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*.”

**Article 1121: Conditions Precedent to Submission of a Claim to Arbitration & Article 1122: Consent to Arbitration**

10. In Procedural Order No. 5, the Tribunal asked about the disputing investor’s consent to arbitration and the NAFTA Party’s consent to the submission of a claim to arbitration “*in accordance with the procedures set out in this Agreement*,” as stated in Article 1121(1) and (2) and Article 1122(1).

11. Article 1121 (Conditions Precedent to Submission of a Claim to Arbitration) provides in pertinent part that a disputing investor “may submit a claim to arbitration *only if*” the investor (or both the investor and the enterprise) “*consent[s] to arbitration in accordance with the procedures set out in this Agreement*” and waives its/their right to pursue redress in other fora. (Emphasis added.) By comparison, Article 1122 (Consent to Arbitration) provides in pertinent part that “[e]ach [NAFTA] Party *consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement*.” (Emphasis added.) Article 1121 addresses the disputing investor’s consent in the context of a requirement for submitting a claim, and Article 1122 addresses the consent of the NAFTA Parties to the submission of a claim in the context of their standing offer to arbitrate. In each case, consent is qualified, and is only applicable “in accordance with the procedures set out in this Agreement.”

12. The phrase “in accordance with the procedures set out in this Agreement,” in both Articles 1121 and 1122, refers to all procedures relevant to arbitrating a Section B claim—wherever those procedures appear in the NAFTA. While these procedures are principally set out in Section B, the ordinary meaning of “procedures set out in this Agreement” includes relevant procedures found elsewhere in the NAFTA and cannot be read as limited to those procedures set forth in Articles 1123-1138. For example, relevant procedures found elsewhere in the Agreement include those detailed in Article 2103(6). Also known as NAFTA’s “tax filter,” that provision sets out detailed procedures that an investor must follow before it may invoke Article 1110 (Expropriation and Compensation) as a basis for a claim involving taxation measures. Specifically, the investor must refer the issue of whether a taxation measure is not an expropriation for a determination to the competent authorities “at the time that it gives notice under Article 1119.” Only where the competent authorities do not agree to consider the issue, or having agreed to consider it, fail to agree that the measure is not an expropriation within six months of referral, may the investor then “submit its claim to arbitration under Article 1120.”

13. By expressing consent to arbitration “in accordance with the procedures set out in this Agreement,” as Article 1121 requires the investor to do, an investor consents to and accepts all of the procedures in the NAFTA that may be relevant to arbitration under Chapter Eleven, Section B. As explained by the tribunal in *ICS Inspection and Control Services*, a disputing investor may only accept or decline a State Party’s standing offer to arbitrate “but cannot vary its terms[:.]”

The investor, regardless of the particular circumstances affecting the investor or its belief in the utility or fairness of the conditions attached to the offer of the host State, must nonetheless contemporaneously consent to the application of the terms and conditions of the offer made by the host State, or else no agreement to arbitrate may be formed.

14. The NAFTA Parties' standing offer of consent to the submission of a claim to arbitration in Article 1122(1) is also provided only "in accordance with the procedures set out in this Agreement." ...

15. Thus, Articles 1119-1120 (among other provisions) contain procedures that must be complied with in order to engage the consent of the NAFTA Party to the submission of a claim to arbitration. ...

\* \* \* \*

17. The Tribunal in the present case has also inquired as to whether the principle of "*effet utile*" requires a treaty interpreter to give effect to the Parties' choice to use the term "conditions precedent" in the header of Article 1121, but not in the headers of Articles 1119 and 1120. Article 31(1) of the Vienna Convention on the Law of Treaties provides that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The interpretations that the United States has set forth herein comport with this general rule of interpretation.

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The United States submitted a third non-disputing party submission in *B-Mex v. Mexico* on December 21, 2018, providing U.S. interpretive views on Article 1117 ("own [ ] or control [ ] directly or indirectly") and Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("VCLT"). Excerpts follow (with footnotes omitted) from the third U.S. submission.

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2. Procedural Order No. 7 notes that the Tribunal "must determine the proper interpretation" of the phrase "own [ ] or control [ ] directly or indirectly" in NAFTA Article 1117. The Tribunal refers in this connection to Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("VCLT"), which provides that: "[t]here shall be taken into account, together with the context: ...any relevant rules of international law applicable in the relations between the parties." ...

3. For the following reasons, the United States does not view the definition contained in Article XXVIII(n) of the GATS as a relevant rule of international law, within the meaning of the VCLT Article 31(3)(c), that the Tribunal is required to take into account in interpreting NAFTA Article 1117.

4. The United States observes that Article 31(3)(c) operates as only one part of the treaty interpretation framework reflected in the VCLT. In other words, reference to relevant rules of international law applicable in the relations between the parties to a treaty may provide one means of helping to interpret a treaty provision. But Article 31(3)(c) may not be applied to the exclusion of other means of determining a treaty's meaning, including in particular Article 31(1) of the VCLT, which provides the general rule that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their *context* and in the light of [the treaty's] *object* and *purpose*." (Emphasis added.)

5. For a rule of international law to be "taken into account" for the purposes of Article 31(3)(c), it must be, among other considerations, "relevant." Here, the external treaty provision cited by the Tribunal—i.e., the definition of "juridical person" in Article XXVIII(n) of the GATS—does not constitute a "relevant" rule of international law applicable between the parties that must be taken into account under Article 31(3)(c) when interpreting NAFTA Article 1117(1).

6. Properly understood, NAFTA Article 1117(1) and the definition of "juridical person" in Article XXVIII(n) of the GATS are distinct. (By contrast, as discussed further below, the customary international law rules governing the status of corporations with respect to international claims are rules applicable in the relations between the parties that must be taken into account.)

7. NAFTA Articles 1116 and 1117 are jurisdictional standing provisions, located in Section B—Settlement of Disputes between a Party and an Investor of Another Party, and claims brought thereunder are limited to the type of loss or damage available under the particular Article invoked. Articles 1116 and 1117 "set forth the kinds of claims that may be submitted to arbitration: respectively, allegations of direct injury to an investor, and allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by an investor." As the United States has explained on several occasions, these articles were carefully and purposefully drafted against the background of two existing principles of customary international law addressing the status of corporations with respect to international claims. The first of these principles is that no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares. The second principle is that no international claim may be asserted against a State on behalf of the State's own nationals.

8. Article 1117(1) provides a limited carve-out to these background principles of customary international law, which principles should be taken into account in interpreting Article 1117(1). In this sense, those background principles of customary international law are "relevant rules of international law applicable in the relations between the [NAFTA] parties" consistent with VCLT Article 31(3)(c).

9. Without Article 1117(1)'s carve-out, the application of these background principles would leave a common situation without a remedy. Investors often choose to make an investment through a separate enterprise, such as a corporation, incorporated in the host State. If the host State were to injure that enterprise in a manner that does not directly injure the investor, no remedy would ordinarily be available under customary international law. In such a case, the loss or damage is directly suffered only by the enterprise. As the investor has not suffered a direct loss or damage, it cannot bring an international claim. Nor may the enterprise maintain an international claim against the State of which it is a national under the principle of non-responsibility. However, Article 1117(1)'s carve-out to customary international law is

purposefully limited by the requirement that the “investor own[] or control[] directly or indirectly” the enterprise, thereby excluding non-controlling minority shareholders, who are limited to bringing claims under Article 1116. This carefully crafted dichotomy between the types of claims that may be brought against a NAFTA Party pursuant to Articles 1116(1) and 1117(1) serves also to reduce the risk of multiple actions with respect to the same disputed measures.

10. Article 1117(1) does not include a definition of what constitutes ownership or control, whether direct or indirect, of the enterprise. As the United States has previously explained, the omission of a definition for “control” in the NAFTA accords with long-standing U.S. practice, reflecting the fact that determinations as to whether an investor controls an enterprise will involve factual situations that must be evaluated on a case-by-case basis.

11. By contrast, Article XXVIII(n) of the GATS provides specific definitions and thresholds for determining whether a “juridical person” is “owned” or “controlled” by “persons of a Member.” A “juridical person” is “owned” by persons of a WTO Member if more than 50 percent of the equity interest in the juridical person is beneficially owned by persons of that Member, whereas a juridical person is “controlled” by persons of a WTO Member “if such persons have the power to name a majority of its directors or otherwise to legally direct its actions.”

12. These definitions appear in a multilateral agreement—the GATS—that is concerned with, among other things, the liberalization of trade in services among WTO Members. The chapeau of Article XXVIII (“Definitions”) provides that such definitions are “[f]or the purpose of this Agreement[.]” Article XXVIII(n) defines thresholds for ownership and control for the purpose of determining the scope and applicability of the GATS and the obligations and specific commitments made under it. Thus, these definitions are building blocks for multilateral services rules, and reflect the logic and architecture of the GATS as a whole.

13. Moreover, the GATS definitions form part of rules whose alleged breach can only be adjudicated through state-to-state dispute settlement. The WTO dispute settlement system does not permit individuals or companies to assert claims. In contrast, as discussed above, NAFTA Article 1117(1) is a jurisdictional standing provision designed to address and differ from customary international law rules with respect to corporate ownership, to enable qualifying investors to bring individual claims for damages on behalf of an enterprise.

14. These differences, among others, confirm that GATS Article XXVIII(n) is not a relevant rule of international law, within the meaning of the VCLT Article 31(3)(c), that the Tribunal is required to take into account in interpreting NAFTA Article 1117.

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## **2. Non-Disputing Party Submissions under other Trade Agreements**

### **a. CAFTA-DR: *Ballantine v. The Dominican Republic***

Chapter Ten of the Dominican Republic-Central America-United States-Free Trade Agreement (“CAFTA-DR”) contains provisions designed to protect foreign investors and their investments and to facilitate the settlement of investment disputes. Article 10.20.2 of the CAFTA-DR, like Article 1128 of NAFTA, allows for non-disputing Party submissions. The United States filed such a submission in 2018 in an arbitration initiated by Michael

Ballantine and Lisa Ballantine (“the Ballantines”), alleging that the Dominican Republic’s Ministry of the Environment, and the City of Jarabacoa, wrongly refused them approvals needed to continue their development of the Jamaca de Dios gated community in the Dominican Republic’s central mountain range. The Ballantines allege CAFTA-DR violations of Article 10.3 (national treatment), Article 10.4 (most-favored nation treatment), Article 10.5 (minimum standard of treatment), Article 10.7 (expropriation), and Chapter 18 (transparency). The July 6, 2018 U.S. submission is excerpted below (with footnotes omitted). The submission, in its entirety, is available at <https://www.state.gov/michael-ballantine-lisa-ballantine-and-rachel-ballantine-v-the-dominican-republic/>.

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### Dominant and Effective Nationality Requirement for Claims Under Chapter Ten

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5. Where the requisite nationality does not exist at the operative times..., the respondent Party has not consented to the submission of a claim to arbitration at the outset, and the tribunal therefore lacks jurisdiction *ab initio* under Article 10.17: “Each Party consents to the submission of a claim to arbitration under this Section [B] in accordance with this Agreement.” ...

6. The conclusions above are consistent with the well-established principle of international law that an individual or entity cannot maintain an international claim against its own State. As the United States has long maintained with respect to the rule of “continuous nationality” and as the tribunal in *Loewen v. United States of America* explained: “In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*.” In the absence of continuous nationality of the claimant as set forth above, a tribunal lacks jurisdiction over the relevant claim.

#### **Article 10.18: Conditions and Limitations on Consent of Each Party (Limitations Period)**

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8. As is made explicit by Article 10.18, the CAFTA-DR Parties did not consent to arbitrate an investment dispute if “more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach” and “knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage.” ...[A] claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.

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10. With regard to knowledge of the “breach” under Article 10.18.1, a “breach” of an international obligation exists “when an act of th[e] State is not in conformity with what is required of it by that obligation.” Thus, with respect to a claim under a given article in Chapter Ten, a claimant has actual or constructive knowledge of the alleged “breach” once it has (or should have had) knowledge of all elements required to make a claim under the article in question. In other words, the operative date is the date on which the claimant first acquired actual or constructive notice of facts sufficient to make a claim under the article.

11. With regard to knowledge of “incurred loss or damage” under Articles 10.18.1, the term “incur” broadly means to “to become liable or subject to.” Therefore, an investor may “incur” loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate. As the *Grand River* tribunal correctly held, “damage or injury may be incurred even though the amount or extent may not become known until some future time.”

**Article 10.3 (National Treatment)**

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14. ...[T]he appropriate comparison is between the treatment accorded to the Party’s investment or investor and a national investment or investor *in like circumstances*. As one tribunal has observed, “[i]t goes without saying that the meaning of the term [‘in like circumstances’] will vary according to the facts of a given case. By their very nature, ‘circumstances’ are context dependent and have no unalterable meaning across the spectrum of fact situations.” The United States understands the term “circumstances” to denote conditions or facts that *accompany* treatment as opposed to the treatment itself. Thus, identifying appropriate comparators for purposes of the “in like circumstances” analysis requires consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other possible relevant characteristics. Simply being in the same sector, or selling the same product, is not alone sufficient to demonstrate like circumstances. When determining whether the claimant was in like circumstances with alleged comparators, the Party’s investor or investment should be compared to a national investor or investment that is alike in all relevant respects but for nationality of ownership. Moreover, whether treatment is accorded in “like circumstances” under Article 10.3 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

15. Nothing in Article 10.3 requires that investors or investments of investors of a Party, regardless of the circumstances, be accorded the best, or most favorable, treatment given to any national investor or any investment of a national. The appropriate comparison is between the treatment accorded a foreign investment or investor and a national investment or investor *in like circumstances*. This is an important distinction intended by the Parties. Thus, a CAFTA-DR Party may adopt measures that draw distinctions among entities without necessarily violating Article 10.3.

**Article 10.5 (Minimum Standard of Treatment)**

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17. .... The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law. The standard establishes a minimum “floor below which treatment of foreign investors must not fall.”

18. Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, expressly addressed in Article 10.5.2, concerns the obligation to provide “fair and equitable treatment,” which includes “the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.” Other areas included within the minimum standard of treatment concern the obligation not to expropriate covered investments except under the conditions specified in Article 10.7, and the obligation to provide “full protection and security,” which, as stated in Article 10.5.2(b), “requires each Party to provide the level of police protection required under customary international law.”

19. Annex 10-B to the CAFTA-DR addresses the methodology for interpreting customary international law rules covered by the agreement. The annex expresses the CAFTA-DR Parties’ “shared understanding that ‘customary international law’ generally and as specifically referenced in Article 10.5 . . . results from a general and consistent practice of States that they follow from a sense of legal obligation.” This two-element approach—State practice and *opinio juris*—is “widely endorsed in the literature” and “generally adopted in the practice of States and the decisions of international courts and tribunals, including the International Court of Justice.”

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21. The concept of “transparency” has not crystallized as a component of “fair and equitable treatment” under customary international law giving rise to an independent host-State obligation. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation of host-State transparency under the minimum standard of treatment.

22. Moreover, as Article 10.5.3 makes clear: “A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.” In this connection, a Chapter Ten tribunal does not have jurisdiction to address matters that arise under Chapter Eighteen (“Transparency”). Rather, the jurisdiction of a Chapter Ten tribunal is limited, according to Article 10.16(1), to claims that a respondent Party breached an obligation of Chapter Ten (Section A), an investment authorization, or an investment agreement. An investor bringing an Article 10.5 claim may not invoke an alleged host State violation of an international obligation owed to another State or to the investor’s home State, including, for example, an obligation contained in another treaty or another Chapter of CAFTA-DR such as Chapter Eighteen. A violation of Chapter Eighteen, which is subject to the State-to-State dispute resolution provisions of Chapter Twenty, may be the basis of a claim by one CAFTA-DR Party against another, but that violation does not provide a separate cause of action for an investor, who may only bring claims against a host Party for alleged breaches of Chapter Ten, Section A.

23. The concept of “legitimate expectations” is also not a component element of “fair and equitable treatment” under customary international law that gives rise to an independent host State obligation. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. The United States is aware of no general and consistent State practice and

*opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations; instead, something more is required, such as a complete repudiation of a contract.

24. In addition, the customary international law minimum standard of treatment set forth in Article 10.5.1 does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination. As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently. To the extent that the customary international law minimum standard of treatment incorporated in Article 10.5 prohibits discrimination, it does so only in the context of other established customary international law rules, such as prohibitions against discriminatory takings or access to judicial remedies or treatment by the courts, as well as the obligation of States to provide full account for violating the customary minimum standard of protection ... [N]either Article 1105 nor the customary international law standard of protection generally prohibits discrimination against foreign investments.”).

25. States may decide expressly by treaty to make policy decisions to extend protections under the rubric of “fair and equitable treatment” and “full protection and security” beyond what is required by customary international law. The practice of adopting such autonomous standards is not relevant to ascertaining the content of Article 10.5, in which “fair and equitable treatment” and “full protection and security” are expressly tied to the customary international law minimum standard of treatment. Thus, arbitral decisions interpreting “autonomous” fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 10.5.<sup>34</sup> Likewise, decisions of international courts and arbitral tribunals interpreting “fair and equitable treatment” as a concept of customary international law are not themselves instances of “State practice” for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice. A formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State practice and *opinio juris* fails to establish a rule of customary international law as incorporated by Article 10.5.1.

#### *Conclusions on the application of Article 10.5*

26. The Treaty Parties thus expressly intended Article 10.5 to afford the minimum standard of treatment to covered investments, as that standard has crystallized into customary international law through general and consistent State practice and *opinio juris*. For alleged standards that are not specified in the treaty, a claimant must demonstrate that such a standard has crystallized into an obligation under customary international law.

27. To do so, the burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*. “The party which relies on a custom,” therefore, “must prove that this custom is established in such a manner that it has become binding on the other Party.” ...

28. Once a rule of customary international law has been established, the claimant must then show that the State has engaged in conduct that violates that rule. Determining a breach of the minimum standard of treatment “must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders.”

**Article 10.7 (Expropriation and Compensation)**

29. As the Parties confirm in CAFTA-DR Annex 10-C, Article 10.7.1 “is intended to reflect customary international law concerning the obligation of States with respect to expropriation,” and addresses two situations: “The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure. The second situation ... is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.”

\* \* \* \*

31. Under international law, where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory. CAFTA-DR Annex 10-C, paragraph 4, provides specific guidance as to whether an action, including a regulatory action, constitutes an indirect expropriation.

\* \* \* \*

36. Annex 10-C, paragraph 4(b), further provides that “[e]xcept in rare circumstances, nondiscriminatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.” This paragraph is not an exception, but rather is intended to provide tribunals with additional guidance in determining whether an indirect expropriation has occurred.

\* \* \* \*

**b. U.S.-Panama TPA: Bridgestone v. Panama**

Chapter Ten of the United States-Panama Trade Promotion Agreement (“U.S.-Panama TPA”) contains provisions designed to protect foreign investors and their investments and to facilitate the settlement of investment disputes. Article 10.20.2 of the U.S.-Panama TPA, like Article 1128 of NAFTA, allows for non-disputing party submissions. On December 7, 2018, the United States made its third non-disputing party submission in *Bridgestone v. Panama*, addressing interpretation of the minimum standard of treatment, national treatment, and most favored nation treatment provisions in the U.S.-Panama FTA. The submission also discusses proximate causation. The submission is excerpted below (with footnotes omitted) and available in its entirety at <https://www.state.gov/bridgestone-licensing-services-inc-and-bridgestone-americas-inc-v-the-republic-of-panama/>. See *Digest 2017* at 500-04 for discussion of the previous U.S. submissions.

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3. As a threshold matter, Article 10.5.1 requires a Party to accord “treatment” to a covered investment. Article 10.5.1 differs from other substantive obligations (*e.g.*, 10.3, 10.4 and 10.6) in that it obligates a Party to accord treatment only to a “covered *investment*.” The minimum standard of treatment under Article 10.5.1 includes the obligation to provide “fair and equitable treatment,” which, as explained in 10.5.2(a), includes the customary international law obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings. Therefore, to establish a breach of Article 10.5.1 on the basis of denial of justice, a claimant must establish that the treatment accorded to its covered investment rose to the level of a denial of justice under customary international law.

4. Denial of justice in its historical and “customary sense” denotes “misconduct or inaction of the judicial branch of the government” and involves “some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process.” A denial of justice may occur in instances such as when the final act of a State’s judiciary constitutes a “notoriously unjust” or “egregious” administration of justice “which offends a sense of judicial propriety.” More specifically, a denial of justice exists where there is, for example, an “obstruction of access to courts,” “failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment.” A manifestly unjust judgment is one that amounts to a travesty of justice or is grotesquely unjust. As the United States has explained elsewhere, to be manifestly unjust a court decision must amount “to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man[.]” Instances of denial of justice also have included corruption in judicial proceedings, discrimination or ill-will against aliens, and executive or legislative interference with the freedom or impartiality of the judicial process. At the same time, erroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law.<sup>10</sup> In this connection, it is well-established that international tribunals, such as U.S.-Panama TPA Chapter Ten tribunals, are not empowered to be supranational courts of appeal on a court’s application of domestic law.

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7. Articles 10.3 (National Treatment) and 10.4 (Most-Favored-Nation Treatment) require the Parties to the Agreement to accord to investors of the other Party and to covered investments treatment no less favorable than that accorded to a Party’s own investors and investments, or the investors or investments of a non-Party, respectively, to the extent they are in like circumstances. If a Party does not “accord ... treatment” to an investor of the other Party or to a covered investment, there can be no breach of these provisions.

8. Articles 10.3 and 10.4 are intended to prevent discrimination on the basis of nationality between domestic investors (or investments) and investors (or investments) of the other Party, in the case of Article 10.3, and between investors (or investments) of the other Party and investors (or investments) of a non-Party, in the case of Article 10.4, that are in “like circumstances.” They are not intended to prohibit all differential treatment among investors or investments. Rather, they are designed only to ensure that the Parties do not treat entities that are “in like circumstances” differently based on nationality.

9. As the United States has previously explained in the NAFTA context, one of the steps required to establish a National Treatment violation is to identify domestic investors or investments in like circumstances (sometimes referred to as “comparators”) with the claimant or claimant’s investments. If the claimant does not identify any domestic investor or investment as allegedly being in like circumstances, no violation of Article 10.3 can be established.

10. The steps required to establish a Most-Favored-Nation Treatment violation are the same as those required to establish a National Treatment violation, except that the applicable comparators are investors or investments of non-Parties. Thus, as is the case for a claim under Article 10.3, if a claimant does not identify such non-Party investors or investments as allegedly being in like circumstances with the claimant or claimant’s investments, no violation of Article 10.4 can be established.

11. As the United States has previously explained in the context of the National Treatment obligation in the NAFTA (Article 1102), the ordinary meaning of the term “like products” in trade agreements such as the General Agreement on Tariffs and Trade 1994 (“GATT 1994”) is not the same as “like circumstances.” The phrase “in like circumstances” contemplates that broad account be taken of the circumstances of the treatment, the investor and the investment. This is a fact-specific inquiry, requiring consideration of more than just the business or economic sector, but also the legal and regulatory frameworks which apply to or govern the conduct of investors or investments (including any relevant policy objectives), among other possible relevant characteristics.

12. Articles 10.3 and 10.4 of the U.S.-Panama TPA address discrimination on the basis of the *nationality of investors and their investments*, and do not address discrimination based on the origin of goods. As a result, decisions interpreting the term “like products” in the GATT 1994 are inapposite in ascertaining whether an investor or an investment has been accorded less favorable treatment within the meaning Articles 10.3 and 10.4 of the U.S.-Panama TPA.

**Article 10.16.1 (Proximate Causation)**

13. Article 10.16.1 provides in relevant part (emphases added):

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached [a relevant obligation] and (ii) that the claimant *has incurred loss or damage by reason of, or arising out of, that breach*; and

(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim (i) that the respondent has breached [a relevant obligation] and (ii) that the enterprise *has incurred loss or damage by reason of, or arising out of, that breach*.

14. As the United States has previously explained with respect to substantively identical language in NAFTA Articles 1116(1) and 1117(1), the ordinary meaning of “by reason or arising out of” requires an investor to demonstrate proximate causation. In this connection, NAFTA tribunals have consistently imposed a requirement of proximate causation under NAFTA Articles 1116(1) and 1117(1). For example, the *S.D. Myers* tribunal held that damages may only be awarded to the extent that there is a “sufficient causal link” between the breach of a specific

NAFTA provision and the loss sustained by the investor, and then subsequently clarified that “[o]ther ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the *proximate* cause of the harm.”

15. Indeed, proximate causation is an “applicable rule[] of international law” that under the U.S.-Panama TPA Article 10.22.1 must be taken into account in fixing the appropriate amount, if any, of monetary damages. Article 10.16.1 contains no indication that the Agreement Parties intended to vary from this established rule. Accordingly, any loss or damage cannot be based on an assessment of acts, events, or circumstances not attributable to the alleged breach. Injuries that are not sufficiently “direct,” “foreseeable,” or “proximate” may not, consistent with applicable rules of international law, be considered when calculating a damage award.

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## C. WORLD TRADE ORGANIZATION

The following discussion of developments in select WTO dispute settlement proceedings involving the United States in 2018 is drawn largely from Chapter V “The World Trade Organization” of the Annual Report of the President of the United States on the Trade Agreements Program (“Annual Report”), released in March 2019 and available at [https://ustr.gov/sites/default/files/2019\\_Trade\\_Policy\\_Agenda\\_and\\_2018\\_Annual\\_Report.pdf](https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf). WTO legal texts referred to below are available at [https://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](https://www.wto.org/english/docs_e/legal_e/legal_e.htm).

### 1. Disputes brought by the United States

#### a. *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States (DS427)*

As discussed in *Digest 2013* at 319 and *Digest 2011* at 372-72, a panel of the WTO concluded in 2013 that U.S. complaints about anti-dumping and countervailing duties imposed by China on U.S. broiler products were valid. China agreed to implement the panel’s findings by 2014. However, the United States requested a compliance panel in 2016 after deeming China’s actions to comply with the panel report inadequate. As summarized in the Annual Report at 157, the compliance panel issued its report on January 18, 2018 and found China to be in continuing breach of its obligations by, *inter alia*:

Continuing to levy countervailing duties on U.S. producers in excess of the amount of subsidization; Continuing to rely on flawed price comparisons for its determination that China’s domestic industry had suffered injury; Continuing to not properly allocate costs in calculating U.S. producers’ cost of production while declining to use the books and records of two major U.S. producers in calculating costs of production; Improperly resorting to facts available for a U.S. respondent that had submitted appropriate and verifiable data.

The compliance panel report was adopted by the WTO Dispute Settlement Body (“DSB”) on February 28, 2018. China removed the duties that gave rise to the dispute.

**b. *European Union and certain Member States – Measures affecting trade in large civil aircraft (DS316)***

As discussed in *Digest 2016* at 494-95 and *Digest 2011* at 373-74, a panel of the WTO and the Appellate Body agreed with U.S. claims that subsidies provided by the EU, France, Germany, Spain, and the United Kingdom to Airbus were inconsistent with WTO obligations. The EU and EU member states purported to comply with the findings but the matter was referred back to the panel, which found that the EU and certain EU member states continued to breach the Subsidies and Countervailing Measures (“SCM”) Agreement. The EU appealed the compliance panel’s report. The Appellate Body issued its report on May 15, 2018. The Annual Report, at page 165, summarizes the Appellate Body’s conclusions:

The Appellate Body confirmed that the EU and certain EU member States failed to comply with the earlier WTO determination finding launch aid inconsistent with their WTO obligations. The Appellate Body further confirmed that almost \$5 billion in new launch aid for the A350 XWB was WTO-inconsistent. The Appellate Body found that the WTO- inconsistent subsidies continue to cause significant lost sales of Boeing aircraft in the twin-aisle and very large aircraft markets, and that these subsidies impede exports of Boeing 747 aircraft to numerous geographic markets. The Appellate Body also found that, due to the passage of time, the EU no longer needed to take action regarding some of the earlier (*i.e.*, pre-A380) launch aid subsidies previously found to be WTO-inconsistent.

Arbitration proceedings regarding the level of countermeasures, which were suspended in 2012, resumed at the request of the United States and a decision is expected in 2019.

**2. Disputes brought against the United States**

**a. *Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products (Mexico) (DS381)***

As discussed in *Digest 2011* at 375-76, *Digest 2012* at 378-79, *Digest 2013* at 320, *Digest 2015* at 478-79, *Digest 2016* at 496, and *Digest 2017* at 513, Mexico challenged U.S. dolphin-safe labeling requirements for tuna and tuna products. The dispute came to an end in 2018 with the December 14, 2018 appellate report upholding all aspects of the previous analysis by the WTO panels in the dispute, including findings that the dolphin-safe labeling measure was not inconsistent with Article 2.1 of the Technical Barriers to Trade (“TBT”) Agreement and was justified under Article XX of the GATT 1994. See Annual Report at 180-81.

**b. *Countervailing Duty Measures on Certain Products from China (DS437)***

As discussed in *Digest 2014* at 475, China challenged certain U.S. countervailing duty determinations in which the U.S. Department of Commerce considered Chinese state-owned enterprises to be public bodies under the SCM Agreement. The panel findings only partially agreed with China and both the United States and China appealed. The Appellate Body reversed several of the panel's findings. China sought review by a compliance panel after the United States implemented the DSB recommendations. The Annual Report, at page 188, summarizes the March 21, 2018 report of the compliance panel and next steps in the case:

...The compliance Panel found that Commerce's redeterminations that certain state-owned enterprises were "public bodies" were not inconsistent with Article 1.1(a)(1) of the SCM Agreement, and Commerce's Public Bodies Memorandum is not inconsistent with the SCM Agreement, "as such". The compliance Panel also upheld Commerce's redetermination concerning regional specificity. However, the compliance Panel found in favor of China with respect to China's claims regarding Commerce's calculation of benchmarks and its input specificity analysis.

On April 27, 2018, the United States appealed certain findings of the compliance Panel regarding the Public Bodies Memorandum, Commerce's benchmark and input specificity redeterminations, and whether certain Commerce determinations were within the compliance Panel's terms of reference. On May 2, 2018, China appealed certain findings of the compliance Panel regarding Commerce's redeterminations that certain state-owned enterprises were "public bodies", the Public Bodies Memorandum, and the legal interpretation of Articles 1.1(b) and 14(d) of the SCM Agreement. The appellate proceedings are ongoing.

**c. *Anti-Dumping Measures on Oil Country Tubular Goods from Korea (DS488)***

As discussed in *Digest 2017* at 514-15, the panel in this dispute brought by Korea found some of the U.S. measures to be WTO-inconsistent but also rejected some of Korea's claims. On January 12, 2018, the DSB adopted the panel's report. The Annual Report, at page 192, conveys that Korea and the United States agreed that the reasonable period of time for the United States to implement the DSB's recommendations and rulings would be January 12, 2019, subsequently extended by agreement to July 12, 2019.

**d. *Countervailing Measures on Supercalendered Paper from Canada (DS505)***

As discussed in the Annual Report at 193, Canada brought claims related to U.S. countervailing duties on supercalendered paper. On July 5, 2018, the panel circulated its report, upholding Canada's claims "with respect to the U.S. Department of Commerce

treatment of subsidies that exporters refused to disclose in response to Commerce questionnaires, but which Commerce subsequently discovered during the course of the countervailing duty investigation.” The United States has appealed the panel’s findings regarding the treatment of undisclosed subsidies.

***e. Countervailing Measures on Certain Pipe and Tube Products from Turkey (DS523)***

As discussed in the Annual Report at 196, a WTO panel circulated its report on December 18, 2018, upholding some of the claims by Turkey that the Department of Commerce had acted inconsistently with its WTO obligations in imposing countervailing duty measures on certain pipe and tube products. The Annual Report details the panel’s findings as follows:

With respect to public body, the panel found that Commerce acted inconsistently with Article 1.1(a)(1) by failing to apply the standard set out previously by the Appellate Body, and failing to establish based on record evidence that the relevant entities were public bodies. With respect to benchmarks as such, the panel rejected Turkey’s claims that Commerce has a practice of rejecting in-country benchmarks solely based on majority or substantial government ownership or control of the market. For benchmarks as applied, the panel declined to make a finding under Article 14(d) of the SCM Agreement because the relevant determination had ceased to have legal effect prior to the panel’s establishment. With respect to specificity, the panel found that Commerce acted inconsistently with Articles 2.1(c) and 2.4 of the SCM Agreement by failing to identify and clearly substantiate the existence of a subsidy program, and failing to take into account the extent of diversification of Turkey’s economy and the length of time in which the program had been in place. With respect to facts available, the panel found the U.S. Department of Commerce acted inconsistently with Article 12.7 of the SCM Agreement by failing to do a comparative process of reasoning and evaluation before selecting from the facts available in certain circumstances. With respect to injury, the panel found that Article 15.3 of the SCM Agreement does not permit the U.S. International Trade Commission (USITC) to assess cumulatively the effects of imports not subject to countervailing duty investigations with the effects of imports subject to countervailing duty investigations. The panel thus found cross-cumulation by the USITC, both in the original investigations at issue and as a practice, to be inconsistent with Article 15.3. With respect to cross-cumulation in sunset reviews, the panel found the USITC did not act inconsistently with Article 15.3 of the SCM Agreement, either “as such” or in connection with the sunset review at issue.

**D. INVESTMENT TREATIES, TRADE AGREEMENTS AND TRADE-RELATED ISSUES****1. Africa Growth and Opportunity Act**

In Proclamation 9771 of July 30, 2018, the President determined that the Republic of Rwanda (“Rwanda”) is not meeting the requirements to be a beneficiary sub-Saharan African country for purposes of section 506A(a)(1) of the Trade Act of 1974 (19 U.S.C. 2466a(a)(1)), as added by section 111(a) of the African Growth and Opportunity Act (“AGOA”), and therefore suspended the application of duty-free treatment for all AGOA-eligible goods in the apparel sector from Rwanda. 83 Fed. Reg. 37,993 (Aug. 2, 2018). The same proclamation also modified the Harmonized Tariff Schedule of the United States (“HTS”) to reflect changes made to the United States-Bahrain Free Trade Agreement (“USBFTA”) after Proclamation 9549 of December 1, 2016, as well as other provisions in the HTS.

On November 2, 2018, the President announced his intention to terminate the AGOA beneficiary status of Mauritania due to its failure to establish, or make continual progress toward establishing, the protection of internationally recognized worker rights, including its insufficient progress toward combatting forced labor practices. See White House announcement, available at <https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-senate-45/>; see also USTR press release, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/november/president-trump-terminates-trade>. In Proclamation 9834 of December 21, 2018, the President terminated Mauritania’s AGOA beneficiary status effective January 1, 2019. 84 Fed. Reg. 35 (Jan. 7, 2019). In the same proclamation, the President also took other actions with regard to trade with Israel, trade preferences for Nepal, and changes relating to the Panama Trade Promotion Agreement, the United States–Korea Free Trade Agreement (“KORUS”), and the Morocco Free Trade Agreement. <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-take-certain-actions-african-growth-opportunity-act-purposes-4/>.

**2. NAFTA/U.S.-Mexico-Canada Agreement (“USMCA”)**

As discussed in *Digest 2017* at 516, the Trump Administration notified Congress of its intent to renegotiate the North American Free Trade Agreement (“NAFTA”) and released negotiation objectives. On August 31, 2018, the President notified Congress of his intent to enter into a trade agreement with Mexico, “and with Canada if it is willing.” 83 Fed. Reg. 45191 (Sep. 5, 2018). On September 30, 2018, U.S. Trade Representative Robert Lighthizer and Canadian Foreign Affairs Minister Chrystia Freeland issued a joint statement announcing that Canada had also joined the agreement, to be called the U.S.-Mexico-Canada Agreement (“USMCA”). The joint statement is available at

<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/joint-statement-united-states>.

On November 30, 2018, U.S. Trade Representative Robert Lighthizer, Canadian Foreign Affairs Minister Chrystia Freeland, and Mexican Economy Secretary Ildefonso Guajardo signed the Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada in Buenos Aires, Argentina.

### **3. U.S.-Korea Free Trade Agreement (“KORUS”)**

The United States published in September 2018 the outcomes of negotiations with the Republic of Korea on amendments and modifications to the U.S.-Korea Free Trade Agreement (“KORUS”) and its implementation. See September 3, 2018 USTR press release, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/ustr-publishes-agreed-outcomes-us>. The two sides engaged in their respective domestic procedures throughout the remaining months of 2018 in preparation for bringing the outcomes of their negotiations into force in 2019. The text of the agreement as amended and modified, along with the related letter exchanges and understandings, is available at <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/>.

### **4. Asia-Pacific Economic Cooperation**

On November 19, 2018, at the conclusion of the Asia-Pacific Economic Cooperation (“APEC”) meetings, the State Department issued a press statement on the failure to reach consensus at the meetings on draft statements agreeing to promote free and fair trade in the region. The press statement is available at <https://www.state.gov/u-s-position-on-apec-statements/>. As described in the press statement, “the United States was ... fully prepared to join consensus on the draft APEC statements.... It is unfortunate that not all economies—despite their rhetoric—could support these positions.”

### **5. Termination of U.S.-Ecuador BIT**

On May 18, 2018, the U.S. Department of State and Office of the U.S. Trade Representative published notification of the termination of the U.S.-Ecuador Bilateral Investment Treaty (“BIT”). 83 Fed. Reg. 23,327 (May 18, 2018). The Government of Ecuador delivered notice dated May 18, 2017, to the United States that it was terminating the BIT. The BIT terminated pursuant to the terms of the treaty one year later, on May 18, 2018, except for investments made or acquired prior to the date of termination, to which it applies for 10 years. Supplementary information in the Federal Register notice follows:

The Treaty was signed at Washington on August 27, 1993, and entered into force on May 11, 1997. Under the terms of the Treaty, either Party may terminate the Treaty at the end of the initial ten-year period, or any time thereafter, by giving one year's written notice to the other Party. The provisions of the Treaty will continue to apply for an additional 10 years to all investments made or acquired prior to the date of termination and to which the Treaty otherwise applies. The Treaty provides protections to cross-border investment between the two countries and the option to resolve investment disputes through international arbitration. The Department of State and the Office of the U.S. Trade Representative, which co-lead the U.S. bilateral investment treaty program, are providing this notice so that existing or potential U.S. investors in Ecuador can factor the termination of the Treaty into their business planning, as appropriate.

## **E. IMPORT ADJUSTMENTS BASED ON U.S. NATIONAL SECURITY**

Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. 1862), as amended, authorizes the President to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security. The President acted pursuant to Section 232 in 2018 with respect to imports of aluminum, steel, and automobiles.

### **1. Aluminum**

On March 8, 2018, the President issued Proclamation 9704, "Adjusting Imports of Aluminum Into the United States." 83 Fed. Reg. 11619 (Mar. 15, 2018). Excerpts follow from the Proclamation.

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1. On January 19, 2018, the Secretary of Commerce (Secretary) transmitted to me a report on his investigation into the effect of imports of aluminum ... under section 232 ...

2. The Secretary found and advised me of his opinion that aluminum is being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States. The Secretary found that the present quantities of aluminum imports and the circumstances of global excess capacity for producing aluminum are "weakening our internal economy, leaving the United States "almost totally reliant on foreign producers of primary aluminum" and "at risk of becoming completely reliant on foreign producers of high-purity aluminum that is essential for key military and commercial systems." Because of these risks, and the risk that the domestic aluminum industry would become "unable to satisfy existing national security needs or respond to a national security emergency that requires a large increase in domestic production," and taking into account the close relation of the economic welfare of the Nation to our national security, *see* 19 U.S.C. 1862(d), the Secretary

concluded that the present quantities and circumstances of aluminum imports threaten to impair the national security as defined in section 232 of the Trade Expansion Act of 1962, as amended.

3. In light of this conclusion, the Secretary recommended actions to adjust the imports of aluminum so that such imports will not threaten to impair the national security. Among those recommendations was a global tariff of 7.7 percent on imports of aluminum articles in order to reduce imports to a level that the Secretary assessed would enable domestic aluminum producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production. The Secretary has also recommended that I authorize him, in response to specific requests from affected domestic parties, to exclude from any adopted import restrictions those aluminum articles for which the Secretary determines there is a lack of sufficient U.S. production capacity of comparable products, or to exclude aluminum articles from such restrictions for specific national security-based considerations.

4. I concur in the Secretary's finding that aluminum articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States, and I have considered his recommendations.

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7. In the exercise of these authorities, I have decided to adjust the imports of aluminum articles by imposing a 10 percent ad valorem tariff on aluminum articles, as defined below, imported from all countries except Canada and Mexico. In my judgment, this tariff is necessary and appropriate in light of the many factors I have considered, including the Secretary's report, updated import and production numbers for 2017, the failure of countries to agree on measures to reduce global excess capacity, the continued high level of imports since the beginning of the year, and special circumstances that exist with respect to Canada and Mexico. This relief will help our domestic aluminum industry to revive idled facilities, open closed smelters and mills, preserve necessary skills by hiring new aluminum workers, and maintain or increase production, which will reduce our Nation's need to rely on foreign producers for aluminum and ensure that domestic producers can continue to supply all the aluminum necessary for critical industries and national defense. Under current circumstances, this tariff is necessary and appropriate to address the threat that imports of aluminum articles pose to the national security.

8. In adopting this tariff, I recognize that our Nation has important security relationships with some countries whose exports of aluminum to the United States weaken our internal economy and thereby threaten to impair the national security. I also recognize our shared concern about global excess capacity, a circumstance that is contributing to the threatened impairment of the national security. Any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country. Should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on aluminum articles imports from that country and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require.

9. I conclude that Canada and Mexico present a special case. Given our shared commitment to supporting each other in addressing national security concerns, our shared commitment to addressing global excess capacity for producing aluminum, the physical proximity of our respective industrial bases, the robust economic integration between our countries, the export of aluminum produced in the United States to Canada and Mexico, and the close relation of the economic welfare of the United States to our national security, *see* 19 U.S.C. 1862(d), I have determined that the necessary and appropriate means to address the threat to the national security posed by imports of aluminum articles from Canada and Mexico is to continue ongoing discussions with these countries and to exempt aluminum articles imports from these countries from the tariff, at least at this time. I expect that Canada and Mexico will take action to prevent transshipment of aluminum articles through Canada and Mexico to the United States.

10. In the meantime, the tariff imposed by this proclamation is an important first step in ensuring the economic viability of our domestic aluminum industry. Without this tariff and satisfactory outcomes in ongoing negotiations with Canada and Mexico, the industry will continue to decline, leaving the United States at risk of becoming reliant on foreign producers of aluminum to meet our national security needs—a situation that is fundamentally inconsistent with the safety and security of the American people. It is my judgment that the tariff imposed by this proclamation is necessary and appropriate to adjust imports of aluminum articles so that such imports will not threaten to impair the national security as defined in section 232 of the Trade Expansion Act of 1962, as amended.

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In Proclamation 9776 of August 29, 2018, the President determined that the measures imposed by Proclamation 9704 should be maintained in light of national security interests. 83 Fed. Reg. 45,019 (Sep. 4, 2018). Proclamation 9710 of March 22, 2018 temporarily exempted some countries pending discussions. Proclamation 9739 of April 30, 2018 also temporarily exempted some countries pending discussions (and setting time limits for some). And Proclamation 9758 of May 31, 2018 set quotas for Argentina, exempted Australia, and subjected all others to the duties.

## 2. Steel

On March 8, 2018, the President issued Proclamation 9705, “Adjusting Imports of Steel Into the United States.” 83 Fed. Reg. 11625 (Mar. 15, 2018). Excerpts follow from the Proclamation.

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1. On January 11, 2018, the Secretary of Commerce (Secretary) transmitted to me a report on his investigation into the effect of imports of steel mill articles (steel articles) ... under section 232 ...

2. The Secretary found and advised me of his opinion that steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States. The Secretary found that the present quantities

of steel articles imports and the circumstances of global excess capacity for producing steel are “weakening our internal economy,” resulting in the persistent threat of further closures of domestic steel production facilities and the “shrinking [of our] ability to meet national security production requirements in a national emergency.” Because of these risks and the risk that the United States may be unable to “meet [steel] demands for national defense and critical industries in a national emergency,” and taking into account the close relation of the economic welfare of the Nation to our national security, *see* 19 U.S.C. 1862(d), the Secretary concluded that the present quantities and circumstances of steel articles imports threaten to impair the national security as defined in section 232 of the Trade Expansion Act of 1962, as amended.

3. In reaching this conclusion, the Secretary considered the previous U.S. Government measures and actions on steel articles imports and excess capacity, including actions taken under Presidents Reagan, George H.W. Bush, Clinton, and George W. Bush. The Secretary also considered the Department of Commerce’s narrower investigation of iron ore and semi-finished steel imports in 2001, and found the recommendations in that report to be outdated given the dramatic changes in the steel industry since 2001, including the increased level of global excess capacity, the increased level of imports, the reduction in basic oxygen furnace facilities, the number of idled facilities despite increased demand for steel in critical industries, and the potential impact of further plant closures on capacity needed in a national emergency.

4. In light of this conclusion, the Secretary recommended actions to adjust the imports of steel articles so that such imports will not threaten to impair the national security. Among those recommendations was a global tariff of 24 percent on imports of steel articles in order to reduce imports to a level that the Secretary assessed would enable domestic steel producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production. The Secretary has also recommended that I authorize him, in response to specific requests from affected domestic parties, to exclude from any adopted import restrictions those steel articles for which the Secretary determines there is a lack of sufficient U.S. production capacity of comparable products, or to exclude steel articles from such restrictions for specific national security-based considerations.

5. I concur in the Secretary’s finding that steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States, and I have considered his recommendations.

\* \* \* \*

8. ...I have decided to adjust the imports of steel articles by imposing a 25 percent ad valorem tariff on steel articles, as defined below, imported from all countries except Canada and Mexico. In my judgment, this tariff is necessary and appropriate in light of the many factors I have considered, including the Secretary’s report, updated import and production numbers for 2017, the failure of countries to agree on measures to reduce global excess capacity, the continued high level of imports since the beginning of the year, and special circumstances that exist with respect to Canada and Mexico. This relief will help our domestic steel industry to revive idled facilities, open closed mills, preserve necessary skills by hiring new steel workers, and maintain or increase production, which will reduce our Nation’s need to rely on foreign producers for steel and ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense. Under current circumstances, this tariff is necessary and appropriate to address the threat that imports of steel articles pose to the national security.

9. In adopting this tariff, I recognize that our Nation has important security relationships with some countries whose exports of steel articles to the United States weaken our internal economy and thereby threaten to impair the national security. I also recognize our shared concern about global excess capacity, a circumstance that is contributing to the threatened impairment of the national security. Any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country. Should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on steel articles imports from that country and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require.

10. I conclude that Canada and Mexico present a special case. Given our shared commitment to supporting each other in addressing national security concerns, our shared commitment to addressing global excess capacity for producing steel, the physical proximity of our respective industrial bases, the robust economic integration between our countries, the export of steel articles produced in the United States to Canada and Mexico, and the close relation of the economic welfare of the United States to our national security, *see* 19 U.S.C. 1862(d), I have determined that the necessary and appropriate means to address the threat to the national security posed by imports of steel articles from Canada and Mexico is to continue ongoing discussions with these countries and to exempt steel articles imports from these countries from the tariff, at least at this time. I expect that Canada and Mexico will take action to prevent transshipment of steel articles through Canada and Mexico to the United States.

11. In the meantime, the tariff imposed by this proclamation is an important first step in ensuring the economic viability of our domestic steel industry. ... It is my judgment that the tariff imposed by this proclamation is necessary and appropriate to adjust imports of steel articles so that such imports will not threaten to impair the national security as defined in section 232 of the Trade Expansion Act of 1962, as amended.

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The President issued several additional proclamations on adjusting imports of steel. Proclamation 9711 of March 22, 2018 noted the continuing discussions between the United States and Argentina, Australia, Brazil, Canada, Mexico, South Korea, and the European Union on other means of addressing the threat to U.S. national security posed by imports of steel and exempted steel from those countries from the tariff in Proclamation 9705 until May 1, 2018. 83 Fed. Reg. 13,361 (Mar. 28, 2018).

Proclamation 9740 of April 30, 2018 noted agreements in principle with Argentina, Australia, and Brazil and extended the temporary exemption of these countries from the tariff proclaimed in Proclamation 9705. 83 Fed. Reg. 20,683 (May 7, 2018). And Proclamation 9759 of May 31, 2018 excluded these countries from the tariff proclaimed in Proclamation 9705 on a long-term basis. 83 Fed. Reg. 25,857 (June 5, 2018).

On August 10, 2018, the President issued Proclamation 9772, "Adjusting Imports of Steel Into the United States." 83 Fed. Reg. 40429 (Aug. 15, 2018). Excerpts follow from the Proclamation.

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4. The Secretary has informed me that while capacity utilization in the domestic steel industry has improved, it is still below the target capacity utilization level the Secretary recommended in his report. Although imports of steel articles have declined since the imposition of the tariff, I am advised that they are still several percentage points greater than the level of imports that would allow domestic capacity utilization to reach the target level.

5. In light of the fact that imports have not declined as much as anticipated and capacity utilization has not increased to that target level, I have concluded that it is necessary and appropriate in light of our national security interests to adjust the tariff imposed by previous proclamations.

6. In the Secretary's January 2018 report, the Secretary recommended that I consider applying a higher tariff to a list of specific countries should I determine that all countries should not be subject to the same tariff. One of the countries on that list was the Republic of Turkey (Turkey). As the Secretary explained in that report, Turkey is among the major exporters of steel to the United States for domestic consumption. To further reduce imports of steel articles and increase domestic capacity utilization, I have determined that it is necessary and appropriate to impose a 50 percent ad valorem tariff on steel articles imported from Turkey, beginning on August 13, 2018. The Secretary has advised me that this adjustment will be a significant step toward ensuring the viability of the domestic steel industry.

\* \* \* \*

On August 29, 2018, the President issued Proclamation 9777, "Adjusting Imports of Steel Into the United States." 83 Fed. Reg. 45025 (Sep. 4, 2018). Excerpts follow from the Proclamation.

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3. Consistent with the Secretary's recommendation that I authorize him to exclude from any adopted import restrictions those steel articles for which the Secretary determines there is a lack of sufficient domestic production of comparable products, or for specific national security-based considerations, I have determined to authorize the Secretary to provide relief from quantitative limitations on steel articles adopted pursuant to section 232 of the Trade Expansion Act of 1962, as amended, including those set forth in Proclamation 9740 of April 30, 2018 (Adjusting Imports of Steel Into the United States), and Proclamation 9759 of May 31, 2018 (Adjusting Imports of Steel Into the United States), on the same basis as the Secretary is currently authorized to provide relief from the duty established in clause 2 of Proclamation 9705.

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### 3. Automobiles

On May 23, 2018, the Trump Administration initiated a Section 232 investigation into the imports of motor vehicles and automotive parts to determine if those imports threaten to impair U.S. national security. 83 Fed. Reg. 24,735 (May 30, 2018). The investigation was ongoing through the end of 2018.

## F. OTHER ISSUES

### 1. FATCA

As discussed in *Digest 2015* at 487-88 and *Digest 2016* at 503-04, a federal district court dismissed claims challenging the Foreign Account Tax Compliance Act (“FATCA”) and the international agreements implementing FATCA (“IGAs”) in 2016. *Crawford et al. v. U.S. Dep’t. of the Treasury et al.*, No. 3:15-cv-250 (S.D. Ohio). As discussed in *Digest 2017* at 516, the U.S. Court of Appeals for the Sixth Circuit affirmed and rehearing en banc was denied. In 2018, the United States filed its brief in opposition to the petition for certiorari in the U.S. Supreme Court. The brief is excerpted below. On April 2, 2018, the U.S. Supreme Court denied the petition for certiorari in the case. No. 17-911.

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2. The court of appeals correctly held that petitioners lack standing to bring their current challenges to FATCA, the IGAs, and the [foreign bank account report or] FBAR requirements and penalties.

a. The court of appeals correctly held that “[n]o [petitioner] has standing to challenge FATCA’s individual-reporting requirements or the Passthru Penalty” or the [foreign financial institution or] FFI penalty “because no [petitioner] (or proposed Plaintiff) has alleged of prosecution from noncompliance with FATCA.” Pet. App. 32a.

Petitioners do not appear to be subject to FATCA’s reporting requirements. Johnson and Zell are the only petitioners who have alleged holding at least \$50,000 in foreign accounts, the minimum threshold at which the reporting requirements can apply. Pet. App. 33a; see 26 U.S.C. 6038D(a). Although Johnson alleged that he held at least \$75,000 in his accounts, he lives outside the United States, where the reporting threshold is \$200,000, or \$400,000 if he elects to file a joint return with his wife. 26 C.F.R. 1.6038D-2(a)(3) and (4); see Pet. App. 33a (“[N]ow and at the time [petitioners] filed suit, Johnson is not subject to FATCA.”). Zell alleged that he has signatory authority over accounts for the benefit of non-United States persons exceeding \$200,000. See Pet. App. 34a. But “FATCA *itself* does not require reporting where, as here, the trust accounts are held entirely for the benefit of non-United States persons,” nor does FATCA require “reporting of accounts based on signatory authority.” *Ibid.*

Petitioners also lack standing to challenge the penalties and withholding taxes that FATCA requires. No petitioner has alleged “the imposition [against him] of a penalty for noncompliance, or an FFI’s deduction of the Passthru Penalty from a payment to or from a foreign account.” Pet. App. 32a-33a. Nor has any petitioner alleged that he was subjected to “a demand for compliance.” *Id.* at 32a. Petitioners also lack standing to pursue their current challenge to the so-called “FFI Penalty,” that is, the tax withholding “imposed upon financial institutions for their noncompliance with FATCA.” *Id.* at 34a. “[S]uch a challenge would require either that the foreign banks themselves bring suit or that [petitioners] rely on third-party standing, and [petitioners] have made clear that they do not.” *Ibid.*

The court of appeals correctly held that other harms allegedly flowing from FATCA were not fairly traceable to respondents’ conduct. Pet. App. 35a-36a. Crawford alleged that Saxo Bank had refused to allow his firm, Aksioner, to accept American clients. *Id.* at 35a. Yet even if that refusal could qualify as a cognizable injury, “it is not fairly traceable to FATCA but rather \*\*\* to Saxo Bank’s own independent actions” in choosing how the bank complies with FATCA. *Ibid.*; see *Allen*, 468 U.S. at 758 (describing as “entirely speculative” plaintiffs’ allegation that withdrawal of an allegedly unconstitutional tax exemption from non-party private school “would lead the school to change its policies”). For similar reasons, neither Adams’s and Zell’s alleged difficulties in obtaining banking services from FFIs, nor the decision of Zell’s foreign clients not to do business with him for fear of being forced to disclose information, gives petitioners standing to sue. Rather, “a foreign bank’s choice either not to do business with Adams or Zell, or (as in Zell’s case) to require Zell’s non-United States clients to make financial or other disclosures even though these clients are not subject to FATCA, is a choice voluntarily made by the bank and is not fairly traceable to FATCA.” Pet. App. 35a-36a. Nor may Johnson challenge FATCA on the basis of his own decision to separate his assets from his wife’s in order to avoid disclosure of her finances. “[T]here is no allegation that FATCA has actually compelled any such disclosure,” and the decision to separate their finances “is traceable to the Johnsons’ own independent actions, not to FATCA.” *Id.* at 35a.

Petitioners’ other allegations relating to FATCA are similarly deficient. Nelson, who is not a United States citizen and is not subject to FATCA, “has stated no facts whatsoever indicating that her account information was disclosed because of FATCA.” Pet. App. 35a. Kuettel’s alleged difficulty in trying to refinance his mortgage—in addition to being “traceable only to the foreign banks and not to FATCA because nothing in FATCA prevented the foreign banks from refinancing Kuettel’s mortgage”—at most constitutes past harm that would be insufficient to warrant prospective injunctive relief. *Id.* at 36a. Finally, petitioners’ other alleged injuries, such as Kish’s marital discord, and “discomfort” on the part of Crawford and Johnson regarding FATCA’s disclosure requirements, are “not the sort of concrete injury that can give rise to standing.” *Ibid.*

b. The court of appeals correctly held that petitioners lacked standing to challenge the IGAs. Senator Paul is the only petitioner who has “alleged injuries that are traceable to the IGAs.” Pet. App. 38a. Senator Paul claims that he “has been denied the opportunity to exercise his constitutional right as a member of the U.S. Senate to vote against the FATCA IGAs.” *Id.* at 37a (citation omitted). This Court has held, however, that “the abstract dilution of institutional legislative power” does not cause cognizable injury to an individual legislator. *Raines*, 521 U.S. at 826. The court of appeals also correctly held that Senator Paul does not fall within the rule of *Coleman v. Miller*, 307 U.S. 433 (1939), in which this Court upheld the standing of a group of 20 state senators whose votes were “overridden and virtually held for naught.” *Id.* at 438. It was

crucial to this Court's resolution of the standing issue in *Coleman* that "the plaintiff-legislators' votes would have been sufficient to defeat the contested legislation." Pet. App. 37a; see *Coleman*, 307 U.S. at 438 ("[I]f [the state legislators] are right in their contentions their votes would have been sufficient to defeat [the challenged law]."). Senator Paul, by contrast, "has not pleaded that his vote on its own would have been sufficient to forestall the IGAs." Pet. App. 37a.

c. The court of appeals correctly held that petitioners do not have standing to challenge the FBAR requirement or the penalty for willful violations. Several petitioners have alleged that they hold foreign bank accounts with more than \$10,000, so that the requirement applies to them. Pet. App. 38a. But no petitioner has alleged "both an intent to violate the FBAR requirement and a credible threat of the imposition of a failure-to-file penalty," which would be necessary to maintain standing for a pre-enforcement challenge to the requirement. *Ibid.* Only Zell has alleged that he intends to violate the requirement, yet he "has not alleged any facts that would show a credible threat of enforcement against him." *Ibid.* And even if he had plausibly alleged that the requirement will be enforced against him, the penalty is discretionary: "Zell has not alleged any facts that show that the Willfulness Penalty, as opposed to the lower ordinary penalty (which [petitioners] do not challenge), would be imposed." *Ibid.*, (citation omitted). Finally, the desire of Daniel Kuettel's daughter to hold her college fund in her own name does not give her or her father standing to challenge the FBAR requirement. Her alleged injury "is traceable to Daniel Kuettel's personal choice not to transfer the account, and not to the FBAR." *Id.* at 39a.

3. Petitioners' contrary arguments (Pet. 17-34) lack merit.

a. Petitioners principally contend (Pet. 17-19) that the court of appeals adopted an impermissibly restrictive approach to determining whether a plaintiff has standing to raise a pre-enforcement challenge seeking injunctive relief based on the threat of criminal prosecution. Petitioners assert that the court adopted a "rule that 'the threat of prosecution 'must be *certainly impending*,,' with 'a *certain* threat of prosecution,' " Pet. 17 (quoting Pet. App. 26a), whereas this Court's decision in *Driehaus* requires only an allegation of "'certainly impending' future harm *or* a 'substantial risk' thereof," such as "'a credible threat of prosecution,'" *ibid.* (quoting *Driehaus*, 134 S.Ct. at 2341-2342). Petitioners assert that the decision below conflicts with *Driehaus* and with decisions of other courts of appeals that have "followed *Driehaus*'s credible-threat-of-prosecution test for pre-enforcement challenges." See Pet. 19 (citing cases).

Petitioners' argument reflects a misunderstanding of the court of appeals' ruling. The court correctly recognized that, "[i]n a pre-enforcement challenge to a federal statute, the Supreme Court has held that a plaintiff satisfies the injury requirement of standing by alleging 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and that there exists a credible threat of prosecution thereunder.'" Pet. App. 25a-26a (quoting *Driehaus*, 134 S. Ct. at 2342) (brackets omitted). The court of appeals further explained, however, that no matter how committed the plaintiff may be to engaging in the forbidden conduct, "[t]he mere possibility of prosecution \*\*\* does not amount to a 'credible threat' of prosecution. Instead, the threat of prosecution 'must be certainly impending to constitute injury in fact.'" *Id.* at 26a (quoting *Clapper*, 568 U.S. at 410). The court's statement later in the same paragraph that "there must be a certain threat of prosecution," *ibid.*, was simply a paraphrase of this Court's statement in *Clapper* and other decisions that the "threatened injury must be *certainly impending* to constitute injury in fact." 568 U.S. at 409 (citation omitted). The court of appeals did not announce a new, substantively different test. Petitioners could not satisfy their own preferred test.

b. In holding that no petitioner has standing to challenge the FBAR requirement, the court of appeals explained that, “[o]ther than Zell, no [petitioner] has alleged any intent to violate” the requirement, and that “Zell has not alleged any facts that would show a credible threat of enforcement against him.” Pet. App. 38a. Petitioners assert (Pet. 20) that “numerous Petitioners verified that they don’t *want* to file FBAR reports, believing them unconstitutional, and wouldn’t file them if not required.” Petitioners contend on that basis (Pet. 20-21) that petitioners other than Zell have adequately alleged an intent to violate the FBAR requirement, and that the decision below conflicts with *Driehaus*. Although petitioners’ argument is not entirely clear, petitioners appear to attribute to the court a holding that, in order to establish standing to challenge an allegedly invalid law, a plaintiff must allege that he intends to violate the law *even if* ‘the court declines to declare the law invalid.

Nothing in the court of appeals’ opinion supports that characterization. And the question whether the court correctly construed the complaint in stating that “[o]ther than Zell, no [petitioner] has alleged any intent to violate the FBAR requirement,” Pet. App. 38a, has no significance beyond the circumstances of this case. In any event, the court acknowledged that Zell had adequately alleged an intent to violate the law, and it held that he lacked standing on the separate ground that he “ha[d] not alleged any facts that would show a credible threat of enforcement against him.” *Ibid.* Petitioners identify no reason to believe that the court would have reached a different conclusion if it had examined whether other petitioners had adequately alleged a credible threat that the FBAR requirement would be enforced against them.

c. Petitioners contend (Pet.225) that they have suffered an “indirect injury” from the legal requirements imposed on FFIs. Pet. 21 (capitalization altered). Petitioners assert (Pet. 22) that the restrictions on FFIs under FATCA and the IGAs have resulted in “FFIs \*\*\* declining to provide financial services to Americans abroad,” including some petitioners. Petitioners claim (Pet. 21) that they therefore have standing to challenge FATCA and the IGAs under the theory that a “third-party withholding of a service due to a law gives persons denied the service standing to challenge the law.” Petitioners rely on *Roe v. Wade*, 410 U.S. 113 (1973), in which the Court held that “Jane Roe had standing to challenge” a law that penalized doctors performing abortions “because physicians wouldn’t provide her an abortion.” Pet. 22. Petitioners assert (*ibid.*) that, under *Roe*, they similarly have standing in light of the “coercive effect of FATCA and the IGAs.”

As the court of appeals correctly recognized, petitioners’ challenge is fundamentally dissimilar to the challenge in *Roe*. See Pet. App. 29a & n.8. There, neither a woman seeking an abortion, nor a doctor who desired to perform one, could have accomplished those ends without violating the law. *Ibid.* In the present case, by contrast, there is “a third option available” to FFIs, which is to “comply with FATCA and do business with United States persons—without imposing additional requirements on their clients beyond what FATCA and the IGAs themselves require.” *Id.* at 29a. Petitioners have alleged that some FFIs have made a “voluntary choice to go above and beyond FATCA and the IGAs,” including in some instances by declining to do business with United States citizens. *Id.* at 30a. Any ensuing injury to petitioners, however, cannot be attributed to the challenged laws, but rather results from the FFIs’ “own independent actions.” *Id.* at 35a.

d. Petitioners contend (Pet. 25-28) that the court of appeals failed to accept their allegations as true and to construe the complaint in their favor, as required by *Warth v. Seldin*, 422 U.S. 490 (1975). Although petitioners acknowledge that the court articulated the correct standard, see Pet. App. 32a, they claim (Pet. 26) that the court “didn’t do as required.” Petitioners

point in particular to the court’s conclusion that any FFI denying service to a petitioner did so based on a “voluntary and independent” choice, which was not “traceable to the IGAs.” Pet. 27 (quoting Pet. App. 30a, 38a) (emphasis omitted). That conclusion was improper, petitioners argue (*ibid.*), because “Petitioners said denial of services by FFIs was *because of* FATCA/IGAs.”

Petitioners’ assertions of traceability, however, are not the sort of “nonconclusory factual allegation[s]” that a court must take as true in ruling on a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009). The court of appeals did not dispute petitioners’ *factual* allegation that some FFIs have reacted to FATCA and the IGAs by declining service to Americans. See Pet. App. 35a-36a. The court held, however, that those choices were “voluntary,” and therefore not “traceable to FATCA” or the IGAs as a *legal* matter, because neither FATCA nor the IGAs compelled them. *Id.* at 36a.

The court’s application of the traceability requirement is consistent with this Court’s instruction that the requirement is not satisfied “if the injury complained of is the result of the independent action of some third party not before the court.” *Bennett*, 520 U.S. at 169...

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## 2. Universal Postal Union (“UPU”)

On August 23, 2018, the President issued a memorandum on “Modernizing the Monetary Reimbursement Model for the Delivery of Goods Through the International Postal System and Enhancing the Security and Safety of International Mail.” 83 Fed. Reg. 47,791 (Sep. 19, 2018). Excerpts follow from the memorandum.

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**Sec. 2. Policy.** (a) The UPU was established in 1874 by 21 countries. The United States played an integral role in the UPU’s creation and, since that time, the United States has actively participated in all phases of the UPU’s work. The United States is a party to the current Constitution of the UPU—which was adopted in 1964—and intends to continue to participate fully in and financially contribute to the UPU, as provided in Article 21 of the UPU Constitution. As a member country of the UPU, the United States recognizes the importance of this longstanding organization and is proud of the United States’ unbroken record of participation in it.

The Congress has provided that the Secretary of State (Secretary), in concluding postal treaties, conventions, or other international agreements, shall, to the maximum extent practicable, take measures to encourage governments of other countries to make available to the United States Postal Service (USPS) and private companies a range of nondiscriminatory customs procedures that will fully meet the needs of all types of American shippers (39 U.S.C. 407(e)(3)).

The Congress has likewise directed that responsible officials shall apply the customs laws of the United States and all other laws relating to importation or exportation of goods in the same manner to shipments of goods that are competitive products of the USPS and to similar shipments by private companies (39 U.S.C. 407(e)(2)).

It is the policy of the United States to promote and encourage the development of an efficient and competitive global system that provides for fair and nondiscriminatory postal rates.

(b) It is in the interest of the United States to:

(i) promote and encourage communications between peoples by efficient operation of international postal services and other international delivery services for cultural, social, and economic purposes (39 U.S.C. 407(a)(1));

(ii) promote and encourage unrestricted and undistorted competition in the provision of international postal services and other international delivery services, except where provision of such services by private companies may be prohibited by the laws of the United States (39 U.S.C. 407(a)(2));

(iii) promote and encourage a clear distinction between governmental and operational responsibilities with respect to the provision of international postal services and other international delivery services by the Government of the United States and by intergovernmental organizations of which the United States is a member (39 U.S.C. 407(a)(3)); and

(iv) participate in multilateral and bilateral agreements with other countries to accomplish these objectives (39 U.S.C. 407(a)(4)).

(c) Some current international postal practices in the UPU do not align with United States economic and national security interests:

(i) UPU terminal dues, in many cases, are less than comparable domestic postage rates.

As a result:

(A) the United States, along with other member countries of the UPU, is in many cases not fully reimbursed by the foreign postal operator for the cost of delivering foreign-origin letter post items, which can result in substantial preferences for foreign mailers relative to domestic mailers;

(B) the current terminal dues rates undermine the goal of unrestricted and undistorted competition in cross-border delivery services because they disadvantage non-postal operators seeking to offer competing collection and outward transportation services for goods covered by terminal dues in foreign markets; and

(C) the current system of terminal dues distorts the flow of small packages around the world by incentivizing the shipping of goods from foreign countries that benefit from artificially low reimbursement rates.

(ii) The UPU has not done enough to reorient international mail to achieve a clear distinction between documents and goods. Without such a distinction, it is difficult to achieve essential pricing reforms or to ensure that customs requirements, including provision of electronic customs data for goods, are met. Under the current system, foreign postal operators do not uniformly furnish advance electronic customs data that are needed to enhance targeting and risk management for national security and to facilitate importation and customs clearance. My Administration's Initiative to Stop Opioids Abuse and Reduce Drug Supply and Demand, launched in March of this year, requires accurate advance electronic customs data for 90 percent of all international mail shipments that contain goods and consignment shipments within 3 years, so that the Department of Homeland Security can better detect and flag high-risk shipments.

(d) It shall be the policy of the executive branch to support efforts that further the policies in this memorandum, including supporting a system of unrestricted and undistorted competition between United States and foreign merchants. Such efforts include:

(i) ensuring that rates charged for delivery of foreign-origin mail containing goods do not favor foreign mailers over domestic mailers;

(ii) setting rates charged for delivery of foreign-origin mail in a manner that does not favor postal operators over non-postal operators; and

(iii) ensuring the collection of advance electronic customs data.

**Sec. 3. *Relations with the UPU.*** (a) The United States must seek reforms to the UPU that promote the policies outlined in this memorandum. Such reforms shall provide for:

(i) a system of fair and nondiscriminatory rates for goods that promotes unrestricted and undistorted competition; and

(ii) terminal dues rates that:

(A) fully reimburse the USPS for costs to the same extent as domestic rates for comparable services;

(B) avoid a preference for inbound foreign small packages containing goods that favors foreign mailers over domestic mailers; and

(C) avoid a preference for inbound foreign small packages containing goods that favors postal operators over private-sector entities providing transportation services.<sup>[SEP]</sup>

(b) If negotiations at the UPU's September 2018 Second Extraordinary Congress in Ethiopia fail to yield reforms that satisfy the criteria set forth in subsection (a) of this section, the United States will consider taking any appropriate actions to ensure that rates for the delivery of inbound foreign packages satisfy those criteria, consistent with applicable law.

**Sec. 4. *Actions by the Secretary.*** (a) The Secretary shall notify the Director General of the UPU of the policies and intentions of the United States described in this memorandum.

(b) The Secretary or his designee shall, consistent with 39 U.S.C. 407(b)(1), seek agreement on future Convention texts that comport with the policies of this memorandum in meetings of the UPU, including at the September 2018 Extraordinary Congress.

(c) No later than November 1, 2018, the Secretary shall submit to the President a report summarizing the steps being taken to implement this memorandum. If the Secretary determines that sufficient progress on reforms to promote compatibility of the Acts of the UPU with the policy of this memorandum is not being achieved, the Secretary shall include recommendations for future action, including the possibility of adopting self-declared rates.

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The Department of State provided the report called for in the August 23, 2018 memorandum, *supra*. On October 17, 2018, President Trump responded to the report, as described in a White House press statement, available at <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-38/>, and excerpted below. See Chapter 4 for discussion of the U.S. notice of withdrawal from the UPU.

\* \* \* \*

...The report noted that sufficient progress has not been made on reforming terms of the Acts of the Universal Postal Union (UPU) in line with the policies of the United States outlined in the Memorandum. The report also recommended steps the United States can take to address the problems identified in the Memorandum.

The President concurs with the Department of State's recommendation to adopt self-declared rates for terminal dues as soon as practical, and no later than January 1, 2020. The Department of State will also file notice that the United States will withdraw from the UPU. This will begin a one-year withdrawal process, as set forth in the UPU Constitution. During this period, the Department of State will seek to negotiate bilateral and multilateral agreements that resolve the problems discussed in the Presidential Memorandum. If negotiations are successful, the Administration is prepared to rescind the notice of withdrawal and remain in the UPU.

\* \* \* \*

### **3. Intellectual Property**

#### ***a. Special 301 Report***

The "Special 301" Report is an annual review of the global state of intellectual property rights ("IPR") protection and enforcement. USTR provides information about the Special 301 Report on its website at <https://ustr.gov/issue-areas/intellectual-property/Special-301>.

USTR issued the 2018 Special 301 Report in April 2018. The Report is available at <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf>. The 2018 Report lists the following countries on the Priority Watch List: Algeria, Argentina, Canada, Chile, China, Colombia, India, Indonesia, Kuwait, Russia, Ukraine, and Venezuela. It lists the following on the Watch List: Barbados, Bolivia, Brazil, Costa Rica, Dominican Republic, Ecuador, Egypt, Greece, Guatemala, Jamaica, Lebanon, Mexico, Pakistan, Peru, Romania, Saudi Arabia, Switzerland, Tajikistan, Thailand, Turkey, Turkmenistan, the United Arab Emirates, Uzbekistan, and Vietnam. See *Digest 2007* at 605–7 and the *2018 Special 301 Report* at 7 and Annex 1 for additional background on the watch lists.

#### ***b. Investigation of China's Policies on Technology Transfer, IP and Innovation***

On August 14, 2017, the President directed USTR to determine whether to investigate China's laws, policies, practices, or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation, or technology development. On August 18, 2017, USTR initiated an investigation under section 301 of the Trade Act of 1974, as amended (the "Act") (19 U.S.C. 2411). On March 22, 2018, the President issued a memorandum on the Section 301 investigation of China's laws, policies, practices, or actions related to technology transfer, IP, and innovation. 83 Fed. Reg. 13,099 (Mar. 27, 2018). Excerpts follow from the memorandum.

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\* \* \* \*

The Trade Representative has advised me that the investigation supports the following findings:

First, China uses foreign ownership restrictions, including joint venture requirements, equity limitations, and other investment restrictions, to require or pressure technology transfer from U.S. companies to Chinese entities. China also uses administrative review and licensing procedures to require or pressure technology transfer, which, inter alia, undermines the value of U.S. investments and technology and weakens the global competitiveness of U.S. firms.

Second, China imposes substantial restrictions on, and intervenes in, U.S. firms' investments and activities, including through restrictions on technology licensing terms. These restrictions deprive U.S. technology owners of the ability to bargain and set market-based terms for technology transfer. As a result, U.S. companies seeking to license technologies must do so on terms that unfairly favor Chinese recipients.

Third, China directs and facilitates the systematic investment in, and acquisition of, U.S. companies and assets by Chinese companies to obtain cutting-edge technologies and intellectual property and to generate large-scale technology transfer in industries deemed important by Chinese government industrial plans.

Fourth, China conducts and supports unauthorized intrusions into, and theft from, the computer networks of U.S. companies. These actions provide the Chinese government with unauthorized access to intellectual property, trade secrets, or confidential business information, including technical data, negotiating positions, and sensitive and proprietary internal business communications, and they also support China's strategic development goals, including its science and technology advancement, military modernization, and economic development.

It is hereby directed as follows:

**Section 1. *Tariffs.*** (a) The Trade Representative should take all appropriate action under section 301 of the Act (19 U.S.C. 2411) to address the acts, policies, and practices of China that are unreasonable or discriminatory and that burden or restrict U.S. commerce. The Trade Representative shall consider whether such action should include increased tariffs on goods from China.

(b) To advance the purposes of subsection (a) of this section, the Trade Representative shall publish a proposed list of products and any intended tariff increases within 15 days of the date of this memorandum. After a period of notice and comment in accordance with section 304(b) of the Act (19 U.S.C. 2414(b)), and after consultation with appropriate agencies and committees, the Trade Representative shall, as appropriate and consistent with law, publish a final list of products and tariff increases, if any, and implement any such tariffs.

**Sec. 2. *WTO Dispute Settlement.*** (a) The Trade Representative shall, as appropriate and consistent with law, pursue dispute settlement in the World Trade Organization (WTO) to address China's discriminatory licensing practices. Where appropriate and consistent with law, the Trade Representative should pursue this action in cooperation with other WTO members to address China's unfair trade practices.

(b) Within 60 days of the date of this memorandum, the Trade Representative shall report to me his progress under subsection (a) of this section.

**Sec. 3. *Investment Restrictions.*** (a) The Secretary of the Treasury (Secretary), in consultation with other senior executive branch officials the Secretary deems appropriate, shall propose executive branch action, as appropriate and consistent with law, and using any available

statutory authority, to address concerns about investment in the United States directed or facilitated by China in industries or technologies deemed important to the United States.

(b) Within 60 days of the date of this memorandum, the Secretary shall report to me his progress under subsection (a) of this section.

\* \* \* \*

USTR conducted further proceedings in the investigation based on the determination that China's acts, policies, and practices are actionable under section 301(b), including soliciting public comment on the proposed imposition of an additional ad valorem duty of 25% on products from China classified in a list of 1,333 tariff subheadings. 83 Fed. Reg. 14,906 (Apr. 6, 2018).

On May 29, 2018, the President announced that the United States would impose a 25 percent tariff on \$50 billion of goods imported from China containing industrially significant technology. Statement available at <https://www.whitehouse.gov/search/?s=statement+steps+protect+domestic+technology++intellectual+property+chinas+discriminatory+burdensome+trade+practices>.

The additional duties were imposed in two tranches, following public comments and public hearings. Tranche 1 covered 818 tariff subheadings, with an approximate annual trade value of \$34 billion. 83 Fed. Reg. 28710 (June 20, 2018). Tranche 2 covered 279 tariff subheadings, with an approximate annual trade value of \$16 billion. 83 Fed. Reg. 40823 (August 16, 2018).

In a notice published on September 21, 2018, USTR, at the direction of the President, imposed tariffs on products of China with an annual trade value of approximately \$200 billion. 83 Fed. Reg. 47,974 (Sep. 21, 2018). Additional duties of 10 percent were imposed starting on September 24, 2018 and the rate was set to increase to 25 percent on January 1, 2019. *Id.*

On December 19, 2018, USTR published notice of a further modification of the action being taken in the Section 301 investigation, postponing until March 2019 the imposition of the 25 percent duty on products from China determined previously. 83 Fed. Reg. 65,198 (Dec. 19, 2018). Excerpts follow from the notice in the Federal Register, explaining the reason for the postponement:

The United States is engaging with China with the goal of obtaining the elimination of the acts, policies, and practices covered in the investigation. The leaders of the United States and China met on December 1, 2018, and agreed to hold negotiations on a range of issues, including those covered in this Section 301 investigation. ... The December 1 Statement notes that the President "agreed that on January 1, 2019, he will leave the tariffs on \$200 billion worth of product at the 10% rate, and not raise it to 25% at this time. Both parties agree that they will endeavor to have this transaction completed within the next 90 days. If at the end of this period of time, the parties are unable to reach an agreement, the 10% tariffs will be raised to 25%." The end of the 90-day period mentioned in the December 1 Statement is March 1, 2019.

#### 4. Presidential Permits

##### a. *Keystone XL pipeline*

As discussed in *Digest 2017* at 518-19, the State Department issued a permit for the proposed Keystone XL pipeline. The U.S. Department of State announced the availability of the Draft Environmental Assessment (“Draft EA”) for the Proposed Keystone XL Pipeline Mainline Alternative Route (“MAR”) in Nebraska for public review and comment. 83 Fed. Reg. 36,659 (July 30, 2018). In September, the Department issued a notice of intent to prepare a Supplemental Environmental Impact Statement (SEIS) — consistent with the National Environmental Policy Act (“NEPA”) of 1969—to analyze the potential environmental impacts of the Keystone XL MAR. 83 Fed. Reg. 46,989 (Sep. 17, 2018). On September 24, 2018, the Department announced the availability for public review and comment of the Draft SEIS for the Keystone XL Pipeline MAR in Nebraska. 83 Fed. Reg. 48,358 (Sep. 24, 2018).

On November 8, 2018, a U.S. district court in Montana issued an order granting partial summary judgment in a case challenging the issuance of the permit for the Keystone XL Pipeline; vacating the record of decision (“ROD”) issued on March 23, 2017; and granting plaintiffs’ request for an injunction against any activity in furtherance of the construction or operation of the Keystone XL Pipeline until the SEIS is supplemented to comply with requirements of NEPA and the Administrative Procedures Act (“APA”). *Indigenous Environmental Network and North Coast River Alliance et al., v. U.S. Dept. of State and TransCanada, et al.*, No. CV-17-29, CV 17-31. Excerpts follow from the court’s order.

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\* \* \* \*

The Department’s purpose, therefore, stems from Keystone’s crossing of the international border between the United States and Canada. This crossing requires a cross-border permit. . . . The Department must put forth a ROD approving or denying TransCanada’s cross-border permit application. *Id.* The Department needed to consider Keystone’s application and whether it would serve the national interest. *Id.* The Department reached a national interest determination based on its evaluation of the Keystone’s potential environmental, cultural, economic, and other impacts. *Id.*

No error exists in the Department’s purpose and need statement. The Department possesses broad discretion to define the purpose of its actions. The Department may consider private interests as part of its purpose and need. *See Alaska Survival*, 705 F.3d at 1085. The Department reasonably stated that it sought to determine whether approval of the permit would serve the national interest. . . . The Department’s purpose and need statement further proves reasonable when it considered both TransCanada’s private interests and the Department’s own requirements for issuing cross-border permits.

\* \* \* \*

The Department adequately examined proposed alternatives and reasonably excluded those that did not meet the Project’s purpose and need. The factors that the Secretary deemed relevant to the national interest included the following: “foreign policy; energy security; environmental, cultural, and economic impacts; and compliance with applicable law and policy.” ... The 2014 SEIS articulated and analyzed the proposed Project and the alternatives. The 2014 SEIS also provided a separate section that detailed the alternatives considered, but excluded from further consideration. *Id.* at 6082. The Department set forth reasonable explanations for why each excluded alternative did not meet the private needs of TransCanada. Further, the Department explained why it excluded the alternatives due to national interest factors including environmental and cultural resources, or increased spill risk. The Department’s analysis of both the private interest of TransCanada and the Department’s national interest considerations (i.e. environmental and cultural impacts) proves reasonable in its dismissal of alternatives.

\* \* \* \*

Defendants argue, and the Court agrees, that the 2014 SEIS contained a full and fair discussion of the market demand for oil. (Doc. 173 at 31.) ...

\* \* \* \*

The Court must limit its review to determining whether the 2014 SEIS took a “hard look” at the effects of Keystone on oil markets. *See Norton*, 276 F.3d at 1072. The Department met this “hard look” requirement in its market analysis and its conclusion that Keystone would not impact the rate of tar sands extraction. The Department provided sufficient analysis that went beyond mere assumptions of the rate of oil sands extraction rates in 2014. The Court finds no error in the Department’s 2014 analysis of the rate of tar sands extraction and its impact on climate change.

## 2. New Information Since 2014

Plaintiffs argue, however, that significant new information has come forth since 2014 regarding oil markets, rail transportation, and greenhouse gas emissions that requires a supplement of the Project’s impacts. (Doc. 140 at 35.) NEPA imposes a continuing duty on federal agencies to supplement new and relevant information. *Price Rd. Neighborhood Ass’n v. U.S. Dep’t of Transp.*, 113 F.3d 1505, 1508-09 (9th Cir. 1997). NEPA requires a supplemental EIS if an “agency makes substantial changes in the proposed action that are relevant to environmental concerns; or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(i)-(ii). An agency is not required, however, to “supplement an EIS every time new information comes to light after the EIS is finalized.” *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989). A supplement proves necessary “if the new information [presented] is sufficient to show the remaining action will ‘affec[t] the quality of the human environment’ in a significant manner or to a significant extent not already considered[.]” *Id.* at 374 (quoting 42 U.S.C. § 4332(2)(C)).

### a. Change in Oil Markets

Plaintiffs first argue that the Department failed to consider a decrease in oil prices in the 2014 SEIS. (Doc. 140 at 27.) The 2014 SEIS analyzed the possibility of moderate fluctuations in oil prices and the possibility of a low oil price scenario. The 2014 SEIS failed to address, however,

the significant changes in oil prices that have occurred since 2014. This lack of analysis fails to satisfy NEPA's hard look requirement. The 2014 SEIS stated that "pipeline constraints are unlikely to impact production given expected supply-demand scenarios, prices, and supply costs. Over the long term, lower-than-expected oil prices could affect the outlook for oil sand production[.]" ... The Department acknowledges that a significant drop in oil prices materially could change the analysis. The 2014 SEIS conditioned much of its analysis, however, on the price of oil remaining high.

The record demonstrates the need to supplement. The 2014 SEIS stated the price of crude oil would range from \$100 per barrel to \$140 per barrel over twenty years. *Id.* at 5864. The 2014 SEIS predicts the price of oil needed to fall within the range of \$65-\$75 per barrel in order for Keystone to break even. *Id.* at 5767. The 2014 SEIS concedes that Keystone would be affected by supply costs if the oil prices fell within or below that range. *Id.*

The United States Energy Information Administration predicts that the price of oil likely will remain below \$100 for decades. *Id.* at 1849. The record shows further that a dramatic drop in oil prices occurred soon after publication of the 2014 SEIS that lowered the price to nearly \$38 per barrel. The Department suggests that the current price of oil stands at roughly \$60 per barrel. (Doc. 173 at 49.) This drop constitutes more than a mere fluctuation in oil prices. Plaintiffs also present evidence that the Environmental Protection Agency called upon the Department to revisit the EIS's conclusions after the 2015 oil prices dropped. ... Oil prices have remained below the "break-even" numbers established in the 2014 SEIS. This new and relevant information bears upon the Department's earlier analysis in the 2014 SEIS. The Court makes no suggestion of whether this information should alter the Department's analysis. Such an analysis proves material, however, to the Department's consideration of Keystone's impact on tar sands production.

\* \* \* \*

### c. Greenhouse Gas Emissions

Plaintiffs next allege that the Department violated NEPA by failing to evaluate the cumulative climate impacts of Keystone in combination with other pipelines. ...

\* \* \* \*

Defendants failed to analyze cumulative climate impacts along with the pending Alberta Clipper expansion. The Court considers the Department's analysis of Keystone in the Alberta Clipper EIS as a cumulative action. *See* 40 C.F.R. § 1508.7. The Department similarly should have analyzed the Alberta Clipper pipeline's emissions in the Keystone SEIS. The Department argues that the Keystone SEIS obtained a full picture of the pipeline's climate change impacts. (Doc. 173 at 43.) The Department also admits, however, that the 2014 SEIS failed to analyze greenhouse gas emissions associated with the Alberta Clipper. (Doc. 173 at 50-51.) The Department thus failed to paint a full picture of emissions for these connected actions, and, therefore, ignored its duty to take a "hard look." *See Norton*, 276 F.3d at 1072.

\* \* \* \*

The Keystone SEIS indicated that greenhouse gas emissions associated with the pipeline would range annually from 1.3 to 27.4 MMTCO<sub>2e</sub>. The Alberta Clipper EIS determined that combined

greenhouse gas emissions associated with both pipelines would range annually from 2.1 to 49.9 MMTCO<sub>2</sub>e. A difference of this magnitude cannot be dismissed simply as harmless error. The error left out significant information from the climate analysis in the Department's possession. The Department should have considered the cumulative impacts of both projects. The Court recognizes the Department's decision to issue the permit regarding the Alberta Clipper expansion. The Court cannot assume without reasoned analysis, however, that the Department would reach the same conclusion for the Keystone permit. The Department must supplement this analysis to include the same information. Further, the Department must supplement the environmental analysis to include the same updated GREET model analysis used in the Alberta Clipper EIS.

#### **D. Impacts in Canada**

Plaintiffs next argue that the Department violated NEPA by failing to consider sufficiently potential environmental impacts in Canada. ...

\* \* \* \*

... The 2014 SEIS's incorporation of the Canadian government's environmental review sufficiently informed officials and citizens of impacts in Canada before the Department made a decision and took action on Keystone. *See Id.*

#### **E. Other Environmental Impacts**

Plaintiffs allege three additional areas where the Department failed to provide a "full and fair discussion." These areas include Keystone's impacts to cultural resources, the adequacy of comment responses, and oil spills.

##### **1. Cultural Resources**

NEPA requires agencies to analyze impacts to cultural resources. 40 C.F.R. §§ 1502.16(g), 1508.8. Plaintiffs argue that Keystone poses risks of direct damage to cultural resources within the Project area. (Doc. 146 at 36.) Plaintiffs contend that the social, cultural, and health impacts run the length of Keystone, and that over 1,000 acres remain unsurveyed for potential cultural resources. *Id.*

\* \* \* \*

The Department appears to have jumped the gun when it issued the ROD in 2017 and acted on incomplete information regarding potential cultural resources along the 1,038 acres of unsurveyed route. The Department must supplement the information on the unsurveyed acres to the 2014 SEIS's cultural resources analysis, in order to comply with its obligations under NEPA. *See* 40 C.F.R. §§ 1502.16(g), 1508.8.

##### **2. Comments**

Plaintiffs next argue that Defendants failed to respond adequately to public comments that it received on the Draft 2014 SEIS. ...

The 2014 SEIS adequately addressed the comments. The 2014 SEIS first organized comments into themes based on subject matter. The 2014 SEIS dedicated a significant portion to responding to the categories and opposing viewpoints. ... The Department did not violate NEPA in its comments analysis.

##### **3. Oil Spills**

Plaintiffs next allege that the Department failed to consider new information regarding oil spills. ...

\* \* \* \*

The major spills that occurred between 2014 and 2017 qualify as significant. The Department would have evaluated the spills in the 2014 SEIS had the information been available. Further, the risk of spills likely would affect Keystone's potential impact on other areas of the ROD's analysis, including risks to water and wildlife. These new spills and the information provided by them warrant an update.

The ROD similarly fails to show how the 2014 SEIS adequately addressed the NAS study regarding tar sands oil. The ROD merely asserts that Keystone has agreed to consult with local emergency responders and update its mitigation response plans as new information becomes available. This conclusory statement fails to meet NEPA's "hard look" requirement. The absence of this information from the 2014 SEIS's mitigation measures demonstrates that the agency acted upon incomplete information in setting forth its mitigation measures. *Marsh*, 490 U.S. at 371. The Department must supplement this information.

Plaintiffs also argue that the Department failed to analyze sufficiently potential impacts of Keystone's spills and leaks to water resources. The Court's determination that the Department must supplement information regarding spills allows the Department to address how the updated information on spills will impact water resources.

#### **F. The Department's Change in Course Between 2015 and 2017**

An agency must provide a detailed justification for reversing course and adopting a policy that "rests upon factual findings that contradict those which underlay its prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Agency action qualifies as "arbitrary and capricious if the agency has ... offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Org. Vill. of Kake v. U.S. Dept. of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

##### **1. Compliance with the APA standard for a policy change**

The United States Supreme Court established a four part test in *Fox* to determine whether a policy change complies with the APA: (1) the agency displays "awareness that it is changing position;" (2) the agency shows that "the new policy is permissible under the statute;" (3) the agency "believes" the new policy is better; and (4) the agency provides "good reasons" for the new policy. *Fox*, 556 U.S. at 515-16; *See also Kake*, 795 F.3d at 966. The new policy must include "a reasoned explanation... for disregarding facts and circumstances that underlay or were engendered by the prior policy," if the new policy rests upon factual findings that contradict those underlying its prior policy. *Id.*

\* \* \* \*

Here, as in *Kake*, the central issue involves whether the 2017 ROD rests on factual findings that contradict those in the 2015 ROD. And if the 2017 ROD's factual findings contradict the 2015 ROD, the Court must analyze whether the 2017 ROD contains a "reasoned explanation." *Id.* at 967.

##### **2. The Department's Conclusions on Climate Change**

The Department denied the permit in its 2015 ROD. The Department relied heavily on the United States's role in climate leadership. ... The Department issued a new ROD in 2017. The new ROD noted that "there have been numerous developments related to global action to address climate change, including announcements by many countries of their plans to do so" since the 2015 ROD. *Id.* at 2518. Moreover, the new ROD suggested that "a decision to approve

[the] proposed Project would support U.S. priorities relating to energy security, economic development, and infrastructure.” *Id.* The Department argues that this about-face constitutes a mere policy shift, and that on its own, cannot be found arbitrary and capricious. (Doc. 173 at 88.) The Department possesses the authority to give more weight to energy security in 2017 than it had in 2015. *See Kake*, 795 F.3d at 968. *Kake* and *State Farm* make clear, however, that “even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation.” *Id.* The Department did not merely make a policy shift in its stance on the United States’s role on climate change. It simultaneously ignored the 2015 ROD’s Section 6.3 titled “Climate Change-Related Foreign Policy Considerations.”

Section 6.3 of the 2015 ROD determined that the United States’s climate change leadership provided a significant basis for denying the permit. The Department acknowledged science supporting a need to keep global temperature below two degrees Celsius above pre-industrial levels *Id.* at 1182-83. The Department further recognized the scientific evidence that human activity represents a dominant cause of climate change. *Id.* The Department cited trans-boundary impacts including storm surges and intense droughts. *Id.* And finally, the Department accepted the United States’s impact as the world’s largest economy and second-largest greenhouse gas emitter. *Id.*

The 2017 ROD initially tracked the 2015 ROD nearly word-for-word. The 2017 ROD, without explanation or acknowledgment, omitted entirely a parallel section discussing “Climate Change-Related Foreign Policy Considerations.” The 2017 ROD ignores the 2015 ROD’s conclusion that 2015 represented a critical time for action on climate change. The 2017 ROD avoids this conclusion with a single paragraph. The 2017 ROD simply states that since 2015, there have been “numerous developments related to global action to address climate change, including announcements by many countries of their plans to do so.” *Id.* at 2518. Once again, this conclusory statement falls short of a factually based determination, let alone a reasoned explanation, for the course reversal. “An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.” *Fox*, 556 U.S. at 573.

The Department’s 2017 conclusory analysis that climate-related impacts from Keystone subsequently would prove inconsequential and its corresponding reliance on this conclusion as a centerpiece of its policy change required the Department to provide a “reasoned explanation.” *See Kake*, 795 F.3d 968. The Department instead simply discarded prior factual findings related to climate change to support its course reversal.

\* \* \* \*

### CONCLUSION AND REMEDIES

Plaintiffs have asked the Court to issue an injunction that would require the Department to comply fully with NEPA, the ESA, and the APA. Plaintiffs have asked the Court to enjoin and set aside the Department’s cross-border permit and ROD. . . Finally, Plaintiffs have requested that the Court prohibit activity in furtherance of construction or operation of Keystone and associated facilities.

An agency action is deemed invalid when not promulgated in compliance with the APA. *Kake*, 795 F.3d at 970. Upon remand, a court should provide the agency with specific instructions to address its errors. *Alliance for the Wild Rockies v. Zinke*, 265 F.Supp.3d 1161, 1181 (D. Mont. 2017). The Court provides the following instructions.

Claim 1: The Department's "purpose and need" statement in the 2014 SEIS did not violate NEPA. The Department's range of alternatives analyzed in the 2014 SEIS did not violate NEPA. 40 C.F.R. §§ 1502.1, 1502.13, 1502.14. Further, the Department did not violate NEPA when it set forth its no-action alternative in the 2014 SEIS. Similarly, the Department did not violate NEPA in its analysis of transportation of crude oil by rail in the 2014 SEIS. The Department's response to public comments on the draft 2014 SEIS comported with its obligations under NEPA. And finally, the Department's incorporation of the CNEB's analysis of impacts in Canada satisfied NEPA.

The Department's analysis of the following issues fell short of a "hard look" and requires a supplement to the 2014 SEIS in order to comply with its obligations under NEPA:

- The effects of current oil prices on the viability of Keystone (Section I (C)(2)(a));
- The cumulative effects of greenhouse gas emissions from the Alberta Clipper expansion and Keystone (Section I (C)(2)(c));
- A survey of potential cultural resources contained in the 1,038 acres not addressed in the 2014 SEIS (Section I (E)(1)); and
- An updated modeling of potential oil spills and recommended mitigation measures (Section I (E)(3)).

These omissions require a remand with instructions to the Department to satisfy its obligations under NEPA to take a "hard look" at the issues through a supplement to the 2014 SEIS.

Claim 2: Plaintiffs' second group of claims relate to the need for TransCanada to obtain a right of way across BLM-owned land. The parties' current motions for summary judgment do not address these claims. The Court defers ruling on these claims until the parties have submitted motions and supporting briefs.

Claim 3: NEPA and the APA require a detailed justification for reversing course and adopting a policy that "rests upon factual findings that contradict those which underlay its prior policy." *Fox*, 556 U.S. at 515. The Department must give "a reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Kake*, 795 F.3d at 996. The Court previously determined in its Order denying Defendants' Motion to Dismiss (Doc. 99) that it possessed jurisdiction to review the ROD as a final agency action under NEPA and the APA. *Id.* at 8-9. The Department failed to comply with NEPA and the APA when it disregarded prior factual findings related to climate change and reversed course. The Court vacates the 2017 ROD and remands with instructions to provide a reasoned explanation for the 2017 ROD's change in course. *Kake*, 795 F.3d at 996.

Claims 4 and 5: Section 7(a)(2) of the [Endangered Species Act, or] ESA requires that an agency ensure its actions are not likely to jeopardize the continued existence of endangered or threatened species, and are not likely to destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). The agency must rely on the best available science and commercial data available in reaching its conclusions. 16 U.S.C. § 1533(b)(1)(A). The Department did not violate the ESA when it did not use the telemetry data to assess potential harm to whooping cranes. The Department did not violate the ESA when it put forth mitigation measures related to the western prairie fringed orchid. The Department did not violate the ESA in its analysis of the black-footed ferret, the rufa red knot, the northern long-eared bat or terns and plovers. Further, the Department did not violate the ESA when it did not apply Section 7 in Canada.

The Department's 2012 [Biological Assessment, or] BA, and [the Forest and Wildlife Service's, or] FWS's 2013 [Biological Opinion, or] BiOp and concurrence shall be set aside and remanded to the Department with instructions to consider potential adverse impacts to

endangered species from oil spills associated with Keystone in light of the updated data on oil spills and leaks. The Court declines at this time to require the Department to re-initiate formal consultation with FWS pending the outcome of FWS's updated analysis of the oil spill data.

\* \* \* \*

**b. *Borrego Crossing Pipeline***

The Secretary of State issued a Presidential permit to Borrego Crossing Pipeline, LLC (“Borrego”) on May 25, 2018, authorizing Borrego Pipeline facilities at the U.S.-Mexico border near Laredo, Texas, for the export of refined petroleum products. 83 Fed. Reg. 28,485 (June 19, 2018). The Secretary made the decision under E.O. 13337, and after taking into consideration: environmental effects, consistent with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1536), and other statutes relating to environmental concerns; as well as the National Historic Preservation Act of 1966 (U.S.C. 470f *et seq.*); and the views of members of the public, various federal and state agencies, and various Indian tribes. *Id.*

**5. Corporate Responsibility Regimes**

**a. *Kimberley Process***

The Kimberley Process (“KP”) is an international, multi-stakeholder initiative created to increase transparency and oversight in the diamond industry in order to eliminate trade in conflict diamonds, i.e. rough diamonds sold by rebel groups or their allies to fund conflict against legitimate governments. See State Department Conflict Diamonds webpage, <https://www.state.gov/e/eb/tfs/tfc/diamonds/index.htm>. For background on U.S. participation in the KP, see *Digest 2016* at 511-12; *Digest 2014* at 506-07; *Digest 2013* at 183; *Digest 2004* at 653-54; *Digest 2003* at 704-709; and *Digest 2002* at 728-29.

Consistent with prior practice, the United States sent a delegation to the 2018 Kimberley Process Plenary in Brussels, Belgium. The Final Communiqué from the 2018 Plenary is available at <https://www.kimberleyprocess.com/en/2018-final-communique-brussels-belgium>.

**b. *Business and Human Rights***

See Chapter 6.

**6. Committee on Foreign Investment in the United States**

On March 12, 2018, President Trump issued an order “Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited.” 83 Fed. Reg. 11,631 (Mar. 15, 2018), excerpted below. The order cites “credible evidence” that Broadcom, a company organized under the laws of Singapore, through exercising control of Qualcomm, might

take action that threatens to impair the national security of the United States. In accordance with the Defense Production Act of 1950, the order prohibits the proposed takeover of Qualcomm by Broadcom. It further requires Broadcom and Qualcomm to certify in writing to the Committee on Foreign Investment in the United States (“CFIUS”) that the proposed takeover has been terminated.

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Section 1. Findings. (a) There is credible evidence that leads me to believe that Broadcom Limited, a limited company organized under the laws of Singapore (Broadcom), along with its partners, subsidiaries, or affiliates, including Broadcom Corporation, a California corporation, and Broadcom Cayman L.P., a Cayman Islands limited partnership, and their partners, subsidiaries, or affiliates (together, the Purchaser), through exercising control of Qualcomm Incorporated (Qualcomm), a Delaware corporation, might take action that threatens to impair the national security of the United States; and

(b) Provisions of law, other than section 721 and the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), do not, in my judgment, provide adequate and appropriate authority for me to protect the national security in this matter.

Sec. 2. Actions Ordered and Authorized. On the basis of the findings set forth in section 1 of this order, considering the factors described in subsection 721(f) of the Defense Production Act of 1950, as appropriate, and pursuant to my authority under applicable law, including section 721, I hereby order that:

(a) The proposed takeover of Qualcomm by the Purchaser is prohibited, and any substantially equivalent merger, acquisition, or takeover, whether effected directly or indirectly, is also prohibited.

(b) All 15 individuals listed as potential candidates on the Form of Blue Proxy Card filed by Broadcom and Broadcom Corporation with the Securities and Exchange Commission on February 20, 2018 (together, the Candidates), are hereby disqualified from standing for election as directors of Qualcomm. Qualcomm is prohibited from accepting the nomination of or votes for any of the Candidates.

(c) The Purchaser shall uphold its proxy commitments to those Qualcomm stockholders who have returned their final proxies to the Purchaser, to the extent consistent with this order.

(d) Qualcomm shall hold its annual stockholder meeting no later than 10 days following the written notice of the meeting provided to stockholders under Delaware General Corporation Law, Title 8, Chapter 1, Subchapter VII, section 222(b), and that notice shall be provided as soon as possible.

(e) The Purchaser and Qualcomm shall immediately and permanently abandon the proposed takeover. ...

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On August 13, 2018, President Trump signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232, which included (at Subtitle A of Title XVII of Division A) the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”). On that date, Treasury Secretary Mnuchin, the Chair of the inter-agency

Committee, issued a statement, available at <https://home.treasury.gov/news/press-releases/sm457>, that includes the following:

FIRRMA delivers much-needed reforms that will ensure CFIUS has the tools necessary to identify, examine, and address national security concerns arising from foreign investment. America is a vibrant place to invest, and better protecting critical U.S. technology and infrastructure will ensure it stays that way. FIRRMA passed with overwhelming bipartisan support, and I am extremely proud of the work between Treasury and Congress to reach this historic agreement.”

In 2018 the Department of the Treasury issued two sets of CFIUS regulations implementing FIRRMA:

- Provisions Pertaining to Certain Investments in the United States by Foreign Persons, 83 Fed. Reg. 51316, amending 31 CFR Part 800 (Oct. 11, 2018), and
- Determination and Temporary Provisions Pertaining to a Pilot Program To Review Certain Transactions Involving Foreign Persons and Critical Technologies, 83 Fed. Reg. 51322, adding 31 CFR Part 801 (Oct. 11, 2018).

**Cross References**

*Withdrawal from the Universal Postal Union*, **Ch. 4.B.3**

*Marrakesh Treaty to Facilitate Access to Public Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, **Ch. 4.B.5**

*Animal Science Products, Inc. v. Hebei Welcome Pharm. Co.*, **Ch. 5.A.1**

*Detroit International Bridge Co. v. Canada*, **Ch. 5.A.2**

*Business and Human Rights*, **Ch. 6.G**

*Libya claims litigation (Aviation and Alimanestianu)*, **Ch. 8.D.2**

*Environmental cooperation agreement for USMCA*, **Ch. 13.A.3**

## CHAPTER 12

### Territorial Regimes and Related Issues

#### A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES

##### 1. UN Convention on the Law of the Sea

###### a. *Meeting of States Parties to the Law of the Sea Convention*

The United States participated as an observer to the 28th meeting of States Parties to the Law of the Sea Convention (“SPLOS”) at the United Nations, June 11-12, 2018. Elizabeth Kim led the U.S. delegation and delivered a statement on behalf of the United States. The U.S. statement included the following:

The United States delegation would like to thank the Secretary-General for his report on oceans and the law of the sea. We would also like to take this opportunity to thank the Secretary-General of the International Seabed Authority, the President of the International Tribunal for the Law of the Sea, and the Chair of the Commission on the Limits of the Continental Shelf for the reports and information provided by them to this meeting. And we would like to express our appreciation to DOALOS for supporting the important work of the CLCS, including its consistent efforts to help address the challenges facing the Commission and to assist coastal States in making their submissions to the Commission.

As we and others have stated in previous Meetings of States Parties, the role of the Meeting is not as if it were a Conference of Parties with broader authority. Article 319 is not intended to, and does not, empower the Meeting of States Parties to perform general or broad reviews of general topics of interest, or to engage in interpretation of the provisions of the Law of the Sea Convention. Proposals to that effect did not garner sufficient support during the Third Conference, and there is no supporting text to that effect in the

Convention. Rather, the role of the Meetings of States Parties is prescribed in the Convention: to conduct elections for the Tribunal and the Commission, and to determine the Tribunal's budget. In addition, the Meeting receives the report of the Secretary-General on oceans and the law of the sea, reports from the Commission and the Tribunal, and information from the International Seabed Authority. Members have the opportunity to comment on these reports and the reports are then simply noted.

**b. *UN General Assembly Resolution on Oceans and the Law of the Sea***

During meetings of the 73<sup>rd</sup> General Assembly, the United States co-sponsored and voted in favor of a resolution entitled "Oceans and the Law of the Sea" under Agenda Item 78(a). The United States delegation delivered a statement in support of the resolution, which is excerpted below.

My delegation is pleased to co-sponsor the General Assembly resolution on oceans and the law of the sea. The United States underscores the central importance of international law as reflected in the Law of the Sea Convention—the universal and unified character of which is emphasized in this resolution. As we see attempts to impede the lawful exercise of navigational rights and freedoms under international law, it is more important than ever that we remain steadfast in our resolve to uphold these rights and freedoms. In this regard, we call on all States to fashion their maritime claims and conduct their activities in the maritime domain in accordance with international law as reflected in the Convention, to respect the freedoms of navigation and overflight and other lawful uses of the sea that all users of the maritime domain enjoy, and to peacefully settle disputes in accordance with international law.

**2. *South China Sea and East China Sea***

On November 9, 2018, Secretary of State Michael R. Pompeo and Secretary of Defense James N. Mattis met with Director of the Office of Foreign Affairs of the Central Commission of the Communist Party of China Yang Jiechi and State Councilor and Defense Minister General Wei Fenghe for the second U.S.-China Diplomatic and Security Dialogue. See State Department media note, available at <https://www.state.gov/u-s-china-diplomatic-and-security-dialogue-3/>. The media note includes a summary of their discussion regarding the South China Sea:

The two sides committed to support peace and stability in the South China Sea, the peaceful resolution of disputes, and freedom of navigation and overflight and other lawful uses of the sea in accordance with international law. Both sides committed to ensure air and maritime safety, and manage risks in a constructive manner. The United States discussed the importance of all military, law

enforcement, and civilian vessels and aircraft operating in a safe and professional manner in accordance with international law. The United States called on China to withdraw its missile systems from disputed features in the Spratly Islands, and reaffirmed that all countries should avoid addressing disputes through coercion or intimidation. The United States remains committed to fly, sail, and operate wherever international law allows.

### **3. Freedoms of Navigation, Overflight, and Maritime Claims**

#### ***a. China***

On September 29, 2018, the People's Liberation Army Navy LUYANG II Class Destroyer (DDG-170) came dangerously close to the U.S. Ship ("USS") DECATUR, which was conducting a freedom of navigation assertion in the South China Sea. DDG-170's unsafe actions created a substantial risk of collision, and were inconsistent with the International Regulations for Preventing Collisions at Sea, the Code for Unplanned Encounters at Sea, and the Memorandum of Understanding between the Department of Defense of the United States of America and the Ministry of National Defense of the People's Republic of China Regarding the Rules of Behavior for Safety of Air and Maritime Encounters. The United States' protest, excerpts from which follow, was delivered to appropriate government officials in China.

- DDG-170's maneuvers were inconsistent with basic seamanship and international regulations, including the International Regulations for Preventing Collisions at Sea (COLREGS), specifically Rule 8, regarding action to avoid a collision. Moreover, its actions were inconsistent with the Code for Unplanned Encounters at Sea (CUES), Para. 2.6.2 and the Rules of Behavior for Safety of Air and Maritime Encounters (Rules of Behavior), Annex II, Sections III.ii and IV.i.1.
- DDG-170's maneuvers constituted unsafe and unprofessional seamanship that posed a threat to the safety of U.S. and Chinese crews and vessels.
- It is of paramount importance that all ships maintain the highest levels of safety and professionalism and operate in accordance with well-established international rules, regulations, and other established multilateral rules of behavior. This incident also underscores the importance of sustained dialogue about operational safety in the maritime environment, including earnest participation in the Military Maritime Consultative Agreement (MMCA).
- China's harassment of lawfully operating U.S. ships is unsafe and unacceptable.
- The United States will continue to uphold the freedoms of navigation and overflight by asserting navigational rights and freedoms around the world, including in the South China Sea. The United States objects to excessive maritime claims without singling out any particular country or claimant. U.S. forces will continue to fly, sail, and operate wherever international law allows.

**b. Venezuela**

On December 23, 2018, the U.S. State Department issued a press statement regarding actions by the Venezuelan Navy in Guyana's exclusive economic zone. The statement, available at <https://www.state.gov/venezuelan-navy-actions-in-guyana/>, follows:

On December 22, the Venezuelan Navy aggressively stopped ExxonMobil contracted vessels operating under an oil exploration agreement with the Cooperative Republic of Guyana in its Exclusive Economic Zone.

We underscore that Guyana has the sovereign right to explore and exploit resources in its Exclusive Economic Zone. We call on Venezuela to respect international law and the rights of its neighbors.

**4. Maritime Boundary Treaties****a. U.S. Maritime Boundary Treaties with Kiribati and Micronesia**

On July 26, 2018, the U.S. Senate gave its advice and consent to ratification of two maritime boundary treaties: the Treaty between the Government of the United States of America and the Government of the Republic of Kiribati on the Delimitation of Maritime Boundaries, signed at Majuro on September 6, 2013, and the Treaty between the Government of the United States of America and the Government of the Federated States of Micronesia on the Delimitation of a Maritime Boundary, signed at Koror on August 1, 2014. See *Digest 2013* at 363 for background on signing the treaty with Kiribati. See *Digest 2014* at 513 for background on signing the treaty with Micronesia. See *Digest 2016* at 526-27 regarding transmittal of the two treaties to the Senate. The treaty with Kiribati establishes three maritime boundaries in the Pacific with respect to the exclusive economic zone ("EEZ") and continental shelf generated by various Kiribati islands and by each of the U.S. islands of Palmyra Atoll, Kingman Reef, Jarvis Island, and Baker Island. The treaty with the Federated States of Micronesia ("FSM") establishes a single maritime boundary between Guam and several FSM islands. Consistent with similar maritime boundary treaties between the United States and other countries, these two maritime boundary treaties define the limits within which each country may exercise EEZ and continental shelf rights and jurisdiction off the coasts of their respective islands. Each treaty will enter into force upon an exchange of notes between the parties, indicating that parties have completed the internal procedures required to bring that treaty into force.\*

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\* Editor's note: The President of the United States signed instruments of ratification for both treaties on March 27, 2019.

**b. *Australia and Timor-Leste Maritime Boundary Treaty***

On March 6, 2018, the State Department issued a press statement congratulating the governments of Australia and Timor-Leste on their conclusion of a maritime boundary treaty. The press statement, available at <https://www.state.gov/the-united-states-congratulates-australia-and-timor-leste-on-the-conclusion-of-a-maritime-boundary-treaty/>, explains that their treaty was concluded “under the first-ever conciliation process under the 1982 Law of the Sea Convention.”

**5. Other Law of the Sea Issues**

**a. *U.S.-Vietnam Dialogue on Maritime Issues and the Law of the Sea***

On June 19-20, 2018, the United States and Vietnam held their fifth “Dialogue on Maritime Issues and the Law of the Sea” at the U.S. Department of State in Washington, D.C. See June 20, 2018 media note, available at <https://www.state.gov/united-states-and-vietnam-complete-dialogue-on-maritime-issues-and-the-law-of-the-sea/>.

**b. *U.S.-China Dialogue on Law of the Sea and Polar Issues***

On August 23-24, 2018, the United States and China held their ninth annual Dialogue on Law of the Sea and Polar Issues in Zhoushan, China.

**B. OUTER SPACE**

**1. Space Policy Directive 3**

On June 18, 2018, President Trump signed a memorandum, Space Policy Directive 3, directed to administration officials, and entitled “National Space Traffic Management Policy.” 83 Fed. Reg. 28,969 (June 21, 2018). Excerpts follow from Space Policy Directive 3.

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\* Editor’s note: The President of the United States signed instruments of ratification for both treaties on March 27, 2019.

**Sec. 3. Principles.** The United States recognizes, and encourages other nations to recognize, the following principles:

(a) Safety, stability, and operational sustainability are foundational to space activities, including commercial, civil, and national security activities. It is a shared interest and responsibility of all spacefaring nations to create the conditions for a safe, stable, and operationally sustainable space environment.

(b) Timely and actionable [space situational awareness or] SSA data and [space traffic management or] STM services are essential to space activities. Consistent with national security constraints, basic U.S. Government-derived SSA data and basic STM services should be available free of direct user fees.

(c) Orbital debris presents a growing threat to space operations. Debris mitigation guidelines, standards, and policies should be revised periodically, enforced domestically, and adopted internationally to mitigate the operational effects of orbital debris.

(d) A STM framework consisting of best practices, technical guidelines, safety standards, behavioral norms, pre-launch risk assessments, and on-orbit collision avoidance services is essential to preserve the space operational environment.

**Sec. 4. Goals.** Consistent with the principles listed in section 3 of this memorandum, the United States should continue to lead the world in creating the conditions for a safe, stable, and operationally sustainable space environment. Toward this end, executive departments and agencies (agencies) shall pursue the following goals as required in section 6 of this memorandum:

(a) *Advance SSA and STM Science and Technology.* The United States should continue to engage in and enable [science and technology or] S&T research and development to support the practical applications of SSA and STM. ...

(b) *Mitigate the effect of orbital debris on space activities.* The volume and location of orbital debris are growing threats to space activities. It is in the interest of all to minimize new debris and mitigate effects of existing debris. This fact, along with increasing numbers of active satellites, highlights the need to update existing orbital debris mitigation guidelines and practices to enable more efficient and effective compliance, and establish standards that can be adopted internationally. These trends also highlight the need to establish satellite safety design guidelines and best practices.

(c) *Encourage and facilitate U.S. commercial leadership in S&T, SSA, and STM.* ...

(d) *Provide U.S. Government-supported basic SSA data and basic STM services to the public.* ...

(e) *Improve SSA data interoperability and enable greater SSA data sharing.* ...

(f) *Develop STM standards and best practices.* ...

(g) *Prevent unintentional radio frequency (RF) interference.* ...

(h) *Improve the U.S. domestic space object registry.* ...

(i) *Develop policies and regulations for future U.S. orbital operations.* ...

**Sec. 5. Guidelines.** In pursuit of the principles and goals of this policy, agencies should observe the following guidelines:

(a) *Managing the Integrity of the Space Operating Environment.*

\* \* \* \*

(b) *Operating in a Congested Space Environment.*

\* \* \* \*

(c) *Strategies for Space Traffic Management in a Global Context.*

(i) **Protocols to Prevent Orbital Conjunctions.** As increased satellite operations make lower Earth orbits more congested, the United States should develop a set of standard techniques for mitigating the collision risk of increasingly congested orbits, particularly for large constellations. Appropriate methods, which may include licensing assigned volumes for constellation operation and establishing processes for satellites passing through the volumes, are needed. The United States should explore strategies that will lead to the establishment of common global best practices, including:

(iii) **Global Engagement.** In its role as a major spacefaring nation, the United States should continue to develop and promote a range of norms of behavior, best practices, and standards for safe operations in space to minimize the space debris environment and promote data sharing and coordination of space activities. It is essential that other spacefaring nations also adopt best practices for the common good of all spacefaring states. The United States should encourage the adoption of new norms of behavior and best practices for space operations by the international community through bilateral and multilateral discussions with other spacefaring nations, and through U.S. participation in various organizations such as the Inter-Agency Space Debris Coordination Committee, International Standards Organization, Consultative Committee for Space Data Systems, and UN Committee on the Peaceful Uses of Outer Space.

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## 2. UN First Committee

On November 6, 2018, Cynthia Plath, Deputy Permanent Representative to the Conference on Disarmament, provided the U.S. explanation of votes on two resolutions before the First Committee: "Prevention of an Arms Race in Outer Space" and "Transparency and Confidence-Building Measures in Outer Space Activities." Her statement is available at <https://www.state.gov/explanation-of-votes-in-the-first-committee-on-resolutions-l-3-prevention-of-an-arms-race-in-outer-space-and-l-68-rev-1-transparency-and-confidence-building-measures-in-outer-space-activities/> and excerpted below.

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Although the U.S. delegation voted against these resolutions, our votes in no way detract from our longstanding support for voluntary transparency and confidence-building measures (TCBMs) for outer space activities.

The U.S. National Space Strategy seeks to foster conducive international environments through bilateral and multilateral engagements. As part of these efforts to strengthen stability in outer space, the United States will continue to pursue bilateral and multilateral transparency and confidence-building measures to encourage responsible actions in, and the peaceful use of, outer space.

We have repeatedly noted in this and other fora that clear, practicable and confirmable TCBMs, implemented on a voluntary basis, have the potential to strengthen the safety, stability, and sustainability of outer space activities for all nations.

In particular, the United States continues to note the importance of the consensus report of the 2013 Group of Governmental Experts on Transparency and Confidence-building Measures in Outer Space Activities (A/68/189). We encourage all nations to continue to review and implement, to the greatest extent practicable, the proposed transparency and confidence-building measures contained in the 2013 GGE report, through the relevant national mechanisms, on a voluntary basis and in a manner consistent with their national interests.

The United States also encourages Member States to take advantage of fora like the Conference on Disarmament, the UN Disarmament Commission and the Committee on the Peaceful Uses of Outer Space (COPUOS) to make real progress on transparency and confidence-building measures. In particular, we call for all spacefaring nations to begin the practical implementation of the 21 guidelines endorsed in June 2018 by the Committee on the long-term sustainability of outer space activities.

However, our support for voluntary guidelines for the safe and responsible use of space and other transparency and confidence building measures ends when such efforts are tied to proposals for legally-binding space arms control constraints and limitations.

The United States voted “no” on these two resolutions because it believes they make an unacceptable linkage between proposals for voluntary, pragmatic TCBMs and the commencement of futile negotiations a fundamentally flawed arms control proposals. In particular, we note the resolutions’ references to Russia’s and China’s draft treaty proposal introduced in 2014 at the Conference on Disarmament, which the United States opposes. Our most recent critique of their space arms control treaty is in CD/2129 of August 2018.

Mr. Chairman, the United States would prefer that the space domain remain free of conflict. But as Vice President Mike Pence recently noted, “both China and Russia have been aggressively developing and deploying technologies that have transformed space into a warfighting domain.” Therefore, hollow and hypocritical efforts such as PPWT that cannot be confirmed or verified by the international community are not the answer.

Despite this disappointment, the United States will seek to continue to support practical implementation of space TCBMs by Member States and the relevant entities and organizations of the United Nations system. We also will continue to take a leading role in substantive discussions on space TCBMs at the Conference on Disarmament, UN Disarmament Commission and COPUOS.

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**Cross References**

*ICJ case regarding the British Indian Ocean Territory*, **Ch. 7.B.4**

*Ukraine (Kerch Strait)*, **Ch. 9.B.1**

*Proliferation Security Initiative*, **Ch. 19.B.3**

## CHAPTER 13

### Environment and Other Transnational Scientific Issues

#### A. LAND AND AIR POLLUTION AND RELATED ISSUES

##### 1. Climate Change

The United States continued to participate in international climate change negotiations and meetings, including the 24th session of the Conference of the Parties (“COP-24”) to the UN Framework Convention on Climate Change (“UNFCCC”) held in Katowice, Poland from December 2-14, 2018. A November 29, 2018 State Department media note, available at <https://www.state.gov/u-s-delegation-to-the-24th-session-of-the-conference-of-the-parties-to-the-un-framework-convention-on-climate-change/>, identifies key members of the U.S. delegation and reaffirms the U.S. decision to withdraw from the Paris Agreement. The media note explains further:

The United States is participating in ongoing negotiations, including those related to the Paris Agreement, in order to ensure a level playing field that benefits and protects U.S. interests.

During the Conference, the U.S. delegation will share successful strategies in growing the economy while providing affordable, abundant, and secure energy to Americans, promoting jobs, protecting the environment, and reducing emissions. U.S. energy-related CO<sub>2</sub> emissions have fallen by 14 percent since 2005, even as the U.S. economy has grown by 19.4 percent. This world-leading achievement has been possible because of innovation and entrepreneurship that has led to the development and commercialization of innovative technologies across the entire U.S. energy portfolio.

Judith G. Garber, Principal Deputy Assistant Secretary of State for the Bureau of Oceans and International Environmental and Scientific Affairs, delivered the U.S. national statement at COP-24 on December 12, 2018. Her remarks are excerpted below and available at [https://pl.usembassy.gov/us\\_statement\\_cop24/](https://pl.usembassy.gov/us_statement_cop24/). The outcome of COP-24 is discussed in a December 15, 2018 media note available at <https://www.state.gov/outcome-of-the-24th-session-of-the-conference-of-the-parties-cop24-to-the-un-framework-convention-on-climate-change-unfccc/>.

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The United States supports a balanced approach that promotes economic growth, improves energy security, and protects the environment.

The U.S. record of accomplishment and leadership is clear: Our energy-related CO<sub>2</sub> emissions have fallen by 14 percent since 2005, even as our economy has grown by over 19 percent.

As President Trump announced last year, the United States intends to withdraw from the Paris Agreement, absent the identification of terms that are more favorable to the American people. He also made clear that the United States will continue to be a leader in clean energy, innovation, and emissions reduction. Our National Security Strategy declares “The United States will remain a global leader in reducing traditional pollution, as well as greenhouse gases, while expanding our economy. This achievement, which can serve as a model to other countries, flows from innovation, technology breakthroughs, and energy efficiency gains, not from onerous regulation.”

The global climate conversation needs to embrace not only aspiration but today’s reality. The U.S. approach incorporates the realities of the global energy mix and uses all energy sources and technologies as cleanly and efficiently as possible, including fossil fuels, nuclear energy, and renewable energy.

This diverse energy portfolio is possible thanks to early stage research and development and private sector finance and innovation.

A quarter of our energy-sector CO<sub>2</sub> reduction has come from utilizing natural gas. The U.S. natural gas boom is the result of years of U.S. innovation and R&D investment. General Electric, the U.S. National Laboratories, and American entrepreneurs all played a role in perfecting the extraction techniques that unleashed America’s natural gas revolution.

R&D and operational experience are bringing down the cost of Carbon Capture, Utilization, and Storage or CCUS. One hybrid coal and gas power plant in Texas captures more than 90 percent of the emissions from its flue gas stream. CCUS enhances our energy security and economic development and preserves the environment.

The United States is home to the world’s largest nuclear power industry. Thanks to significant investment by the U.S. Department of Energy and the private sector, the first Small Modular Reactors will be operational by the mid-2020s. They will be flexible, scalable, easier to finance, and capable of powering remote areas and micro-grids.

In 2017, the United States exported more advanced energy technology than any other country in the world. The United States is also the world’s largest oil and gas producer and the second largest producer of renewable energy.

In 2018, the United States announced new R&D funding in nuclear, solar, marine, and fossil energy. We are making significant progress in Smart Grids, advanced storage technologies, wind, and hydropower.

In sum, the United States will continue to engage our many partner countries and allies around the world to reduce emissions, to continue to adapt to climate change, and to respond to natural disasters. We will also work with other countries to develop and deploy a broad array of technologies, as we continue to promote economic growth, improve energy security, and protect the environment.

\* \* \* \*

The December 15, 2018 media note (cited *supra*) regarding the outcome of COP-24 also includes the following:

The United States takes note of the negotiated outcome and appreciates the hard work of our negotiators. The outcome took a significant step toward holding our economic competitors accountable for reporting their emissions in a manner consistent with standards the United States has met since 1992. The United States is not taking on any burdens or financial pledges in support of the Paris Agreement and will not allow climate agreements to be used as a vehicle to redistribute wealth. We will work with our many partner countries to innovate and deploy a broad array of technologies that promote economic growth, improve energy security, and protect the environment.

## 2. Proposed Global Pact for the Environment

On May 10, 2018, Minister Counselor for the U.S. Mission to the UN Mark Simonoff delivered the U.S. explanation of vote on a UN General Assembly resolution entitled “Towards a Global Pact for the Environment.” U.N. Doc. A/RES/72/277. The resolution established an ad hoc open-ended working group to, *inter alia*, discuss options to address possible gaps in international environmental law and environment-related instruments, as appropriate, and if deemed necessary, the scope, parameters and feasibility of an international instrument, with a view to making recommendations to the General Assembly. Mr. Simonoff’s remarks are excerpted below and available at <https://usun.usmission.gov/explanation-of-vote-on-a-un-general-assembly-resolution-entitled-towards-a-global-pact-for-the-environment-a-72-l-51/>.

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The United States regrets that we must call a vote and vote against this resolution. To date, there has been no transparent, open discussion among member states about the need for or purpose of a new international environmental instrument. The United States opposes a resolution that—already in its title—purports to prejudge movement towards a “Global Pact for the Environment”

when the concept remains ambiguous, and member states have not yet considered the merits of such a proposal or how it would contribute to the existing international environmental regime.

The United States has engaged constructively in the negotiation of this resolution. In fact, in the spirit of compromise, we have been willing to support the establishment of an open-ended working group to examine whether there are gaps in the existing environmental system and, if so, possible options for addressing those gaps. However, the United States cannot support the title or any language in operative paragraph 2 that would prejudge the working group's discussions or presume—before particular international environmental challenges have even been identified—that a new international instrument would be the most appropriate solution. We also cannot accept language in preambular paragraph 7 of this resolution indicating that environmental challenges need to be addressed in a “comprehensive” manner; in fact, such language ignores that many of the most successful environmental agreements, such as the Montreal Protocol or CITES, are narrowly tailored to address specific environmental problems. Our concerns on these points were not addressed sufficiently or taken into account.

One of our fundamental interests throughout this process has been to ensure that this proposal does not disrupt or distract from the continuing implementation of existing international environmental agreements, and we believe many delegations share our concerns in this regard. As a result, going forward, we understand operative paragraph 9 as recognizing that nothing in this process or any outcome thereof should impact the rights and obligations of Parties under existing agreements. At the same time, given that some of the proponents of a “Global Pact” have suggested it should include a reexamination of certain environmental principles, such as the Rio Principles referenced in preambular paragraph 4, the United States cannot support language reaffirming these principles in this context.

The United States has therefore called a vote on this resolution and will vote against it, and we urge other member states to do so as well. The United States believes that consensus on this resolution could have been achieved if appropriate consideration had been given to member states' legitimate concerns. We are unaware of any successful environmental negotiation that was initiated by vote over the objections of member states on a truncated schedule, and we regret that further time was not allocated to achieve agreement on a path forward or for member states to engage in productive debate. We will now look ahead to a discussion with other member states of the substantive merits of this proposal in the open-ended working group.

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### **3. Environmental Cooperation Agreement**

On November 30, 2018, the United States, Mexico, and Canada concluded a trilateral agreement on environmental cooperation. See November 30, 2018 media note, available at <https://www.state.gov/united-states-mexico-and-canada-conclude-successful-negotiations-on-a-trilateral-agreement-on-environmental-cooperation/>. The agreement takes effect when the U.S.-Mexico-Canada trade agreement (“USMCA”) enters into force and would replace the North American Agreement on Environmental Cooperation (“NAAEC”) that was a companion to the NAFTA. See Chapter 11 for discussion of the USMCA and NAFTA. The trilateral environmental Council created under the NAAEC continues under the new ECA. The text of the ECA is available at

<https://www.epa.gov/international-cooperation/commission-environmental-cooperation-cec>.

## B. PROTECTION OF MARINE ENVIRONMENT AND MARINE CONSERVATION

### 1. Fishing Regulation and Agreements

On October 1, 2018, the State Department announced in a media note, available at <https://www.state.gov/u-s-signs-agreement-to-prevent-unregulated-commercial-fishing-on-the-high-seas-of-the-central-arctic-ocean/>, that it had signed an agreement to prevent unregulated commercial fishing on the high seas of the central Arctic Ocean. The media note is excerpted below. For background on the agreement, see *Digest 2015* at 582-84.

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...This is the first multilateral agreement of its kind to take a legally binding, precautionary approach to protect an area from commercial fishing before that fishing has begun. ...

Ice has traditionally covered the high seas of the central Arctic Ocean year-round. Recently, the melting of Arctic sea ice has left large areas of the high seas uncovered for much of the year. As a result, commercial fisheries in the central Arctic Ocean may become viable in areas where such activity was previously not possible. Prior to this agreement, no legally binding international agreement existed to manage potential fishing in the high seas of this region.

In 2009, the United States closed the U.S. Exclusive Economic Zone (EEZ) north of Alaska to commercial fishing until such time as domestic fisheries managers have sufficient information about the ecosystem to allow fishing to proceed on a well-regulated basis. U.S. stakeholders, including the Alaska-based fishing industry, have been concerned foreign fishing vessels could begin fishing here in the foreseeable future. At a time when U.S. vessels cannot fish within the U.S. EEZ, the United States has negotiated this new fisheries agreement for the central Arctic Ocean that reduces the chance that foreign vessels will fish just beyond the U.S. EEZ.

Initial negotiations among the five coastal parties of the central Arctic Ocean—Canada, Denmark (for Greenland and the Faroe Islands), Norway, Russia, and the United States—resulted in the non-legally binding Oslo Declaration signed on July 16, 2015. The Oslo Declaration recognized other governments may have an interest in potential Arctic fisheries. In December 2015 ten parties, including the five Oslo Declaration signatories, as well as China, Iceland, Japan, the Republic of Korea, and the European Union, entered into negotiations towards a legally-binding agreement. The negotiations toward this legally binding agreement concluded November 30, 2017.

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## 2. Whaling

At its 67th Meeting, September 10-14, 2018 in Florianópolis, Brazil, the International Whaling Commission (“IWC”) provided for automatic renewal of aboriginal subsistence whaling catch limits under certain circumstances. The United States published its 2019 quota for bowhead whales that it has assigned to the Alaska Eskimo Whaling Commission (“AEWC”) in the Federal Register on December 28, 2018 in accordance with the outcome of the 67<sup>th</sup> Meeting. 83 Fed. Reg. 67,237.

## 3. Our Ocean Conference

At the conclusion of the Our Ocean 2018 conference in Bali, Indonesia, the United States described commitments made at the conference in an October 30, 2018 media note, available at <https://www.state.gov/u-s-commitments-at-our-ocean-2018/>. The commitments are:

to strengthen sustainable management of marine resources; prevent plastic and other debris from entering the ocean; support research and observation of ocean ecosystems; and foster partnerships promoting maritime security and a sustainable blue economy.

Additional details about the 2018 conference are available at [ourocean2018.org](http://ourocean2018.org).

## 4. Sea Turtle Conservation and Shrimp Imports

The Department of State makes annual certifications related to conservation of sea turtles, consistent with § 609 of Public Law 101-162, 16 U.S.C. § 1537, which prohibits imports of shrimp and shrimp products harvested with methods that may adversely affect sea turtles. On June 8, 2018, the Department of State certified 39 nations and one economy as having adequate measures in place to protect sea turtles during the course of commercial shrimp fishing, and granted determinations for nine fisheries as having adequate measures in place to protect sea turtles during the course of commercial shrimp fishing, permitting the importation of wild-caught shrimp to the United States under Section 609 of Public Law 101-162. See June 8, 2018 State Department media note, available at <https://www.state.gov/department-of-state-promotes-protection-of-sea-turtles-by-certifying-shrimp-harvesting-nations-and-economies/>. As elaborated in the media note:

Six of the world’s seven species of marine turtles are considered endangered or threatened under the Endangered Species Act. The United States Government is currently providing technology and capacity-building assistance to other nations, in the hope they can contribute to the recovery of sea turtle species and become certified under Section 609. The United States also encourages enactment of

similar legislation by other nations to prevent the importation of shrimp harvested in a manner harmful to protected sea turtles.

Section 609 prohibits the importation of wild-caught shrimp and products from shrimp harvested in ways that may adversely affect sea turtles unless the Department of State certifies to Congress that (1) the government or authorities of the harvesting nation or economy has adopted a regulatory program comparable to that of the United States to reduce the incidental taking of sea turtles in its shrimp trawl fisheries, such as through the use of turtle excluder devices (“TEDs”), or (2) the particular fishing environment of the harvesting nation or economy does not pose a danger to sea turtles. If properly designed, built, installed, used, and maintained, TEDs allow 97% of sea turtles to escape the shrimp net without appreciable loss of shrimp.

See also 83 Fed. Reg. 22,739 (May 16, 2018); and information on United States government sea turtle conservation efforts, available at <http://www.nmfs.noaa.gov/pr/species/turtles/>.

## **C. OTHER ISSUES**

### **1. Biodiversity**

In 2017, the UN General Assembly convened an intergovernmental conference to elaborate the text of an international legally binding instrument under the UN Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (“BBNJ”). U.S. views regarding such an instrument are discussed in *Digest 2011* at 438-39 and *Digest 2016* at 560-68. The United States participated in the first session of the intergovernmental conference, held September 4-17, 2018. Evan Bloom led the U.S. delegation and delivered the following statement on behalf of the United States.

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The United States supports the sustainable use, management, and conservation of the ocean and its resources. We are working to ensure the ocean is clean, safe, and productive. We recognize that a healthy and productive marine environment is fundamental to supporting the blue economy.

We are pleased to be participating in this conference and are hopeful that we can make progress toward our goal of conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction.

We believe that a new BBNJ agreement should result in meaningful, science-based conservation and sustainable use of BBNJ and should promote research and development—which benefit all people.

We must ensure that a new agreement is consistent with the existing LOS regime, which is so important to all States. And we must ensure it does not undermine or duplicate existing relevant instruments, frameworks, or bodies, or their respective mandates. We all share that objective, and this is clearly reflected in Resolution 72/249.

We welcome, in particular, discussions on the topics of area-based management tools and environmental impact assessments, and how a new agreement could be used to enhance the conservation and sustainable use of BBNJ.

The difficult question before us is how to do this in a meaningful way without undermining the beneficial work of existing relevant instruments, frameworks, and bodies.

Regarding marine genetic resources, there are a number of difficult questions before us. We continue to have concerns about whether a benefit sharing regime can be successfully negotiated. The many references to Common Heritage of Mankind that we have heard so far make us wonder whether we are getting closer to any sort of workable compromise. At the very least, such a regime must promote and not stifle or impede exploration, science, innovation, and entrepreneurship. It must not undermine the existing intellectual property rights regime. And it must be consistent with the Law of the Sea Convention.

We also want to stress the importance of an eventual agreement meeting the legitimate needs of all States. We must not negotiate an agreement that might be acceptable to a majority but that leaves States with key interests out of the picture.

Furthermore, we believe the only way to achieve a strong, broadly-supported agreement is to negotiate text. We have all spent many days in general discussions of the issues. Now we are embarking on a new phase. The intergovernmental conference must move beyond general discussions to work on specific textual proposals, negotiated by delegations line-by-line.

We are ready to work hard with all delegations to find common ground and negotiate a balanced agreement that advances our shared goals of conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction.

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On November 30, 2018, Angela Palazzolo, Advisor for the U.S. Mission to the UN, delivered the explanation of position for the United States on a resolution in the Second Committee of the UN General Assembly on the Convention on Biological Diversity. The U.S. explanation of position follows and is available at

<https://usun.usmission.gov/explanation-of-position-on-a-second-committee-resolution-on-the-convention-on-biological-diversity/>.

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The United States is pleased to join consensus on the resolution: Implementation of the Convention on Biological Diversity and its contribution to sustainable development. We would like to clarify several points regarding the resolution.

The United States dissociates from OP6, which calls for a summit on biodiversity in 2020. As the resolution states that the summit will be convened within existing resources, the United States expects that as plans for this summit develop that any budgetary impacts of this

high level event beyond existing resources will be fully taken into account in consultation with member states in the appropriate fora.

Though CBD Parties at the High Level Session of the UN Biodiversity Conference in Sharm El-Sheikh, Egypt, invited the General Assembly to convene a summit on biodiversity, the timing of such—at the very end of a two-year preparatory process—means as a practical matter that a summit will have no meaningful impact on the development of the post-2020 global biodiversity framework expected to be adopted at the Conference.

Moreover, since there has been no discussion about the outcomes expected or to develop any sense of the duration or extent or character of such a summit, it is impossible to determine how realistic it is to expect that it could be accomplished within existing resources, and we have serious concerns that it would likely be very costly. Finally, we refer you to our national statement delivered on November 8, which addresses our concerns regarding the 2030 Agenda for Sustainable Development, the Addis Ababa Action Agenda, the Paris Agreement, and the characterization of trade, technology transfer, and inclusive economic growth.

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## 2. Sustainable Development

The November 8, 2018 U.S. statement, referenced in Ms. Palazzolo’s remarks above, is excerpted below and available at <https://usun.usmission.gov/general-explanation-of-position-on-second-committee-agenda-items-for-action/>. Courtney Nemroff, Deputy U.S. Representative to ECOSOC, delivered the statement as a general explanation of position at the UN Second Committee.

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We take this opportunity to make important points of clarification on some of the language we see reflected across multiple resolutions. We underscore that the resolutions, and many of the outcome documents referenced therein, including the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda, are non-binding documents that do not create rights or obligations under international law.

We understand references in resolutions to “internationally agreed development goals” to refer to the 2030 Agenda for Sustainable Development; the United States’ position is articulated in the Explanation of Position on that document. The U.S. supports the spirit of the 2030 Agenda for Sustainable Development as a framework for development and will continue to be a global leader in sustainable development through our policies, partnerships, innovations, and calls to action. We applaud the call for shared responsibility, including national responsibility, in the 2030 Agenda and emphasize that all countries have a role to play in achieving its vision. However, the 2030 Agenda recognizes that each country must work toward implementation in accordance with its own national policies and priorities.

The United States also underscores that paragraph 18 of the 2030 Agenda calls for countries to implement the Agenda in a manner that is consistent with the rights and obligations of States under international law. We also highlight our mutual recognition in paragraph 58 that 2030 Agenda implementation must respect and be without prejudice to the independent mandates

of other processes and institutions, including negotiations, and does not prejudge or serve as precedent for decisions and actions underway in other forums. For example, this Agenda does not represent a commitment to provide new market access for goods or services. This Agenda also does not interpret or alter any WTO agreement or decision, including the Agreement on Trade-Related Aspects of Intellectual Property.

We take this opportunity to make important points of clarification regarding the reaffirmation of the Addis Ababa Action Agenda. Specifically, we note that much of the trade-related language in the Addis outcome document has been overtaken by events since July 2015; therefore, it is immaterial, and our reaffirmation of the outcome document has no standing for ongoing work and negotiations that involve trade.

The United States notes that the U.S. Administration announced its intention to withdraw from the Paris Agreement as soon as it is eligible to do so, consistent with the terms of the Agreement, unless suitable terms for re-engagement are identified. Therefore, the Paris Agreement and climate change language in those negotiations is without prejudice to U.S. positions. We affirm our support for promoting economic growth and improving energy security while protecting the environment.

The United States reiterates our views on the Sendai Framework for Disaster Risk Reduction from the U.S. Explanation of Position delivered in 2015. We have been a strong supporter of disaster risk-reduction initiatives designed to reduce loss of life and the social and economic impacts of disasters. This assistance helps recipients build a culture of preparedness, promote greater resilience, and achieve self-reliance.

With respect to the New Urban Agenda, the United States believes that each Member State has the sovereign right to determine how it conducts trade with other countries and that this includes restricting trade in certain circumstances. Economic sanctions, whether unilateral or multilateral, can be a successful means of achieving foreign policy objectives. In cases where the United States has applied sanctions, they have been used with specific objectives in mind, including as a means to promote a return to rule of law or democratic systems, to respect human rights and fundamental freedoms, or to prevent threats to international security. We are within our rights to utilize our trade and commercial policy as tools to achieve noble objectives. Targeted economic sanctions can be an appropriate, effective, and legitimate alternative to the use of force.

The United States enjoys strong and growing trade relationships across the globe. We welcome efforts to bolster those relationships, increase economic cooperation, and drive prosperity to all of our peoples through free, fair, and reciprocal trade. However, as President Trump stated to the General Assembly on September 25, the United States will act in its sovereign interest, including on trade matters. This means that we do not take our trade policy direction from the United Nations.

It is our view that the United Nations must respect the independent mandates of other processes and institutions, including trade negotiations, and must not involve itself in decisions and actions in other forums, including at the World Trade Organization. The UN is not the appropriate venue for these discussions, and there should be no expectation or misconception that the United States would heed decisions made by the Economic and Social Council or the General Assembly on these issues. This includes calls that undermine incentives for innovation, such as technology transfer that is not voluntary and on mutually agreed terms.

The United States also notes that the term “inclusive growth” appears throughout many of the resolutions. Part of the problem with placing inclusive growth at the forefront of economic discussions is that the term itself is vaguely defined and applied freely to economic discussions, with little consideration for the trade-offs between higher levels of sustainable, supply-led economic growth and a more equitable distribution of resources of that growth. The United States recognizes the importance of studying inequality and improving the measurements of income and consumption across populations; however, we want to ensure that any work or goal related to inclusivity remain grounded in evidence and proven best practices.

And finally, it is our intention that this statement applies to action on all agenda items in the Second Committee. We request that this statement be made part of the official record of the meeting. Thank you.

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### 3. Wildlife Trafficking

On October 10, 2018, the State Department issued its report to Congress in accordance with the Eliminate, Neutralize, and Disrupt (“END”) Wildlife Trafficking Act (P.L. 114-231). The Act requires the Secretary of State, in consultation with the Secretary of the Interior and the Secretary of Commerce, to report on “focus countries” and “countries of concern.” The report is available at <https://www.state.gov/remarks-and-releases-bureau-of-oceans-and-international-environmental-and-scientific-affairs/2018-end-wildlife-trafficking-report/> and excerpted below.

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Wildlife trafficking remains a serious transnational crime that threatens security, economic prosperity, the rule of law, long-standing conservation efforts, and human health. President Trump, in Executive Order 13773 calling for a comprehensive and decisive approach to dismantle organized crime syndicates, specifically recognized the connection between wildlife trafficking and transnational organized criminal networks.

The Task Force on Wildlife Trafficking (Task Force), co-chaired by the Secretary of State, the Secretary of the Interior, and the Attorney General, brings together 17 federal departments and agencies to implement the National Strategy for Combating Wildlife Trafficking (the “National Strategy”). The U. S. government’s three-pronged approach to combating wildlife trafficking—strengthening law enforcement, reducing demand, and building international cooperation—deprives criminals of a key source of financing, reducing the criminal threat posed to U.S. citizens.

The Task Force’s work to combat wildlife trafficking is making a difference on the ground at home and worldwide. The Task Force ensures that efforts and activities are better coordinated across the U.S. government; efficiencies are identified and exploited, redundancies eliminated, and resources used more strategically; our international outreach continues to expand; and new areas of work are identified as a result of improved coordination with the intelligence community. Working in partnership with the private sector, local communities, and

non-governmental organizations (NGO), the United States has led the way globally, securing agreements and commitments from governments and stakeholders at all levels to take urgent action. Highlights of Task Force efforts are included in the separate Strategic Review, as called for in Sec. 301(d) of the END Wildlife Trafficking Act.

### **Focus Countries**

#### Methodology for Determining Focus Countries

The Department of State continued to work closely with the other agencies of the Task Force to employ both qualitative and quantitative information to identify Focus Countries and Countries of Concern, as defined in Section 2 of the Act, using the methodology developed for the 2017 END Act Report. Technical experts and scientists from Task Force agencies established a process to analyze wildlife trafficking information, and gathered a set of relevant and available data. This analysis included evaluation of data drawn from public reporting by U.S. government agencies, international entities such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the International Union for the Conservation of Nature (IUCN), and the UN Office of Drugs and Crime (UNODC), and NGOs such as the Center for Advanced Defense Studies (C4ADS), TRAFFIC, the Environmental Investigation Agency (EIA), and Transparency International. Information from the required national assessments reinforced and augmented our previous findings.

Based on the analysis of interagency experts, the input from outside experts, and the availability, quality, and consistency of data, the Task Force employed the following process to identify Focus Countries:

Range States: The Task Force used information from IUCN and CITES, as well as U.S. experience implementing and enforcing the Endangered Species Act to generate a list of wildlife species that are of high conservation concern and are known to be illegally traded. Experts then used the IUCN Red List and other sources to determine the range states for biologically significant populations of these species.

Seizure Data: The Task Force compiled seizures of trafficked wildlife reported by the U.S. government since 2011, and added seizures that other countries reported to the CITES Secretariat. The seizures were analyzed in a manner that scored countries for being the source country for seized wildlife and wildlife products (and in some cases the transit or final destination if this information was known), but excluded from scoring the countries that successfully made the seizure.

The Task Force considered both seizures of illegal wildlife and wildlife products, as well as a secondary analysis of only those species identified in the range analysis, with countries being scored based on whichever analysis caused them to be ranked highest.

Recognizing that seizure data only capture a small but unknown percentage of all illegal wildlife trade and that much of that trade may not transit through a country with a strong customs enforcement system, the Task Force then considered additional data available for several key species.

Species Specific Data: The Task Force utilized the rankings listed in the 2016 CITES Elephant Trade Information System (ETIS) report of countries that play a significant role as a supplier, transit or consumer country. The Task Force also considered trade and market analyses conducted by NGOs for rhinos, reptiles, birds, and pangolins, representing some of the most trafficked species for which detailed information was available.

Risk and Enabling Criteria: The Task Force further considered risk and enabling criteria, including Transparency International's Perceptions of Corruption Index; countries that are currently subject to CITES trade suspensions; and a Department of State analysis of the global transportation network that sought to identify key nodes and chokepoints for illegal wildlife trade.

Country-Specific Analysis: The above data sets were scored in a weighted manner, which led to a list of countries where further country-specific analysis was needed. Factors such as range states, seizures, and species-specific criteria were weighted more heavily than additional risk and enabling factors.

Task Force agencies, including those at U.S. overseas missions, reviewed the initial analysis and provided additional information that was often only available locally. These country-specific analyses helped to round out the global data, including by providing information on additional species such as felines, primates, and marine species. Agencies also considered the trajectory of wildlife populations and trafficking's impact on that trajectory, government and private sector efforts to prevent illegal trade, and the presence of legal or poorly regulated domestic markets for species threatened by wildlife trafficking. Each U.S. mission located in a 2017 Focus Country completed a detailed assessment specifying available resources, local laws and political commitment, capacity, and areas of weakness. They subsequently created mission strategies to combat wildlife trafficking challenges specific to each Focus Country.

The Task Force further evaluated whether governments had recently taken steps to improve legislation, regulations, and/or enforcement and other trends such that the country is stepping up its efforts to combat the illegal trade in wildlife.

#### 2018 Focus Countries

The Department of State, in consultation with the Departments of the Interior and Commerce as well as other agencies of the Task Force, determined that, although we are working to fill them, many of the previously identified information gaps remain. In addition, given the timelines established in the END Act for the completion of the assessments and strategies, there was limited new information to support a new comprehensive analysis. In light of this, the Task Force determined that there was no justification for revising the list of Focus Countries in 2018; the same is true for the Countries of Concern. Each country listed continues to be a "major source of wildlife trafficking products or their derivatives, a major transit point of wildlife trafficking products or their derivatives, or a major consumer of wildlife trafficking products."

This determination is based on our analysis of the statutory criteria in the END Act and does not reflect a positive or negative judgment of the listed countries or indicate that these countries are not working diligently to combat wildlife trafficking. Indeed, the United States has longstanding partnerships with many of these countries with respect to combating wildlife trafficking and recognizes the strong political will that already exists in many of these countries to tackle this problem. The Department of State and other Task Force agencies look forward to continuing close and constructive relationships with these countries as we work collaboratively to combat wildlife trafficking.

2018 Focus Country List (in alphabetical order): Bangladesh, Brazil, Burma, Cambodia, Cameroon, China, Democratic Republic of the Congo, Gabon, India, Indonesia, Kenya, Laos, Madagascar, Malaysia, Mexico, Mozambique, Nigeria, Philippines, Republic of the Congo, South Africa, Tanzania, Thailand, Togo, Uganda, United Arab Emirates, and Vietnam. The 2018 Countries of Concern are Madagascar, Democratic Republic of the Congo, and Laos.

## Countries of Concern

### Methodology for Identifying Countries of Concern

To identify Countries of Concern as directed by Section 201(b) of the Act, the Department of State, in consultation with the Departments of the Interior and Commerce and other agencies of the Task Force, reviewed publicly available information as well as classified material that indicated the following governments actively engaged in or knowingly profited from the trafficking of endangered or threatened species. A review of classified, NGO, and open source reporting found insufficient evidence to designate new Countries of Concern. The situation in the Countries of Concern designated in 2017 remains largely unchanged. This designation does not indicate all parts of the government are or have been involved, but there are serious concerns that either high-level or systemic government involvement in wildlife trafficking has occurred.

2018 Countries of Concern (in alphabetical order): Democratic Republic of Congo, Laos, and Madagascar.

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## 4. Columbia River Treaty

The United States and Canada began negotiations to modernize the Columbia River Treaty regime on May 29, 2018, in Washington, D.C. See State Department media note, available at <https://www.state.gov/on-the-opening-of-negotiations-to-modernize-the-columbia-river-treaty-regime/>. The original treaty was concluded in 1964. The May 22, 2018 media note on the negotiations, available at <https://www.state.gov/launching-negotiations-to-modernize-the-columbia-river-treaty-regime/>, explains U.S. objectives in renegotiating the treaty:

As the United States enters these bilateral negotiations with our Canadian counterparts, our key objectives include continued, careful management of flood risk; ensuring a reliable and economical power supply; and better addressing ecosystem concerns. Our objectives are guided by the *U.S. Entity Regional Recommendation for the Future of the Columbia River Treaty after 2024*, a consensus document published in 2013 after years of consultations among the Northwest's Tribes, states, stakeholders, public, and federal agencies.

The second round of negotiations was held in August in British Columbia, Canada. See August 17, 2018 media note available at <https://www.state.gov/conclusion-of-the-second-round-of-negotiations-to-modernize-the-columbia-river-treaty-regime/>. The third round was held in October in Oregon. See October 19, 2018 media note, available at <https://www.state.gov/conclusion-of-the-third-round-of-negotiations-to-modernize-the-columbia-river-treaty-regime/>. The fourth round was held in December in British Columbia. See December 14, 2018 media note, available at <https://www.state.gov/conclusion-of-the-fourth-round-of-negotiations-to-modernize-the-columbia-river-treaty-regime/>.

**Cross references**

Texas v. New Mexico (*case regarding U.S.-Mexico water convention*), **Ch. 4.C.1**

Center for Biological Diversity (*case involving UNFCCC*), **Ch. 4.C.2**

*Human Rights and the Environment*, **Ch. 6.F**

*WTO proceedings on Tuna and Tuna Products*, **Ch. 11.C.2.a**

*Keystone XL Pipeline*, **Ch. 11.F.4.a**

## CHAPTER 14

### Educational and Cultural Issues

#### A. CULTURAL PROPERTY: IMPORT RESTRICTIONS

In 2018, the United States extended two international agreements and entered into one new agreement pursuant to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“Convention”), to which the United States became a State Party in 1983, in accordance with the Convention on Cultural Property Implementation Act (“CPIA”), which implements parts of the Convention. Pub. L. 97-446, 96 Stat. 2351, 19 U.S.C. § 2601 *et seq.*

If the requirements of 19 U.S.C. § 2602(a)(1) and/or (e) are satisfied, the President has the authority to enter into or extend agreements to apply import restrictions for up to five years on archaeological and/or ethnological material of a nation, the government of which has requested such protections and has ratified, accepted, or acceded to the Convention. Accordingly, the United States took steps in 2018 to protect the cultural property of Libya, Belize, and Algeria by extending an existing memorandum of understanding (“MOU”) or entering into a new one, or considering requests for measures, and imposing corresponding import restrictions on certain archaeological and/or ecclesiastical ethnological material. Current import restrictions and MOUs pertaining to those restrictions are available at <https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions>.

#### 1. Libya

The United States and Libya signed an MOU on cultural property protection on February 23, 2018. See February 20, 2018 press notice, available at <https://www.state.gov/united-states-and-libya-sign-cultural-property-protection->

[agreement/](#). The MOU was signed as part of ongoing efforts to cooperate with the Libyan Government of National Accord (see Chapter 9). The MOU provides for U.S. import restrictions on categories of archaeological material representing Libya’s cultural heritage dating from 12,000 B.C. through 1750 A.D. and Ottoman ethnological material from Libya dating from 1551 to 1911 A.D. The full text of the agreement is available at <https://www.state.gov/18-223/>. The MOU continues emergency import restrictions imposed by the U.S. government on December 5, 2017. See *Digest 2017* at 570.

## 2. Belize

Effective February 27, 2018, the United States and Belize extended for five years their 2013 MOU concerning the imposition of import restrictions on certain categories of archaeological material originating in Belize. 83 Fed. Reg. 8354 (Feb. 27, 2018); and see *Digest 2013* at 422-23. The 2018 extension was concluded via exchange of diplomatic notes after the Cultural Property Advisory Committee and the Acting Assistant Secretary for Educational and Cultural Affairs concluded that the cultural heritage of Belize continues to be in jeopardy from pillage of certain archaeological material. The agreement is available at <https://www.state.gov/18-223-1/>.

## 3. Algeria

On February 27, 2018, the United States received a request from the Government of Algeria under Article 9 of the UNESCO Convention for U.S. import restrictions on archaeological and ethnological material representing Algeria’s cultural patrimony. 83 Fed. Reg. 27,649 (June 13, 2018).

## 4. Cambodia

On September 12, 2018, the United States and Cambodia signed an MOU, which entered into force September 19, 2018, extending import restrictions previously agreed in a 2003 MOU, as extended in 2008, and as amended and extended in 2013. The amended and extended MOU is available at <https://www.state.gov/18-919/>.

## B. CULTURAL PROPERTY: LITIGATION

### ***Three Knife-Shaped Coins (Ancient Coin Collectors Guild)***

In *United States v. Three Knife Shaped Coins*, 246 F. Supp. 3d 1102 (D. Md. 2017), the district court granted summary judgment for the United States as to 15 coins in dispute and granted summary judgment for the Ancient Coin Collectors Guild (the “Guild”) as to seven coins the United States had agreed to return. The Guild appealed. The U.S. Court of Appeals for the Fourth Circuit affirmed the district court’s decision. *United States v.*

*Ancient Coin Collectors Guild v. 3 Knife-Shaped Coins*, 899 F.3d 295 (4th Cir. 2018). Excerpts follow from the opinion of the Court. In October, the Fourth Circuit denied the Guild’s motion for rehearing. The Guild then filed a petition for certiorari.\*

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...The Guild ... decided to manufacture litigation by deliberately importing restricted ancient Cypriot and Chinese coins into the United States. ... Using the Cypriot and Chinese Designated Lists for guidance, [the Guild’s agent] located twenty-three Cypriot and Chinese coins that they considered likely to be detained by Customs.

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The Guild challenges the district court’s judgment on multiple grounds. First, the Guild contends that the court erred in the Forfeiture Opinion by failing to require the government to prove all the elements of its forfeiture case. Second, the Guild argues that the court abused its discretion in the Forfeiture Opinion when it rejected the Guild’s expert evidence. Third, the Guild maintains that the court erred in ruling that the Guild had not been deprived of its right to fair notice of the ancient coins that were subject to import restrictions imposed by the government. Fourth, the Guild maintains that, in the Discovery Order, the court abused its discretion by declining to authorize several discovery requests. Fifth, the Guild argues that the court abused its discretion in the Strike Opinion and Order by striking certain affirmative defenses and other aspects of the Guild’s Amended Answer. Notably, the Guild supports its third and fifth contentions with constitutional arguments.

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In its initial appellate contention, the Guild maintains that the district court erred in failing to require the government to prove two essential elements of its prima facie forfeiture case. According to the Guild, the government was obliged to prove that the ancient Cypriot and Chinese coins were (1) first discovered within and hence subject to the export control of the State Party for which restrictions were granted (“first discovery”); and (2) illegally removed from the State Party’s control after those restrictions were granted (“illegal removal”). ...

The government counters that it had to prove—pursuant to § 2610—only that a particular seized item was “listed in accordance with section 2604.” ...

As explained below, we reject the Guild’s contentions with respect to the first discovery and illegal removal elements. We agree that the district court properly determined that the government had satisfied its burden with respect to the fifteen ancient Cypriot and Chinese coins at issue in these forfeiture proceedings.

... Contrary to the Guild’s erroneous reading of the CPIA, the first discovery requirement only delimits what material the executive branch can place on a restricted list. Once the material is properly included on a list, or, in other words, “designated,” the government no longer must establish the first discovery element with regard to particular imported material.

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\* Editor’s note: The Supreme Court denied the petition for certiorari on February 19, 2019.

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... Thus, in *Ancient Coin I*, we decided that the government had properly listed the Cypriot and Chinese coins, having satisfied the first discovery element.

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As noted, the CPIA uses the defined term “designated archaeological material”—which does not contain the first discovery element—in describing the responsibilities of federal officials *after* import restrictions have gone into effect, i.e., after ancient coins have been placed on a “designated list.” *See* 19 U.S.C. § 2601(7). Thus, Customs is tasked with preventing the “designated archaeological ... material” from entering the United States without adequate documentation. *Id.* § 2606(a). Furthermore, when a determination has been made by Customs that “designated archaeological ... material” was sought to be imported in violation of § 2606, the government is obliged to initiate an appropriate forfeiture action. *Id.* § 2606(b); *see also id.* § 2609. Finally, during the forfeiture proceedings, the government’s initial burden of proof is simply to demonstrate that “material subject to the provisions of section 2606”—that is, designated archaeological material—is listed “in accordance with section 2604.” *Id.* § 2610.

The crux of the Guild’s incorrect interpretation of the CPIA appears to emanate from the “in accordance with section 2604” language. *See* 19 U.S.C. § 2610(1). In addition to directing the executive branch to promulgate lists of restricted material, § 2604 also imposes minimum drafting standards for those lists. It provides that each listing “shall be sufficiently specific and precise to ensure [both] that [the restrictions] are applied only to the archeological and ethnological material covered by the agreement” and that importers have fair notice regarding what material is subject to those restrictions. *Id.* § 2604. However, our *Ancient Coin I* decision foreclosed a subsequent challenge to whether Cypriot and Chinese coins were “listed in accordance with section 2604.” *See* 698 F.3d at 183 (“Here, CBP has listed the Chinese and Cypriot coins by type, in accordance with 19 U.S.C. § 2604 ....”). Instead, in the forfeiture proceedings, the government had to demonstrate that the particular coins in question fall under the type described in the listing.

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Here, Congress’s use of the term “designated archaeological material” absolves the government from the need to again prove the first discovery element after properly promulgated import restrictions have gone into effect. If that were not the case, the importers—such as the Guild—could always relitigate the State Department’s conclusions that certain materials belong to a particular country’s cultural patrimony. And that is precisely what the Guild seeks to do in this forfeiture action. As we recognized in *Ancient Coin I*, however, the determination of where certain types of archaeological materials are typically discovered is beyond the competence of the federal courts. *See* 698 F.3d at 179 (“The federal judiciary has not been generally empowered to second-guess the Executive Branch in its negotiations with other nations over matters of great importance to their cultural heritage.”).

Consistent with the foregoing, the issue pursued by the Guild regarding first discovery is resolved by the designated lists in the regulations—and need not be relitigated in a forfeiture action. We therefore reject the Guild’s contention that the district court erroneously excused the government from proving first discovery as an essential element of its prima facie forfeiture case.

...[T]he Guild also maintains that the government failed to establish that the fifteen ancient coins were illegally removed from Cyprus or China. This argument is predicated on the fact that the CPIA does not bar importation of all “designated archaeological or ethnological material,” but rather only designated material that has been “exported ... from the State Party after the designation of such material under section 2604,” without “documentation which certifies that such exportation was not in violation of the laws of the State Party.” *See* 19 U.S.C. § 2606(a). ... [T]he Guild contends that the government had to prove the illegal removal element as part of its prima facie forfeiture case.

Simply put, we reject the Guild’s interpretation of the CPIA on this point. As we explained in *Ancient Coin I*, Congress anticipated efforts to import archaeological material “without precisely documented provenance and export records.” *See* 698 F.3d at 182. In those circumstances, the CPIA does not require the *government* to produce evidence establishing the provenance or export status of the archaeological material. Rather, as *Ancient Coin I* recognized, when Customs has determined that the archaeological material “has been designated by ‘type’ and included in the list of restricted articles,” § 2606 “expressly places the burden on importers to prove [the designated material is] importable.” *Id.* at 182. The importer can satisfy that burden by presenting to Customs one of the three types of documentation specified in § 2606(b). *Id.* Unless the importer does so, however, Customs must “refuse to release the material from customs custody.” *See* 19 U.S.C. § 2606(b).

\* \* \* \*

Distilling the statutory requirements, the government must establish the following in order to meet its initial burden in a forfeiture action for material subject to § 2606 of the CPIA: (1) that the material is covered by an MOU, *see* 19 U.S.C. § 2601(7)(A)(i); (2) that the material is “listed by regulation under section 2604,” *id.* § 2601(7) (B); and (3) that the listing is “sufficiently specific and precise” to ensure both that “the import restrictions ... are only applied to the archeological or ethnological material covered by the [MOU],” and that “fair notice is given to importers and other persons as to what material is subject to such restrictions” *id.* § 2604.

The Forfeiture Opinion properly determined that the government had met its initial burden. ...

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In its third contention of error, the Guild argues that the Customs regulation promulgated and codified at 19 C.F.R. § 12.104—which governs the enforcement of CPIA import restrictions—irreconcilably conflicts with its statutory parent’s requirements, which are found in 19 U.S.C. § 2601(2). And the Guild further argues that this purported conflict deprives an importer of fair notice of those specific items that are subject to the import restrictions.

\* \* \* \*

In contrast to the § 2601(2) statutory definition enacted by Congress, the “Definitions” provision in the related regulation, that is, 19 C.F.R. § 12.104(a), does not segregate the words “first discovered within, and is subject to export control by the State Party” from the preceding subparagraphs. ...

The Guild argues that the “first discovered within” clause of the regulatory definition therefore applies only to subparagraph (3) of 19 C.F.R. § 12.104(a). According to the Guild, the regulatory provision in § 12.104(a) suggests that fully intact archaeological or ethnological objects— as opposed to fragmented objects—are not subject to the “first discovered within” proviso. On the other hand, the statutory definition in § 2601(2) clearly provides that the “first discovered within” proviso applies to each category of object, regardless of whether an archaeological or ethnological object is fully intact or in fragments.

The Guild presses two arguments in connection with what it perceives as a fatal drafting error. First, it contends that the error in the regulation—§ 12.104(a)—deprived the Guild of “fair notice” of those objects that are subject to import restrictions under § 2604. ... [T]hat contention misses the mark and must be rejected. Section 2604’s fair notice provision applies only to those regulations that “list [archaeological or ethnological] material by type or other appropriate classification,” i.e., the designated lists. *See* 19 U.S.C. § 2604. The definitional regulation in § 12.104(a), which the Guild says deprived it of fair notice, is not a designated list. To present a viable fair notice challenge under § 2604, the Guild would need to allege that either the Cypriot Designated List or the Chinese Designated List was insufficiently “specific and precise” to notify the Guild of what materials, such as ancient coins, were subject to the import restrictions. *See id.* Because no such allegation has been made, the Guild’s statutory fair notice claim is fatally defective.

\* \* \* \*

In the second part of its fair notice contention, the Guild argues that it was unconstitutionally deprived of adequate notice that the Cypriot and Chinese coins were subject to import restrictions. The Fifth Amendment’s Due Process Clause, under which this contention is presented, requires that “a party must receive fair notice before being deprived of property.” *See United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997). To provide notice that satisfies constitutional due process, a regulation “must ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.’” ...

\* \* \* \*

...The Guild cannot credibly claim that it has been unconstitutionally deprived of its property. The Guild simply implemented a scheme designed to knowingly contravene, and subsequently challenge, a federal law that it opposed.

\* \* \* \*

By its final contention, the Guild maintains that the district court acted improperly by striking the Amended Answer. ...

\* \* \* \*

... [T]he district court did not abuse its discretion by granting the government's motion. In so ruling, the court was simply adhering to our *Ancient Coin I* decision. We therein acknowledged that, during an ensuing forfeiture proceeding, the Guild could “press a *particularized* challenge to the government's assertion that the twenty-three coins are covered by import restrictions.” See 698 F.3d at 185 (emphasis added). The portions of the Amended Answer that were stricken by the district court, however, were not particularized to this forfeiture action. Rather, the stricken allegations sought to resurrect claims that the Guild had already lost in *Ancient Coin I*. ...

The *Ancient Coin I* decision had resolved those issues by ruling that the State Department and Customs had properly imposed import restrictions on ancient Cypriot and Chinese coins, in compliance with the CPIA. In this forfeiture case, the district court thus lacked the authority to question the validity of our earlier rulings. Similarly, we are bound by the rulings of our earlier panel decision. See *McMellon*, 387 F.3d at 332. Thus, the stricken defenses were not pertinent to this forfeiture action, and the court did not err in striking them.

... The Guild also presents its motion to strike contention with a constitutional hue as a violation of its due process rights. Relying on the Supreme Court's decision in *Degen v. United States*, the Guild contends that the ruling on the motion to strike deprived the Guild of the “right of a citizen to defend his property against attack.” See 517 U.S. 820, 828, 116 S.Ct. 1777, 135 L.Ed.2d 102 (1996). A review of the *Degen* case, however, reveals that the constitutional argument is also without merit.

\* \* \* \*

In stark contrast to the claimant in *Degen*, the Guild has not been disentitled from defending its property in a forfeiture action. In fact, the Guild was not even disentitled from pursuing the affirmative defenses stricken by the district court. In the *Ancient Coin I* litigation, the district court and this Court each considered and rejected the Guild's claims regarding the propriety of the import restrictions imposed on ancient Cypriot and Chinese coins. Having already received two hearty bites at the proverbial apple, the Due Process Clause does not entitle the Guild to a third. The district court's conclusion in the Strike Opinion and Order thus did not violate the Guild's due process rights.

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### C. CULTURAL PROPERTY ADVISORY COMMITTEE

On April 2, 2018, the State Department announced that it was renewing the Charter of the Cultural Property Advisory Committee for a two-year period, effective April 8, 2018. Background on the Committee follows, excerpted from the April 2, 2018 State Department media note, available at <https://www.state.gov/u-s-department-of-state-renews-charter-of-cultural-property-advisory-committee/>.

First established in 1983 by the Convention on Cultural Property Implementation Act (Public Law 97-446), the Cultural Property Advisory Committee advises the President of the United States on appropriate U.S. action in response to requests from foreign governments for cultural property agreements. Cultural property agreements with other countries are collaborative tools to prevent illicit excavation and trade in cultural objects. Once an agreement is in place, importation into the United States of designated material is prohibited except under certain exceptional circumstances. U.S. efforts to protect and preserve cultural heritage through these agreements promote stability, economic development, and good governance within the concerned countries, while denying critical financing to terrorist organizations and other criminal networks that engage in such illicit trade.

The Presidentially appointed members of the Committee include private-sector experts in archaeology, anthropology, ethnology, and related fields; experts in the international sale of cultural property; representatives of museums; and the general public. The President has delegated decision-making responsibility for cultural property agreements to the Secretary of State, and the Committee submits its findings and recommendations directly to the Department of State.

## **D. EXCHANGE PROGRAMS**

### **1. Uzbekistan**

On May 16, 2018, the United States and Uzbekistan signed two agreements in the field of education. See U.S. Mission Uzbekistan press release, available at <https://uz.usembassy.gov/landmark-u-s-uzbekistan-agreements-signed-on-education-and-culture/>. First, they signed an MOU supporting partnerships between U.S. universities and higher education institutions across Central Asia for three years. Second, they signed an MOU increasing funding for English language programs in Uzbekistan to include university students, journalists, and professionals; capacity building programs for Uzbek English teaching professionals; and online learning opportunities for both teachers and students.

### **2. ASSE Litigation**

As discussed in *Digest 2017* at 580-81; *Digest 2016* at 582-83; *Digest 2015* at 611; and *Digest 2014* at 576-79, ASSE International, a program sponsor in the State Department's J-1 Exchange Visitor Program ("EVP") challenged in federal court the imposition of sanctions by the Department of State for ASSE's violations of EVP regulations. After the Ninth Circuit reversed the district court's dismissal and remanded the case, *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059 (9th Cir. 2015), the State Department conducted further administrative proceedings and imposed a lesser sanction. ASSE renewed its challenge

in district court to the lesser sanction and sought discovery. The district court’s January 3, 2018 order denied ASSE’s motion to require further production by the Department. On June 19, 2018, the district court granted the government’s motion for summary judgment. ASSE appealed in the U.S. Court of Appeals for the Ninth Circuit.

### 3. *Capron v. Massachusetts*—case relating to the au pair program

On September 25, 2018, the United States filed a brief in response to the request of the U.S. Court of Appeals for the First Circuit in a case involving the U.S. au pair program. *Capron v. Massachusetts*, No. 17-2140. Excerpts follow from the U.S. brief, which is available in full at <https://www.state.gov/digest-of-foreign-law/>.

\* \* \* \*

#### STATEMENT<sup>[SEP]</sup>

1. The Mutual Educational and Cultural Exchange Act of 1961, Pub. L. No. 87-256, 75 Stat. 527 (Fulbright-Hays Act), authorized the Director of the United States Information Agency (USIA), “when he considers that it would strengthen international cooperative relations,” to provide for “educational exchanges...between the United States and other countries of students, trainees, teachers, instructors, and professors.” *See* 22 U.S.C. § 2452(a)(1)(B)(ii). The resulting Exchange Visitor Program (EVP) furthers the Act’s purposes of “increas[ing] mutual understanding between the people of the United States and the people of other countries,” “strengthen[ing] the ties which unite us with other nations,” “promot[ing] international cooperation for educational and cultural advancement,” and “assist[ing] in the development of friendly, sympathetic, and peaceful relations between the United States and the other countries of the world.” *Id.* § 2451. Participants in the EVP enter and remain in the United States on a J visa, a type of nonimmigrant visa that was created for, and is specific to, the EVP. *See* 8 U.S.C. § 1101(a)(15)(J).

The State Department has administered the EVP since 1999, when the USIA and the State Department merged. The State Department’s regulations establish different categories of exchange programs within the EVP—each of which uses the<sup>[SEP]</sup>J visa—that delineate the different roles that exchange visitors may fill. Reflecting the purposes of the Fulbright-Hays Act, these regulations explain that the exchanges “assist the Department of State in furthering the foreign policy objectives of the United States.” 22 C.F.R. § 62.1.

2. One such program category allows foreign nationals to enter the United States as au pairs. 22 C.F.R. § 62.31. The au pair program is a cultural- and educational-exchange program available only to foreigners between the ages of 18 and 26. Young people who qualify for this opportunity spend a year in the United States living with an American host family, providing childcare services within that family, and attending classes at an accredited college or university. By “participat[ing] directly in the home life” of an American family, *id.* § 62.31(a), au pairs gain valuable exposure to our country’s society and values. In the State Department’s judgment, our country’s continued engagement with these young people advances the status of the United States as a global leader and furthers the government’s foreign-policy goals.

\* \* \* \*

3. Although the State Department oversees the EVP, the exchange programs are conducted by organizations known as “sponsors” that the State Department designates for that purpose. *See* 22 C.F.R. §§ 62.1(b), 62.3. ...

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## ARGUMENT

### A. The Au Pair Regulations Require Host Families To Pay A Weekly Stipend That Is Based On The Federal Minimum Wage.

The compensation provision that applies to the au pair program requires sponsors to ensure that participants in the au pair program receive a weekly stipend that is based on the federal minimum wage. ...

Ultimately, au pair wages are determined by sponsors and host families, not by the State Department. Host families are free to pay au pairs—and sponsors are free to direct host families to pay au pairs—more than the minimum that would be required to comply with the State Department’s regulations, and some do. But the State Department’s regulations establish the requirements with which au pair compensation must comply.

The compensation provision of the au pair regulations differs in key respects from the compensation provisions in regulations that govern other categories of the EVP. ...

Consistent with the au pair regulations’ reference to the FLSA, both the USIA and the State Department have informed sponsors about changes in the federal minimum wage. ...

The EVP regulations require sponsors to provide accurate information to prospective exchange visitors and host families about work hours, wages and compensation, and credits for room and board. 22 C.F.R. § 62.9(d)(3). Sponsors have long informed prospective host families and au pairs that the required weekly stipend is based on the federal minimum wage, less a credit for room and board. ...

The district court in this case nevertheless ruled that, by requiring compensation in accordance with the requirements of the FLSA, the State Department’s au pair regulations require host families to comply with applicable state and local minimum-wage laws. That ruling was incorrect. ...

### B. The Au Pair Regulations Preempt State And Local Laws Establishing Terms Of Employment That Differ From The Terms Established By The Federal Regulations.

The federal au pair regulations do not leave room for a state or municipal government to impose terms of employment for au pairs that differ from the terms set forth in the regulations. (Court’s question 1). Like the federal statute at issue in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), the au pair regulations are “drawn not only to bar what they prohibit but to allow what they permit.” *Id.* at 380. “Federal regulations have no less pre-emptive effect than federal statutes.” *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982)...

As discussed, the au pair regulations require host families to pay a weekly stipend that is based on the *federal* minimum wage. They contain no such requirement concerning state or local minimum wages. The au pair regulations also determine the maximum number of hours an au pair can work per day (10) and per week (45); require that au pairs receive a certain number of days off per week (1.5) and per month (one full weekend); require that au pairs receive two

weeks per year of paid vacation; and require that host families facilitate the au pair's enrollment and attendance in an accredited U.S. post-secondary institution and pay the cost of such academic course work in an amount not to exceed \$500. *See* 22 C.F.R. § 62.31(j)(2)-(4), (k).

These nuanced and “detailed provisions” show that the federal government’s “calibrated” approach to the au pair program is deliberate. *Crosby*, 530 U.S. at 377-78...

This conclusion is textually reinforced by the contrast between the au pair regulations and the regulations governing other EVP categories. As noted, the regulations for three such categories—summer work-travel, teachers, and camp counselors—specifically entitle participants to any higher state or local minimum wage that may apply, either explicitly or by entitling participants to compensation that is commensurate with U.S. counterparts. Thus, when the State Department intends to require payment in accordance with state and local law for EVP participants, the Department says so expressly. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (brackets and citation omitted); *accord In re PHC, Inc. Shareholder Litig.*, 894 F.3d 419, 432 (1st Cir. 2018).

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The compensation scheme required under the au pair regulations differs from state labor laws in other ways as well. For example, the compensation required under the au pair regulations is structured as a weekly stipend, rather than as a fixed hourly rate. Under the federal regulations, an au pair’s weekly compensation is “based upon 45 hours of child care services per week” that must be paid even if the au pair has worked fewer than 45 hours. *See* 22 C.F.R. § 62.31(j)(1). State labor law, by contrast, typically requires pay only for hours worked, and requires a different overtime rate for work beyond 40 hours. *See, e.g.*, 940 Mass. Code Regs. § 32.02 (Massachusetts definition of “working time”); *id.* § 32.03(3) (Massachusetts overtime provision for domestic workers).

The Commonwealth appears to acknowledge that the au pair regulations preempt state or local laws governing compensation that are inconsistent with the structure of the federal program—even if it is technically possible for a host family to comply with both the federal and state requirements. Notably, the Commonwealth disavows a reading of its regulations that would require host families to pay au pairs for time spent sleeping and eating. *Resp. Br.* 46. The Commonwealth thus implicitly concedes that such a requirement is not compatible with the State Department’s regulations, which provide that au pairs shall be compensated at a weekly rate “based upon 45 hours of child care services.” 22 C.F.R. § 62.31(j). And if a state claimed that its statute or regulation required au pairs to be paid for sleeping or eating, that state law would be preempted because it is inconsistent with the State Department’s regulations for the au pair program.

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In concluding that Massachusetts’ domestic-worker-compensation law is not preempted by the State Department’s au pair regulations, the district court here relied on a presumption against preemption. *See* JA602. That reliance was misplaced. The presumption applies when a federal statute or regulation would supersede the historical police powers of the States. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). But the presumption “disappears...in fields of regulation that have been substantially occupied by federal authority for an extended

period of time.” *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005) (holding that, despite the states’ “legitimate role in regulating certain banking activity,” the presumption against preemption does not apply in the context of federally chartered banks).

States have no historical power to regulate the Exchange Visitor Program, of which the au pair program is a part. The EVP is a creation of federal law, and it operates in the fields of foreign affairs and immigration—two fields that have long been reserved exclusively to the federal government. Au pairs enter and remain in the United States on a J visa, a type of nonimmigrant visa that was created for, and is specific to, the EVP. *See* 22 C.F.R. § 62.2 (definition of “J visa”). The au pair program is a foreign-relations function of the federal government, regulated and overseen by the State Department, which advises the President in the conduct of U.S. foreign policy. Congress enacted the Fulbright-Hays Act, pursuant to which educational and cultural exchange programs are administered, in order to “increase mutual understanding between the people of the United States and the people of other countries,” “strengthen the ties which unite us with other nations,” “promote international cooperation for educational and cultural advancement,” and “assist in the development of friendly, sympathetic, and peaceful relations between the United States and the other countries of the world.” 22 U.S.C. § 2451. Consistent with these purposes, the State Department’s regulations note that the EVP “assist[s] the Department of State in furthering the foreign policy objectives of the United States.” 22 C.F.R. § 62.1. There is no presumption against preemption in the context of a federal program to implement the foreign-policy and immigration objectives of the United States. In any event, the presumption against preemption is just a presumption, which “can be overcome” by an adequate showing of preemptive intent. *See Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151 (2001). As explained, the comprehensive features of the “calibrated” au pair regulations make clear that their terms are intended to be exclusive with respect to the matters that they address, including the terms on which au pairs are compensated. *See Crosby*, 530 U.S. at 377-78.

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### **C. Policy Arguments For Changing The Terms Of Au Pair Employment Should Be Directed To The State Department.**

State and local regulations have the potential to severely undermine the au pair program, particularly if increased costs or record-keeping burdens discourage participation by host families. The district court correctly noted that the affordability of child care under the au pair program is not a goal of the Fulbright-Hays Act. *See* JA612. However, the viability of the au pair program is a quintessential federal interest. The program is a valuable tool of U.S. foreign policy. For over 30 years, the program has brought young people from other countries to the United States; immersed them in the home life of an American family; enabled them to continue their education at a local college or university; provided them with unique opportunities to develop leadership skills; and allowed them to return home as unofficial “ambassadors” for the United States.

Contrary to the district court’s suggestion, *see* JA607, the USIA did not abandon an interest in a uniform basis of compensation for au pairs when it linked the au pair stipend to the requirements of the FLSA. (Court’s question 5). Per the FLSA, the federal minimum wage is, of course, uniform nationwide. If changes are to be made to the terms and conditions of the au pair program, those changes should be made not through litigation but through rulemaking by the State Department—as clearly intended by Congress, which vested regulatory oversight of the

EVP not in individual states or municipalities but in that agency. The State Department, which has both the relevant foreign policy expertise and the ability to consult with affected constituencies, is best suited to balance the many policy considerations that any proposed change would present. ...

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## E. INTERNATIONAL EXPOSITIONS

### **Expo Dubai 2020**

On February 16, 2018, the Department of State issued a request for proposals for the U.S. Pavilion at Expo Dubai 2020. 83 Fed. Reg. 7098 (Feb. 16, 2018). The Department made a selection in May.\*\*

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\*\* Editor's note: In early 2019, the United States terminated the relationship with the selected entity.

**Cross References**

Visa Regulations and Restrictions, **Ch. 1.B.2**

## CHAPTER 15

### Private International Law

#### A. COMMERCIAL LAW/UNCITRAL

##### 1. UNCITRAL

Julian Simcock, Deputy Legal Adviser for the U.S. Mission to the United Nations, delivered remarks on October 15, 2018 at the UN General Assembly Sixth Committee on the report of the United Nations Commission on International Trade Law (“UNCITRAL”) on the work of its 51st session. Mr. Simcock’s comments are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-sixth-committee-meeting-on-the-report-of-the-united-nations-commission-on-international-trade-law-on-the-work-of-its-fifty-first-session/>.

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The United States welcomes the Report of the 51st session of the United Nations Commission on International Trade Law and commends the efforts of UNCITRAL’s Member States, observers, and Secretariat in continuing to promote the development and harmonization of international commercial law.

Regarding the work of UNCITRAL in this past year, we are delighted that UNCITRAL approved a Convention on International Settlement Agreements Resulting from Mediation, which we expect to become known as the “Singapore Convention on Mediation.” This Convention should help to promote the use of mediation internationally in the same way that the New York Convention has helped to promote the use of arbitration. We are pleased that UNCITRAL also approved the related Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, which updates the Model Law

on International Commercial Conciliation. The revised Model Law may be utilized by states that do not become party to the Convention.

We are also pleased that UNCITRAL approved a Model Law on Cross-Border Recognition and Enforcement of Insolvency-Related Judgments, with a Guide to Enactment. The Model Law will provide a framework for the cross-border recognition and enforcement of court judgments affecting insolvent companies, with the goal of eliminating duplicative litigation and facilitating the efficient gathering of assets by insolvency administrators, thereby promoting the reorganization of failing businesses, or the maximum recovery by creditors in the event of liquidation.

Finally, with respect to work completed, we are also pleased that UNCITRAL completed work on a Legislative Guide on Key Principles of a Business Registry. The legislative guide serves as a reference for governments as they reform laws to make it easier to start a business. We expect that legislative action based on this guide will facilitate access to credit, particularly for micro, small, and medium-sized enterprises.

We are also encouraged to see UNCITRAL continue to discuss various ways of improving its working methods and becoming even more efficient. At the 50th and 51st sessions, several valuable ideas were discussed, such as the goal of structuring the agenda in a way that permits states to deliberate on the overall work program before the session and the scheduling of the finalization of instruments and decisions on future work together to facilitate efficient travel of representatives from capitals.

We look forward to continuing our productive engagement with UNCITRAL this year. UNCITRAL instruments help support stable and predictable legal outcomes for our citizens and businesses, which is why the United States has taken steps to become party to four conventions negotiated at UNCITRAL, each of which has been transmitted to the U.S. Senate for its approval.

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## **2. UNCITRAL Working Group IV (Electronic Commerce)**

At the 56<sup>th</sup> session of UNCITRAL Working Group IV (Electronic Commerce), the United States submitted a paper on contractual aspects of cloud computing. The paper is reproduced below. U.N. Doc. A/CN.9/WG.IV/WP.151.

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1. The United States of America expresses its appreciation to the Secretariat for its efforts in drafting A/CN.9/WG.IV/WP.148, entitled “Contractual aspects of cloud computing.” While the United States of America has not seen a need for a checklist of main issues of cloud computing contracts, it has heard other delegations express support for such a document. Given this support by other delegations, the delegation of the United States has not objected to work on a checklist.

2. The United States of America believes that UNCITRAL documents should not attempt to provide legal advice or seem to favour one type of transacting party over another. A neutral approach is called for by paragraph 15 of A/CN.9/902, the report of the Working Group’s fifty-fifth session, which states “After discussion, the Working Group decided to recommend to the

Commission the preparation of a checklist of major issues that contracting parties might wish to address in cloud services contracts. In light of its nature, the checklist should not offer best practice guidance or recommendations. The need for preparation of guidance materials or model contractual clauses could be considered at a later stage.” However, because WP.148 appears to provide legal advice and to favour one type of transacting party over another, the United States delegation cannot support the current draft and believes that it needs significant revision.

3. There are numerous examples of text that raise the aforementioned concerns. For the sake of brevity, this paper identifies some of the provisions of the draft checklist that appear to provide legal advice and that, moreover, appear to provide such guidance to only one party entering into a cloud computing contract (*i.e.*, the customer):

- Paragraph 43, which includes “The customer may lack any remedy under those contracts since the breach of professional best efforts provisions may be difficult to determine. To avoid such situations, the customer would be interested in including in the SLA quantitative and qualitative performance parameters with specific metrics, quality assurances and performance measurement methodology.”

- Paragraph 77, which includes “Where no option to negotiate exists, the customer may need at least to review any IP clauses to determine whether the provider offers sufficient guarantees and allows the customer appropriate tools to protect and enjoy its IP rights and avoid lock-in risks ...”

- Paragraph 100, which includes “Providers’ standard terms may contain the right of the provider to suspend services at its discretion at any time. The customer may wish to restrict such unconditional right by not permitting suspension except for clearly limited cases (e.g., in case of the fundamental breach of the contract by the customer, for example non-payment).”

- Paragraph 116, which includes “Customer data loss or misuse, personal data protection violations and IP rights infringement in particular could lead to potentially high liability of the customer to third parties or give rise to regulatory fines. Imposing a more stringent liability regime on the provider where those cases are due to the provider’s fault or negligence may be justified.”

4.<sup>[SEP]</sup> The United States delegation will be prepared to raise and discuss additional concerns at the fifty-sixth session of Working Group IV.

5. Should the Working Group recommend continuation of work on a draft checklist of contractual issues relating to cloud computing contracts, and should the Commission accept that recommendation, the delegation of the United States would expect a neutral text that simply highlights the legal issues that may be present in such contracts, without appearing to assist one particular type of party to these contracts.

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### 3. Singapore Convention on Mediation

The United Nations Convention on International Settlement Agreements Resulting from Mediation was concluded at the 68<sup>th</sup> session of UNCITRAL Working Group II in 2018. The full text is available at [http://www.uncitral.org/pdf/english/commissionsessions/51st-session/Annex\\_1.pdf](http://www.uncitral.org/pdf/english/commissionsessions/51st-session/Annex_1.pdf). The UN General Assembly adopted it in December.

**B. FAMILY LAW**

See Chapter 2.

**C. INTERNATIONAL CIVIL LITIGATION*****Micula v. Romania***

On July 13, 2018, the United States filed a statement of interest in the U.S. district court for the District of Columbia in *Micula v. Romania*, No. 17-02332. The brief responds to the court's request for the views of the State Department on whether it has ever received a note verbale or other notification from the Government of Romania regarding acceptable forms of service of process. The statement of interest provides the U.S. position that, under international law, service on a sovereign government cannot be properly completed by mail unless the sovereign has consented. The statement of interest is excerpted below and available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>. See *Digest 2017* at 593-604 for discussion of *Water Splash Inc. v. Menon*, discussed in the statement of interest below.

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**A. Neither the Department of State nor the Department of Justice have found a copy of Romania's note verbale or evidence indicating receipt of the note.**

With respect to the question posed by the court, “whether the Government of Romania has ever communicated to the United States Department of State specific requirements for service of process under Article 10(a) of The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, November 15, 1965, 20 U.S.T. 261 (‘Hague Service Convention’), when the Government of Romania is a named defendant in a civil suit” (ECF No. 23, at 1), the Department of State represents that it has not found any record of such a communication.

With respect to the 2015 template note verbale that is Exhibit B to Romania's Memorandum of Law to Show Cause (ECF No. 18), the components of the Department of State most likely to have received such a note directly or indirectly are:

- The Bureau of European and Eurasian Affairs;
- The Bureau of Consular Affairs;
- The Bureau of Administration (which maintains records of diplomatic correspondence between the Department of State and foreign embassies);
- The Office of the Legal Adviser; and,
- The U.S. Embassy in Bucharest, Romania.

None of these components has located a version of the Romanian note verbale based on the text of Exhibit B. However, the lack of issuance or receipt of a note verbale does not

constitute a waiver by Romania of an objection to service by mail upon the Government of Romania as discussed below.

Within the Department of Justice, the Civil Division's Office of Foreign Litigation, Office of International Judicial Assistance ("OIJA"), is not aware of the note or of this requirement for service on Romania. OIJA is the United States' Central Authority for purposes of service under the Hague Service Convention.

**B. The United States does not consent to service of process upon itself by postal channels under Article 10 of the Hague Service Convention.**

The United States submits additional views related to the Court's inquiry. In the view of the United States a sovereign foreign government's mere lack of objection pursuant to Article 10 of the Hague Service Convention has no relevance to the question of whether service of process by mail on an embassy is a legally permissible form of service on that sovereign. Such service by mail on a sovereign government, barring express consent, is not proper as a matter of customary international law.

The United States does not consent to service of process upon itself by postal mail, even in the absence of an objection pursuant to Article 10 of the Hague Service Convention. The United States recently affirmed this position before the Supreme Court of the United States in *Water Splash Inc. v. Menon*. While that case turned on whether an individual Canadian citizen could be properly served via mail with process issued out of a Texas state court (*see* 137 S. Ct. 1504, 1505 (2017)), the United States noted in an amicus curiae brief the distinction between service on an individual *citizen* as opposed to a *sovereign* government. *See* Brief of the United States as Amicus Curiae in Support of Petitioner, at 19 n. 6, Case No. 16-254, 2017 WL 382689, at \*19 n. 6 (S. Ct. Jan. 24, 2017). The Solicitor General went on to state that the United States does not consent to service of process via mail upon itself:

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, provides the exclusive means of service for purposes of suing a foreign state in a U.S. court. *See* 28 U.S.C. 1608(a)(1)-(4); Fed. R. Civ. P. 4(j)(1). Section 1608(a) does not provide for service by a plaintiff on a foreign sovereign through postal channels without the foreign sovereign's consent. Similarly, service on the U.S. Government cannot be effected through Article 10, even though the United States does not object to Article 10 service by postal channels for private individuals or companies.

*Id.* (internal quotation marks and citation omitted). The United States affirmed this position through a public guidance document issued in January 2018. *See* U.S. Dep't of Justice, Office of Int'l Judicial Assistance, *Service of Judicial Documents on the United States Government Pursuant to the Hague Service Convention*, 2 (Jan. 12, 2018), <https://www.justice.gov/civil/page/file/1036571/download>.

In becoming parties to the Hague Service Convention, neither Romania nor the United States objected pursuant to Article 10(a) of that Convention and therefore the Convention does not limit the freedom to send judicial documents, by postal channels, from abroad to persons in either country. *See* Hague Service Convention, U.S. Central Authority page, available at: <https://www.hcch.net/en/states/authorities/details3/?aid=279>. However, otherwise applicable law would still apply to service by postal channels. As the Supreme Court recognized in *Water Splash*, "in cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second,

service by mail is authorized under otherwise-applicable law.” 137 S.Ct. at 1513 (citation omitted). With respect to foreign litigation against governments, as discussed above, service by mail on an embassy, barring consent, is not proper as a matter of customary international law. Thus, in litigation against the United States, both in Romania and in other foreign countries, the United States consistently objects to service by mail on its embassies, instead insisting on service through OIJA, if served via the Hague Service Convention or through other applicable service conventions, or through diplomatic channels.

\* \* \* \*

**Cross References**

*Intercountry Adoption*, **Ch. 2.B.1.**

*Child Abduction*, **Ch. 2.B.2**

*Animal Science Products, Inc. v. Hebei Welcome Pharm. Co.*, **Ch. 5.A.1**

*International comity (and anti-suit injunctions)*, **Ch. 5.C.1**

*Simon v. Hungary (comity and forum non conveniens)*, **Ch. 10.A.2**

*Philipp v. Germany (comity)*, **Ch. 10.A.2**

*Scalin v. SNCF*, **Ch. 10.A.2**

## CHAPTER 16

### Sanctions, Export Controls, and Certain Other Restrictions

This chapter discusses selected developments during 2018 relating to sanctions, export controls, and certain other restrictions relating to travel or U.S. government assistance. It does not cover developments in many of the United States' longstanding financial sanctions regimes, which are discussed in detail at <https://www.treasury.gov/resource-center/sanctions/Pages/default.aspx>. It also does not cover comprehensively developments relating to the export control programs administered by the Commerce Department or the defense trade control programs administered by the State Department. Details on the State Department's defense trade control programs are available at [https://pmddtc.state.gov/ddtc\\_public](https://pmddtc.state.gov/ddtc_public).

#### A. IMPOSITION, IMPLEMENTATION, AND MODIFICATION OF SANCTIONS

##### 1. Iran

##### a. *The Joint Comprehensive Plan of Action ("JCPOA")*

As discussed in *Digest 2015* at 634-35, the P5+1 and Iran concluded the Joint Comprehensive Plan of Action ("JCPOA") in 2015 to address concerns with Iran's nuclear program. Under the JCPOA, the U.S. committed to lift nuclear-related secondary sanctions—which are generally directed toward non-U.S. persons for specified conduct involving Iran that occurs entirely outside of U.S. jurisdiction and does not involve U.S. persons—but left non-nuclear-related sanctions in place.

On May 8, 2018, President Trump announced his decision to withdraw from the JCPOA. The President's remarks are available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-comprehensive-plan-action/>, and excerpted below. See also the May 8, 2018 White House fact sheet, available at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-ending-united-states-participation-unacceptable-iran-deal/>.

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\* \* \* \*

Over the past few months, we have engaged extensively with our allies and partners around the world, including France, Germany, and the United Kingdom. We have also consulted with our friends from across the Middle East. We are unified in our understanding of the threat and in our conviction that Iran must never acquire a nuclear weapon.

After these consultations, it is clear to me that we cannot prevent an Iranian nuclear bomb under the decaying and rotten structure of the current agreement.

The Iran deal is defective at its core. If we do nothing, we know exactly what will happen. In just a short period of time, the world's leading state sponsor of terror will be on the cusp of acquiring the world's most dangerous weapons.

Therefore, I am announcing today that the United States will withdraw from the Iran nuclear deal.

In a few moments, I will sign a presidential memorandum to begin reinstating U.S. nuclear sanctions on the Iranian regime. We will be instituting the highest level of economic sanction. Any nation that helps Iran in its quest for nuclear weapons could also be strongly sanctioned by the United States.

\* \* \* \*

Secretary of State Mike Pompeo's statement on the decision to withdraw from the JCPOA follows and is available at <https://ir.usembassy.gov/secretary-pompeo-on-president-trumps-decision-to-withdraw-from-the-jcboa/>.

As we exit the Iran deal, we will be working with our allies to find a real, comprehensive, and lasting solution to the Iranian threat. We have a shared interest with our allies in Europe and around the world to prevent Iran from ever developing a nuclear weapon. But our effort is broader than just the nuclear threat and we will be working together with partners to eliminate the threat of Iran's ballistic missile program; to stop its terrorist activities worldwide; and to block its menacing activity across the Middle East and beyond. As we build this global effort, sanctions will go into full effect and will remind the Iranian regime of the diplomatic and economic isolation that results from its reckless and malign activity.

Senior State Department officials held a briefing on May 8, 2018 regarding the President's decision, which is excerpted below, and available at <https://www.state.gov/background-briefing-on-president-trumps-decision-to-withdraw-from-the-jcboa/>.

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...[T]he sanctions reimposition that the President talked about is going to come in two phases. There's going to be one period for wind down that lasts ... 90 days, and one period of wind down that lasts six months. ... wind downs are, by the way, pretty standard across sanctions programs. So this is not Iran-specific, but oftentimes when we either impose sanctions or reimpose sanctions, we provide a wind down to allow both U.S. companies but foreign companies as well to end contracts, terminate business, get their money out of wherever the sanctions target is .... [W]e don't want to impact or have unintended consequences on our allies and partners. We want to focus the costs and the pain on the target. And in this case, that's the Iranian regime.

... In this case, we're providing a six-month wind down for energy-related sanctions. So that's oil, petroleum, petrochemicals, and then all of the ancillary sanctions that are associated with that. So, for example, banking; sanctions on the CBI in particular, because the Central Bank of Iran is involved in Iran's export of oil and the receipt of revenues. Shipping, shipbuilding, ports—all of those sanctions that are related to both the energy sector and then the banking and the shipping or transportation of that energy will all have a six-month wind down. Everything else is going to have a 90-day wind down. ... [T]he architecture of the Iranian sanctions program was quite complex, but everything else includes things like dealing in the rial, providing ... precious metals and gold to the Iranian regime, providing U.S. banknotes.

So there's a whole kind of swath of other sanctions that are all going to have a 90-day wind down. In addition, within the first 90 days, the Treasury Department is going to work to ... terminate the specific licenses that were issued pursuant to the statement of licensing policy on civil aviation. So Treasury's going to be reaching out to those private sector companies that have licenses and work to ... terminate those licenses in an orderly way that doesn't lead to undue impact on the companies.

The other big action that has to be done is the re-designation of all of the individuals that were delisted pursuant to the JCPOA. There are over ... 400 ... specifically designated for conduct, and another 200 or so were identified as part of the Government of Iran. ... [I]t's a lot of work for Treasury. Their aim is to relist all of those individuals and entities by the end of the six-month wind down. They're not going to relist entities and individuals overnight, ... both for practical reasons, but also for policy reasons. If some of those individuals and entities were relisted right away, it would impact the wind down, right? So if we're allowing a six-month wind down for energy-related or petroleum-related business, and then you ... re-designate tomorrow an Iranian-related petroleum entity, it makes null and void the six-month wind down that you just provided. So that's all going to be done in a coherent way to provide a real wind down period.

\* \* \* \*

...[S]ince last December, when we started working with our European allies on both the nuclear file but then also the broader array of Iranian threats, we're going to continue to work closely with them. We're going to broaden that engagement. And like both the President said and I think the Secretary said in his statement, he's going to lead an effort to build a global effort to constrain and to prevent, both on the nuclear front but then also on the ballistic missile front, support to terrorism and the ... six or seven areas that the President has outlined as kind of the broad array of Iranian threats. We're going to build a global coalition to put pressure on Iran to stop that behavior.

\* \* \* \*

... We do think that, given the IRGC's penetration of the Iranian economy and Iran's behavior in the region, as well as its other nefarious activities, that companies should not do business in Iran. That's an intended consequence. And we thank our ambassador out there for reaffirming that message.

\* \* \* \*

...I think as the President laid out, that the problem with the deal was that it reduced our ability to pressure Iran, right. It essentially cordoned off this huge area of the Iranian economy and said, "Hey, we know about the IRGC's penetration of the economy. We know Iran's doing all this nefarious, malign activities in the region. But because of this nuclear angle, which is only one aspect of Iran's behavior—a critical one, but just one—you essentially can't sanction these entities that are involved in all this other stuff."

\* \* \* \*

The President made clear on January 12th that he was giving a certain number of months to ... try to get a supplemental agreement with the E3. We didn't get there. We got close. We ... had movement, a ton of good progress, which will not be wasted, but we didn't get there. So he was clear January 12th that if we don't get this supplemental, he's withdrawing the United States from the JCPOA, and that's what he did. ...

\* \* \* \*

... [W]e have acknowledged for quite some time that the Iranians had a nuclear weapons program, but nobody knew until the Israelis found it, this well curated archive, the level of detail, ... I think it reinforced in a very meaningful way that all of the Iranian statements throughout the negotiations and after were lies.

\* \* \* \*

In the buildup ... to the negotiations that led first to the JPOA and the JCPOA, we had an extensive architecture of secondary sanctions that started more or less with CISADA in 2010. We had to use those secondary sanctions very, very rarely. In fact, we only ever sanctioned two banks with secondary sanctions, Kurlun and Elaf in Iraq. The leverage that we gained from the secondary sanctions is what we used throughout the world with engagement to get countries to partner with us to build the economic isolation of Iran. That's what we want to do again. It's not about sanctioning foreign companies; it's about using the leverage and engaging the way we did before.

\* \* \* \*

Ballistic ... missile sanctions were never lifted under the JCPOA, so under Executive Order 13382, we've always had the authority and we've continued to designate under that authority throughout the JCPOA period, so ... those have not been affected.

\* \* \* \*

...[T]he Secretary's revoking all waivers today, and then he's going to reissue wind down waivers today. So everything is going to be set as of today.

\* \* \* \*

It is our strong view that the JCPOA gave Iran room both for domestic internal political reasons in Tehran and regional reasons to increase their malign activity that helped to destabilize the region substantially.

So in responding to questions about how pulling out of the JCPOA will affect that, ... I think it's important for me to just say that we have seen a dramatic increase to a point where in Syria Iranian behavior—unrelated to the JCPOA but Iranian behavior—is so dangerous and reckless. That's why Israelis—the IDF—is opening shelters in northern Israel. It's not because of the JCPOA. It is because of some really dangerous and reckless behavior, including capabilities and all kinds of other things that are going into Syria.

\* \* \* \*

We believe that by getting rid of the JCPOA, we can come up with a more comprehensive deal, a more comprehensive approach that doesn't just focus on the nuclear file. The focus is on all of the threats together ... [T]he JCPOA tried to deal only with the nuclear file and left everything else off the table in the hopes that it would just kind of get better on its own or we wouldn't have to worry about it as much. That strategy didn't work. So what we hope to do is a much more comprehensive deal.

\* \* \* \*

Secretary Pompeo's May 21, 2018, speech at the Heritage Foundation, identifying twelve steps Iran would need to take before a new agreement could be reached to replace the JCPOA, is discussed in Chapter 19 and available at <https://www.state.gov/after-the-deal-a-new-iran-strategy/>.

On June 26, 2018, a senior State Department official provided a special briefing on U.S. efforts to discuss the re-imposition of sanctions on Iran with its partners around the world. The briefing transcript is available at <https://www.state.gov/r/pa/prs/ps/2018/06/283512.htm>, and excerpted below.

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\* \* \* \*

Over the past few weeks, as you probably have known, I've been in Europe and Asia garnering support for our Iran strategy. ... [A]n interagency team of State and Treasury officials have been explaining the new direction of our policy to our allies, working to garner their support for it. We're going to isolate streams of Iranian funding and looking to highlight the totality of Iran's malign behavior across the region.

I am back in Europe this week between engagements, as you may hear from the street scene behind me, working on this subject. We remain engaged with the E3 throughout this process, and we are going to continue to branch out in new countries and reach new partners as the weeks go forward.

\* \* \* \*

... I am continually struck by the amount of business that is falling out of Iran. Peugeot and others simply view Iran as too risky a place to do business. And I think, frankly, that is a result of at least partially the President's decision on May 8th. Now, Iran also has a terrible investment climate. It is a place where it is not easy to make money, as one of our partners said. But genuinely companies respect secondary sanctions, by my experience.

... I will say on the diplomatic front, we have had secondary sanctions in place with regards to Iran since 1996, the Iran Libya Sanctions Act. We've had secondary sanctions in place with regards to Cuba for a few years before that. ... these are discussions we are extremely used to having. We have a lot of diplomatic muscle memory for urging, cajoling, negotiating with our partners to reduce their investments to zero. ... and that message is one that is sometimes challenging, but these are serious diplomatic relationships we have. Our allies are aware of our concern. They share it. They want to work with us. ... for the vast majority of countries they are willing ... to adhere and support our approach to this because they also view it as a threat, and it's gotten worse in 2015, not better, on the regional activity side.

\* \* \* \*

On June 28, 2018, the Treasury Department's Office of Foreign Assets Control ("OFAC") published amendments to the Iranian Transactions and Sanctions Regulations ("ITSR") to implement the President's May 8, 2018 decision to end U.S. participation in the JCPOA. 83 Fed. Reg. 30,335 (June 28, 2018). As summarized in the Federal Register, OFAC amended the ITSR to:

Amend the general licenses authorizing the importation into the United States of, and dealings in, Iranian-origin carpets and foodstuffs, as well as related letters of credit and brokering services, to narrow the scope of such general licenses to the wind down of such activities through August 6, 2018; add a new general license to authorize the wind down, through August 6, 2018, of transactions related to the negotiation of contingent contracts for activities eligible for authorization under the *Statement of Licensing Policy for Activities Related to the Export or Re-export to Iran of Commercial Passenger Aircraft and Related Parts and Services*, which was rescinded ...; and add a new general license to authorize the wind down, through November 4, 2018, of certain

transactions relating to foreign entities owned or controlled by a United States person.

On August 6, 2018, the State Department held a special briefing previewing Iran sanctions with senior administration officials. The transcript is excerpted below and available in full at <https://www.state.gov/telephonic-press-briefing-with-senior-u-s-administration-officials-on-iran-sanctions/>.

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The next 90 days will see increased economic pressure, culminating in the reimposition of petroleum sector sanctions in November, and this will have an exponential effect on Iran's already fragile economy.

The President has been very clear none of this needs to happen. He will meet with the Iranian leadership at any time to discuss a real comprehensive deal that will contain their regional ambitions, will end their malign behavior, and deny them any path to a nuclear weapon. The Iranian people should not suffer because of their regime's hegemonic regional ambitions.

\* \* \* \*

... We do stand with the Iranian people, who are longing for a country of economic opportunity, transparency, fairness, and greater liberty. As Iran expends enormous resources on its foreign adventurism, its people are becoming increasingly frustrated, and we are seeing this frustration expressed in protests across the country.

We are deeply concerned about reports of Iranian regime's violence against unarmed citizens. The United States supports the Iranian people's right to peacefully protest against corruption and oppression without fear of reprisal.

And two other points. The regime's systematic mismanagement of its economy and its decision to prioritize a revolutionary agenda over the welfare of the Iranian people has put Iran into a long-term economic tailspin. Widespread government corruption and extensive intervention in the economy by the Iran Revolutionary Guard Corps make doing business in Iran a losing proposition. Foreign direct investors in Iran never know whether they are facilitating commerce or terrorism.

\* \* \* \*

I want to briefly describe the actions that we're taking today. The President has issued a new Iran executive order to reimpose sanctions relating to Iran, as you know. On May 8th, the President issued a national security presidential memorandum which directed the secretaries of Treasury and State and others to take a number of actions. And today's announcement is just the next step in implementing the President's decision.

Specifically, we are reimposing sanctions on Iran that had been lifted under the JCPOA. The snapback of these sanctions, again, supports the President's decision to impose significant financial pressure on the Iranian regime, to continue to counter Iran's blatant and ongoing malign

activities, and then ultimately to seek a new agreement that addresses the totality of the Iranian threat.

During the period of the JCPOA, the Iranian regime demonstrated time and time again that it had no intentions to cease its state support for terrorism, foreign proxies, and other malign activities. Iran, as has already been stated, has continued to promote ruthless regimes, destabilize the region, and abuse the human rights of its own people. As our sanctions have been exposing to fund their illicit activities and to evade sanctions, Iran has systematically exploited the global financial system, and willfully deceived countries, companies, and financial institutions around the globe.

This administration intends to fully enforce our sanctions as they come back into effect in order to impose economic pressure on the Iranian regime to stop its destabilizing activity, and ultimately chart a new path that will lead to prosperity for the Iranian people. Specifically, the new Iran EO reimposes relevant provisions of five Iran sanctions executive orders that were revoked or amended in January 16, 2016 in two phases. The first wind-down period ends at midnight tonight, ... at which point relevant sanctions will be reimposed.

At 12:01 a.m. tomorrow, August 7, 2018, sanctions will come back into full effect on the purchase or acquisition of U.S. dollar bank notes by the Government of Iran; Iran's trade in gold and precious metals; the sale or transfer to or from Iran of graphite and metals, such as aluminum and steel, coal, and software for integrating industrial processes; certain transactions related to the Iranian rial; certain transactions related to the issuance of Iranian sovereign debt; and Iran's automotive sector.

Wind-down authorizations will no longer be valid after August 6th, with respect to the importation into the United States of Iranian origin carpets and food stuffs, and transactions related to the purchase of commercial passenger aircraft will be prohibited. After the 180-day wind-down period ends on November 4, 2018, the U.S. Government will reimpose the remaining sanctions that ... had been previously lifted under the JCPOA.

The final round of snapback sanctions, as articulated in the executive order, will include the reimposition of sanctions on Iran's oil exports and energy sector, financial institutions conducting transactions with the Central Bank of Iran, as well as sanctions related to Iran's port operators and shipping and ship-building sectors, and sanctions on the provision of insurance and financial messaging services.

Today's executive order and the snapback of sanctions on Iran, again, is part of the President's broader strategy to apply unprecedented financial pressure on the Iranian regime. We are intent on cutting off the regime's access to resources that they have systematically used to finance terror, fund weapons proliferation, and threaten peace and stability in the region. Again, our actions will continue to severely limit the ability of Iran, which, as you know, is the largest state sponsor of terror, to gain funding to continue to finance its wide range of malign behavior.

Under this administration, OFAC has issued 17 rounds of sanctions designating 145 Iran-related persons. This includes six rounds just since the President's decision in May, including actions relating to the finance of the Qods Force and Hizballah, its ballistic missile program, the Iranian aviation sector, ... the regime's use of front and shell companies and other deceptive means to gain access to currency for the Qods Force, including in complicity with the Central Bank of Iran. We are fully committed to rigorously enforcing our sanctions and ensuring that Iran has no path to a nuclear weapon. This economic pressure campaign is central to our efforts to ... ensure that they change course.

I will just also mention that in addition to the executive order we're going to be publishing a number of FAQs that will provide answers to specific technical questions.

**SENIOR ADMINISTRATION OFFICIAL THREE:** Yeah I would just echo what [Senior State Administration Two] just said. Look, what we know is that Iran systematically uses its aviation sector, including Mahan Air and a number of other airlines that we have designated to continue to further its malign activity. I mean, you see these airlines like Mahan traveling back and forth repeatedly to places like Syria to support the Assad regime and the brutal activities that it's undertaken. So really the pressure is on the regime to stop engaging in this systematic malign behavior that's destabilizing the region, that's victimizing its own people and that's posing a threat to some of our closest allies and partners.

\* \* \* \*

On November 2, 2018, Secretary Pompeo and Secretary of the Treasury Steven T. Mnuchin provided a special briefing on Iran sanctions. The briefing is transcribed at <https://www.state.gov/briefing-on-iran-sanctions/> and excerpted below.

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\* \* \* \*

**SECRETARY POMPEO: ...**

Today, Secretary Mnuchin and I will discuss one of the many lines of effort to achieve these fundamental changes in the Iranian regime's behavior as directed by the President. While important, these economic sanctions are just a part of the U.S. Government's total effort to change the behavior of the Ayatollah Khamenei, Qasem Soleimani, and the Iranian regime.

On November 5th, the United States will reimpose sanctions that were lifted as part of the nuclear deal on Iran's energy, ship building, shipping, and banking sectors. These sanctions hit at the core areas of Iran's economy. They are necessary to spur changes we seek on the part of the regime.

In order to maximize the effect of the President's pressure campaign, we have worked closely with other countries to cut off Iranian oil exports as much as possible. We expect to issue some temporary allotments to eight jurisdictions, but only because they have demonstrated significant reductions in their crude oil and cooperation on many other fronts and have made important moves towards getting to zero crude oil importation. These negotiations are still ongoing. Two of the jurisdictions will completely end imports as part of their agreements. The other six will import at greatly reduced levels.

Let me put this in context for you. The Obama administration issued SREs to 20 countries multiple times between 2012 and 2015. We will have issued, if our negotiations are completed, eight and have made it clear that they are temporary. Not only did we decide to grant many fewer exemptions, but we demanded much more serious concessions from these jurisdictions before agreeing to allow them to temporarily continue to import Iranian crude oil. These concessions are critical to ensure that we increase our maximum pressure campaign and accelerate towards zero.

Our laser-focused approach is succeeding in keeping prices stable with a benchmark Brent price right about where it was in May of 2018 when we withdrew from the JCPOA. Not only is this good for American consumers and the world economy, it also ensures that Iran is not able to increase its revenue from oil as its exports plummet. We will, we expect, have reduced Iranian crude oil exports by more than 1 million barrels even before these sanctions go into effect.

This massive reduction since May of last year is three to five times more than what many analysts were projecting when President Trump announced our withdrawal from the deal back in May. We exceeded our expectations for one simple reason: Maximum pressure means maximum pressure.

The State Department closed the Obama era condensate loophole which allowed countries to continue importing condensate from Iran even while sanctions were in place. This loophole allowed millions of dollars to continue to flow to the regime.

This administration is treating condensate the same as crude since the regime makes no distinction between the two when it decides to spend its oil revenue on unlawful ballistic missiles, terrorism, cyberattacks, and other destabilizing activities like the assassination plot Denmark disclosed this past week.

And starting today, Iran will have zero oil revenue to spend on any of these things. Let me say that again. Zero. One hundred percent of the revenue that Iran receives from the sale of crude oil will be held in foreign accounts and can be used by Iran only for humanitarian trade or bilateral trade in nonsanctioned goods and services.

These new sanctions will accelerate the highly successful effects of our sanctions that have already occurred. The maximum pressure we imposed has caused the rial to drop dramatically, Rouhani's cabinet is in disarray, and the Iranian people are raising their voices even louder against a corrupt and hypocritical regime.

On that note, our actions today are targeted at the regime, not the people of Iran, who have suffered grievously under this regime. It's why we have and will maintain many humanitarian exemptions to our sanctions including food, agriculture commodities, medicine, and medical devices.

I will now turn the call over to Secretary Mnuchin.

**SECRETARY MNUCHIN:** Thank you very much. Since the beginning of the Trump administration, the Treasury Department has been committed to putting a stop to Iran's destabilizing activities across the world. We've engaged a massive economic pressure campaign against Iran, which remains the world's largest state sponsor of terrorism. To date, we have issued 19 rounds of sanctions on Iran, designating 168 targets as part of our maximum pressure campaign. We have gone after the financial networks that the Iranian regime uses to fuel its terrorist proxies and Hizballah and Hamas, to fund the Houthis in Yemen, and to support the brutal Assad regime in Syria.

The 180-day wind-down period ends at 11:59 p.m. Eastern Standard Time on Sunday November 4th. As of Monday November 5th, the final round of snapback sanctions will be enforced on Iran's energy, shipping, shipbuilding, and financial sectors. As part of this action on Monday, the Treasury Department will add more than 700 names to our list of blocked entities. This includes hundreds of targets previously granted sanctions relief under the JCPOA, as well as more than 300 new designations. This is substantially more than we ever have previously done. Sanctions lifted under the terms of Iran's nuclear deal will be reimposed on individuals, entities, vessels, and aircraft that touch numerous segments of Iran's economy. This will include

Iran's energy sector and financial sectors. We are sending a very clear message with our maximum pressure campaign that the U.S. intends to aggressively enforce our sanctions. Any financial institution, company, or individual who evades our sanctions risks losing access to the U.S. financial system and the ability to do business with the United States or U.S. companies. We are intent on ensuring that global funds stop flowing to the coffers of the Iranian regime.

I want to make a couple of comments on the SWIFT messaging systems since I've received lots of questions about this over the last few weeks. So I'd like to make four points. Number one, SWIFT is no different than any other entity. Number two, we have advised SWIFT the Treasury will aggressively use its authorities as necessary to continue intense economic pressure on the Iranian regime, and that SWIFT would be subject to U.S. sanctions if it provides financial messaging services to certain designated Iranian financial institutions. Number three, we have advised SWIFT that it must disconnect any Iranian financial institution that we designate as soon as technologically feasible to avoid sanctions exposure. Number four, just as was done before, humanitarian transactions to nondesignated entities will be allowed to use the SWIFT messaging system as they have done before, but banks must be very careful that these are not disguised transactions or they could be subject to certain sanctions. Thank you very much.

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On November 5, 2018, at the end of the 180-day wind-down period after the May 8 decision to re-impose sanctions on Iran, OFAC took actions summarized in a "Frequently Asked Questions" bulletin published on its website at <https://content.govdelivery.com/accounts/USTREAS/bulletins/2195444>. As part of the re-imposition of sanctions, over 700 persons were added to OFAC's Specially Designated Nationals and Blocked Persons List ("SDN List") on November 5, 2018, including those removed to implement the JCPOA. The list of those persons is available at [https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20181105\\_names.aspx](https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20181105_names.aspx).

On November 13, 2018, Ambassador-at-Large and Coordinator for Counterterrorism Nathan A. Sales delivered a lecture on "Countering Iran's Global Terrorism" at the Washington Institute for Near East Policy. His remarks include references to State Department and Treasury Department sanctions related to Iran's support for terrorism. Ambassador Sales's remarks are available at <https://www.state.gov/countering-irans-global-terrorism/>. Excerpts regarding sanctions follow. See discussion *infra* of State Department and Treasury Department designations in 2018 pursuant to E.O. 13224.

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First, Treasury is sanctioning Shibl Al-Zaydi as a SDGT. Al-Zaydi has served as a financial coordinator between the Qods Force and Shi'a militias in Iraq. He's also facilitated Iraqi investments on behalf of Qasem Soleimani, commander of the Qods Force. Al-Zaydi has helped smuggle oil for Iran, and has sent Iraqi fighters to Syria allegedly at the request of the Qods Force.

In addition, Treasury is designating Yusuf Hashim. Hashim oversees all Hizballah-related operations in Iraq and is in charge of protecting Hizballah's interests in that country.

Treasury is also designating Muhammad Farhat. Farhat has advised militias in Iraq on behalf of Hizballah. He was also tasked with collecting security and intelligence information in Iraq for senior Hizballah and Iranian leadership.

Lastly, Treasury is designating Adnan Kawtharani. Kawtharani facilitates business transactions for Hizballah inside Iraq and regularly meets there with militias and Hizballah officials. He has also helped secure funding for Hizballah, and has served as the right hand man for his brother and senior Hizballah member Muhammad Kawtharani – who himself was designated in 2013.

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**b. *Implementation of UN Security Council resolutions***

As discussed in *Digest 2015* at 636, the UN Security Council unanimously adopted resolution 2231 on July 20, 2015. Resolution 2231 endorsed the JCPOA; terminated the provisions of prior UN Security Council resolutions addressing the Iranian nuclear issue—namely, resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), 1929 (2010), and 2224 (2015)—and imposed new obligations on UN Member States with respect to the transfer to or from Iran of certain nuclear, missile and arms-related items and assistance, as well as the continued implementation of other targeted measures (asset freeze and travel ban) on designated persons or entities. The United States' withdrawal from the JCPOA did not have any effect on Resolution 2231, which remains in effect, although some of the new obligations imposed therein will, by their explicit terms, begin to sunset in 2020 unless further action is taken.

**c. *U.S. sanctions and other controls***

Further information on Iran sanctions is available at <https://www.state.gov/iran-sanctions/> and <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/iran.aspx>. On May 22, 2018, OFAC announced designations of four individuals who met the criteria for sanctions under the Iran sanctions program, the counter terrorism sanctions program, and the nonproliferation sanctions program. See May 22, 2018 OFAC update, available at <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20180522.aspx>, identifying Mehdi AZARPISHEH, Mohammad Agha JA'FARI, Mahmud Bagheri KAZEMABAD, Javad Bordbar SHIR AMIN, and Sayyed Mohammad Ali Haddadnezhad TEHRANI.

**(1) *Section 1245 of NDAA (secondary sanctions for crude oil purchases from Iran)***

On May 14, 2018 and again on October 31, 2018, the President determined “that there is a sufficient supply of petroleum and petroleum products from countries other than Iran to permit a significant reduction in the volume of petroleum and petroleum

products purchased from Iran by or through foreign financial institutions.” 83 Fed. Reg. 26,345 (June 6, 2018) and 83 Fed. Reg. 57,673 (Nov. 16, 2018). The President made the determination under Section 1245(d)(4)(B) and (C) of the National Defense Authorization Act for Fiscal Year 2012, Public Law 112–81, and based on reports submitted to the Congress by the Energy Information Administration, and other relevant factors. *Id.*

On November 3, 2018, the Secretary of State determined, pursuant to Section 1245(d)(4)(D) of the National Defense Authorization Act for Fiscal Year 2012 (“NDAA”), (Pub. L. 112–81), as amended, that as of November 3, 2018, China, Greece, India, Italy, Japan, South Korea, Taiwan, and Turkey had significantly reduced the volume of their crude oil purchases from Iran. 83 Fed. Reg. 63,832 (Dec. 27, 2018).

(2) *E.O. 13382*

On January 19, 2018, OFAC published in the Federal Register the names of persons designated pursuant to E.O. 13382 (“Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters”), subjecting them to sanctions for their ties to or support for persons previously designated under E.O. 13382 based on involvement in Iran’s WMD programs. 83 Fed. Reg. 2875 (Jan. 19, 2018). Individuals so designated are: Morteza RAZAVI, Shi YUHUA, and Yuequn ZHU. *Id.* Entities so designated are: BOCHUANG CERAMIC, INC., A101; GREEN WAVE TELECOMMUNICATION; IRAN AIRCRAFT INDUSTRIES; IRAN HELICOPTER SUPPORT AND RENEWAL COMPANY; and PARDAZAN SYSTEM NAMAD ARMAN. *Id.* Sayyed Mohammad Ali Haddadnezhad TEHRANI was designated pursuant to E.O. 13382 on May 22, 2018. 83 Fed. Reg. 24,391 (May 25, 2018).

(3) *Human Rights (CISADA, TRA, E.O. 13553, E.O. 13606, E.O. 13628)*

Executive Order 13553 implements Section 105 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (“CISADA”) (Public Law 111-195), as amended by the Iran Threat Reduction and Syria Human Rights Act of 2012 (“TRA”). On January 12, 2018, Sadegh Amoli LARIJANI and Gholamreza ZIAEI were designated pursuant to E.O. 13553 of September 28, 2010, “Blocking Property of Certain Persons With Respect to Serious Human Rights Abuses by the Government of Iran and Taking Certain Other Actions.” 83 Fed. Reg. 2875 (Jan. 19, 2018). One entity, RAJAEI SHAHR PRISON, was designated at the same time pursuant to E.O. 13553 and another entity, the ISLAMIC REVOLUTIONARY GUARD CORPS ELECTRONIC WARFARE AND CYBER DEFENSE ORGANIZATION was designated pursuant to E.O. 13606 of April 22, 2012, “Blocking the Property and Suspending the Entry Into the United States of Certain Persons With Respect to Grave Human Rights Abuses by the Governments of Iran and Syria via Information Technology.” *Id.* Two additional entities—NATIONAL CYBERSPACE CENTER and SUPREME COUNCIL OF CYBERSPACE—were designated pursuant to Executive Order 13628 of October 9, 2012, “Authorizing the Implementation of Certain

Sanctions Set Forth in the Iran Threat Reduction and Syria Human Rights Act of 2012 and Additional Sanctions With Respect to Iran.” *Id.* Finally, on May 30, 2018, OFAC designated Abdolhamid MOHTASHAM, under E.O. 13553. 83 Fed. Reg. 26,542 (June 7, 2018).

## 2. Syria

On July 25, 2018, OFAC determined that the property and interests in property subject to U.S. jurisdiction of several individuals and entities should be blocked under E.O. 13382 (“Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters”) due to those persons’ support for chemical weapons activity by the Assad regime in Syria. 83 Fed. Reg. 39,157 (Aug. 8, 2018). The designated individuals are: Tony AJAKA; Anni BEURKLIAN; Mireille CHAHINE; Amir KATRANGI; Houssam Hachem KATRANGI; Maher KATRANGI; Mohamad KATRANGI; Yishan ZHOU. *Id.* The designated entities are: EKT SMART TECHNOLOGY; ELECTRONICS KATRANGI TRADING; GOLDEN STAR CO.; POLO TRADING; and TOP TECHNOLOGIES SARL. *Id.*

On April 6, 2018, OFAC designated ROSOBORONEXPORT OAO and RUSSIAN FINANCIAL CORPORATION pursuant to E.O. 13582, “Blocking Property of the Government of Syria and Prohibiting Certain Transactions With Respect to Syria.” 83 Fed. Reg. 19,138 (May 1, 2018). On September 5, 2018, OFAC designated four individuals—Yasir ‘ABBAS, Adnan AL–ALI, Muhammad AL–QATIRJI, and Fadi Nabih NASSER—along with five entities— ABAR PETROLEUM SERVICE SAL; AL–QATIRJI COMPANY; INTERNATIONAL PIPELINE CONSTRUCTION FZE; NASCO POLYMERS & CHEMICALS CO SAL; and SONEX INVESTMENTS LTD.—pursuant to E.O. 13582. On September 6, 2018, the State Department issued a media note regarding the sanctions on these supporters of the Syrian regime. The note is available at <https://www.state.gov/the-u-s-imposes-sanctions-on-supporters-of-the-syrian-regime/> and includes the following:

Today, the United States imposed financial sanctions on four individuals and five entities that have facilitated weapons or fuel transfers, or provided other financial or material support, to the Assad regime in Syria.

The sanctioned individuals are Syrian nationals Yasir ‘Abas, Adnan Al-Ali, and Muhammad al-Qatirji, and Lebanese national Fadi Nasser. The sanctioned entities are the AL-Qatirji Company, which is based in Syria, Nasco Polymers and Chemicals, which is based in Lebanon, Abar Petroleum Service SAL, which is based in Lebanon, International Pipeline Construction FZE, which is based in the United Arab Emirates, and Sonex Investments Ltd., which is based in the United Arab Emirates.

On November 20, 2018, OFAC made designations under E.O. 13582 and other Syria-related sanctions authorities of several individuals and entities. 83 Fed. Reg. 61,721 (Nov. 30, 2018). Individuals designated are: Mhd Amer ALCHWIKI; Muhammad Qasim AL–BAZZAL; Andrey DOGAEV; Rasoul SAJJAD; and Hossein YAGHOUBI MIAB. *Id.* And

entities so designated are: GLOBAL VISION GROUP; PROMSYRIOIMPORT; MB BANK; and TADBIR KISH MEDICAL AND PHARMACEUTICAL COMPANY. *Id.*

### 3. Cuba

The U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") updated the identifying information of a person currently included in the SDN List: the entity EMPRESA CUBANA DE PESCADOS Y MARISCOS, which had been designated pursuant to the Cuban Assets Control Regulations, 31 CFR part 515. 83 Fed. Reg. 10,950 (Mar. 13, 2018).

### 4. Venezuela

Executive Order 13692, "Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela," was issued in 2015. Executive Order 13808, entitled "Imposing Additional Sanctions With Respect to the Situation in Venezuela," was issued in 2017. The President issued three additional executive orders on Venezuela in 2018: E.O. 13827 of March 19, 2018, E.O. 13835 of May 21, 2018, and E.O. 13850 of November 1, 2018.

On January 5, 2018, OFAC designated the following individuals under E.O. 13692 for being officials of the Government of Venezuela: Gerardo Jose IZQUIERDO TORRES; Rodolfo Clemente MARCO TORRES; Francisco Jose RANGEL GOMEZ; and Fabio Enrique ZAVARSE PABON. 83 Fed. Reg. 1454 (Jan. 11, 2018).

On March 19, 2018, the President responded to "recent actions taken by the Maduro regime to attempt to circumvent U.S. sanctions by issuing a digital currency in a process that Venezuela's democratically elected National Assembly has denounced as unlawful," by issuing E.O. 13827. 83 Fed. Reg. 12,469 (Mar. 21, 2018). That order is excerpted below.

Treasury also designated four current or former Venezuelan government officials pursuant to E.O. 13692 on March 19, 2018: Willian Antonio CONTRERAS, Nelson Reinaldo LEPAJE SALAZAR, Americo Alex MATA GARCIA, Carlos Alberto ROTONDARO COVA. 83 Fed. Reg. 46,254 (Sep. 12, 2018). On September 25, 2019, Treasury designated the following individuals and entities under E.O. 13692: Cilia Adela FLORES DE MADURO, Vladimir PADRINO LOPEZ, Jose Omar PAREDES, Delcy Eloina RODRIGUEZ GOMEZ, Jorge Jesus RODRIGUEZ GOMEZ, Edgar Alberto SARRIA DIAZ, AVERUCA, C.A., PANAZEATE SL, QUIANA TRADING LIMITED. 83 Fed. Reg. 50,144 (Oct. 4, 2018).

**Section 1.** (a) All transactions related to, provision of financing for, and other dealings in, by a United States person or within the United States, any digital currency, digital coin, or digital token, that was issued by, for, or on behalf of the Government of Venezuela on or after January 9, 2018, are prohibited as of the effective date of this order.

(b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, 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 before the effective date of this order. **Sec. 2.** (a) Any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

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On May 18, 2018, OFAC designated the following individuals pursuant to E.O. 13692 for being officials of the Government of Venezuela: Marleny Josefina CONTRERAS HERNANDEZ; Diosdado CABELLO RONDON; and Jose David CABELLO RONDON. 83 Fed. Reg. 25,113 (May 31, 2018). At the same time, OFAC designated Rafael Alfredo SARRIA DIAZ under E.O. 13692 for links to another individual designated under E.O. 13692 as well as three entities linked to persons designated under E.O. 13692 (11420 CORP., NOOR PLANTATION INVESTMENTS LLC, and SAI ADVISORS INC.). *Id.*

On May 21, 2018 the United States responded to developments in Venezuela with a new executive order and statements by the Vice President and Secretary of State. The executive order, E.O. 13835, “Prohibiting Certain Additional Transactions With Respect to Venezuela,” responds to

recent activities of the Maduro regime, including endemic economic mismanagement and public corruption at the expense of the Venezuelan people and their prosperity, and ongoing repression of the political opposition; attempts to undermine democratic order by holding snap elections that are neither free nor fair; and the regime’s responsibility for the deepening humanitarian and public health crisis in Venezuela.

83 Fed. Reg. 24,001 (May 24, 2018). It prohibits specific transactions by U.S. persons or in the United States with Venezuela, such as those involving Government of Venezuela debt. President Trump’s statement on the new measures includes the following:

Today, I have taken action to prevent the Maduro regime from conducting “fire sales,” liquidating Venezuela’s critical assets—assets the country will need to rebuild its economy. This money belongs to the Venezuelan people.

I have signed an Executive Order to prevent the Maduro regime from selling or collateralizing certain Venezuelan financial assets, and to prohibit the regime from earning money from the sale of certain entities of the Venezuelan government.

Vice President Pence made the following statement on May 21, 2018 regarding Venezuela's elections (available at <https://www.whitehouse.gov/briefings-statements/statement-vice-president-mike-pence-venezuelas-elections/>):

- Venezuela's election was a sham—neither free nor fair. The illegitimate result of this fake process is a further blow to the proud democratic tradition of Venezuela. Every day, thousands of Venezuelans flee brutal oppression and grinding poverty—literally voting with their feet. The United States will not sit idly by as Venezuela crumbles and the misery of their brave people continues. America stands against dictatorship and with the people of Venezuela. The Maduro regime must allow humanitarian aid into Venezuela and must allow its people to be heard.

And Secretary Pompeo issued a press statement on May 21, 2018 on the elections in Venezuela, available at <https://www.state.gov/secretary/remarks/2018/05/282303.htm>.

The United States condemns the fraudulent election that took place in Venezuela on May 20. This so-called "election" is an attack on constitutional order and an affront to Venezuela's tradition of democracy. Until the Maduro regime restores a democratic path in Venezuela through free, fair, and transparent elections, the government faces isolation from the international community.

Sunday's process was choreographed by a regime too unpopular and afraid of its own people to risk free elections and open competition. It stacked the Venezuelan courts and National Electoral Council with biased members aligned with the regime. It silenced dissenting voices. It banned major opposition parties and leaders from participating. As of May 14, more than 338 political prisoners remained jailed, more than in all other countries in the hemisphere combined. The regime stifled the free press. State sources dominated media coverage, unfairly favoring the incumbent. Most contemptible of all, the regime selectively parceled out food to manipulate the votes of hungry Venezuelans.

The Maduro regime fails to defend the Venezuelan people's right to democracy as reflected in the Inter-American Democratic Charter. The United States stands with democratic nations in support of the Venezuelan people and will take swift economic and diplomatic actions to support the restoration of their democracy.

E.O. 13835 is excerpted below.

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**Section 1.** (a) All transactions related to, provision of financing for, and other dealings in the following by a United States person or within the United States are prohibited:

(i) the purchase of any debt owed to the Government of Venezuela, including accounts receivable;

(ii) any debt owed to the Government of Venezuela that is pledged as collateral after the effective date of this order, including accounts receivable; and

(iii) the sale, transfer, assignment, or pledging as collateral by the Government of Venezuela of any equity interest in any entity in which the Government of Venezuela has a 50 percent or greater ownership interest. (b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, 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 before the effective date of this order.

**Sec. 2.** (a) Any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

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On September 7, 2018, OFAC updated the SDN list entry for Rafael Alfredo SARRIA DIAZ, an individual sanctioned pursuant to the Venezuela sanctions program. 83 Fed. Reg. 46,254 (Sep. 12, 2018). Also on September 7, OFAC designated the following individuals pursuant to E.O. 13692: Willian Antonio CONTRERAS; Nelson Reinaldo LEPAJE SALAZAR; Americo Alex MATA GARCIA; and Carlos Alberto ROTONDARO COVA. 83 Fed. Reg. 46,254 (Sep. 12, 2018). On September 25, 2018, OFAC designated several individuals, entities, and associated aircraft under Venezuela sanctions authorities. 83 Fed. Reg. 50,144 (Oct. 4, 2018). The following individuals were sanctioned under E.O. 13692 for being officials of the Government of Venezuela: Cilia Adela FLORES DE MADURO; Vladimir PADRINO LOPEZ; Delcy Eloina RODRIGUEZ GOMEZ; and Jorge Jesus RODRIGUEZ GOMEZ. *Id.* The following individuals were designated under E.O. 13692 for their links to other designated persons: Jose Omar PAREDES and Edgar Alberto SARRIA DIAZ. *Id.* The entities blocked under E.O. 13692 on September 25 are: AVERUCA, C.A.; PANAZEATE SL; and QUIANA TRADING LIMITED. *Id.* The State Department issued a media note about the designations on September 25, 2018, available at <https://www.state.gov/the-united-states-imposes-sanctions-on-venezuelan-individuals-and-entities/>, and excerpted below.

Today, the United States imposed sanctions on four current or former officials of the Government of Venezuela: First Lady and Former Attorney General Cilia Adela Flores de Maduro, Executive Vice President Delcy Eloina Rodriguez Gomez, Minister of Communication and Information Jorge Jesus Rodriguez Gomez, and Minister of Defense Vladimir Padrino Lopez.

In addition, the United States has designated additional individuals and entities that are part of a network supporting Rafael Alfredo Sarria Diaz, a key front person for sanctioned Venezuelan President of the illegitimate Constituent Assembly, Diosdado Cabello Rondon. The United States designated both Sarria Diaz and Cabello on May 18. The individuals sanctioned today that form part of the network associated with Rafael Alfredo Sarria Diaz are: Jose Omar Paredes and Edgar Alberto Sarria Diaz. The entities sanctioned for being owned or controlled by, or have acted or purported to act for or on behalf of Sarria Diaz are: Quiana Trading Limited and AVERUCA, C.A. In addition, the United States has sanctioned Panazeate SL for being owned or controlled by, or have acted or purported to act for or on behalf of, Edgar Alberto Sarria Diaz.

E.O. 13850 of November 1, 2018, entitled "Blocking Property of Additional Persons Contributing to the Situation in Venezuela," is excerpted below. 83 Fed. Reg. 55,243 (Nov. 2, 2018).

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**Section 1.** (a) All property and interests in property 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 any United States person of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

- (i) to operate in the gold sector of the Venezuelan economy or in any other sector of the Venezuelan economy as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State;
- (ii) to be responsible for or complicit in, or to have directly or indirectly engaged in, any transaction or series of transactions involving deceptive practices or corruption and the Government of Venezuela or projects or programs administered by the Government of Venezuela, or to be an immediate adult family member of such a person;
- (iii) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any activity or transaction described in subsection (a)(ii) of this section, or any person whose property and interests in property are blocked pursuant to this order; or
- (iv) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

(b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, 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 date of this order.

**Sec. 2.** The unrestricted immigrant and nonimmigrant entry into the United States of aliens determined to meet one or more of the criteria in subsection 1(a) of this order would be detrimental to the interests of the United States, and the entry of such persons into the United States, as immigrants or nonimmigrants, is therefore hereby suspended. Such persons shall be

treated as persons covered by section 1 of Proclamation 8693 of July 24, 2011 (Suspension of Entry of Aliens Subject to United Nations Security Council Travel Bans and International Emergency Economic Powers Act Sanctions).

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## **5. Democratic People's Republic of Korea**

### ***a. General***

On July 23, 2018, the State Department issued as a media note an advisory on sanctions risks for businesses with supply chain links to North Korea. The media note is available at <https://www.state.gov/advisory-released-on-sanctions-risks-for-businesses-with-supply-chain-links-to-north-korea/> and includes the following:

Multiple U.S. and UN sanctions impose restrictions on trade with North Korea and the use of North Korean labor, potentially impacting a company's supply chain operations. The two primary sanctions compliance risks are: (1) inadvertent sourcing of goods, services, or technology from North Korea, and (2) the presence of North Korean citizens or nationals in those supply chains, whose labor generates revenue for the North Korean government. This advisory also provides due diligence references for businesses.

Businesses should be aware of these deceptive practices in order to implement effective due diligence policies, procedures, and internal controls to ensure compliance with applicable legal requirements across their entire supply chain.

### ***b. Human rights***

On December 10, 2018, the State Department issued a press statement on the release of its report on human rights abuses and censorship in North Korea, submitted in compliance with Section 304 (a) of the North Korea Sanctions and Policy Enhancement Act of 2016, Public Law 114-122, enacted on February 18, 2016. The press statement is available at <https://www.state.gov/r/pa/prs/ps/2018/12/287990.htm> and the report is available at <https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/report-on-serious-human-rights-abuses-or-censorship-in-north-korea-2/>. The Act provides for regular reports that: (1) identify each person the Secretary determines to be responsible for serious human rights abuses or censorship in North Korea and describes the conduct of that person; and (2) describes serious human rights abuses or censorship undertaken by the Government of the DPRK or any person acting for or on behalf of the DPRK in the most recent year ending before the submission of the report. For further information on the North Korea Sanctions and Policy Enhancement Act of 2017, see *Digest 2016* at 629 and 646.

The December 2018 report identifies three individuals and three groups responsible for serious human rights abuses or censorship. As summarized in the December 10, 2018 press statement:

This report focuses primarily on the regime's efforts to suppress independent media and freedom of expression. Independent media cannot operate legally in North Korea. All media is strictly censored by government authorities who conduct pre-publication screenings to ensure there is no deviation from the official line. Authorities take steps to jam foreign radio broadcasts, and interagency task forces conduct warrantless searches for foreign media. Individuals accused of viewing foreign films are reportedly subject to imprisonment or even execution.

Excerpts follow from the report.

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**Group 109** (also known as Group 1118 and Group 627) is a committee comprising members of the Ministry of State Security (MSS), the Ministry of People's Security (MPS), and other offices. The committee is most notable for its mandate to restrict the sale or use of foreign media and/or content. Only CDs and DVDs bearing a government seal indicating that they have been reviewed and approved may be used. North Koreans caught with illicit entertainment items such as DVDs, CDs, and USBs are at a minimum sent to prison camps and, in extreme cases, may face public execution. Furthermore, officers in Group 109 have the authority to randomly inspect and raid individuals' homes without a warrant. A Universal Periodic Review of the Human Rights situation in North Korea released by the Committee for Human Rights in North Korea confirmed that Group 109 continues to engage in these activities and commit further abuses.

**Group 118** is a committee that was initially created to stop the trade and movement of illegal drugs. Now its mandate is similar to that of Group 109, and it is known for its particular focus on the inspection and confiscation of computer content. This group is reportedly made up of officers from the MSS and MPS. It conducts random inspections of computers, computer discs (USB and CD-ROM), portable data storage devices, and cell phones (including Chinese cell phones).

**Group 114** is a committee created by the WPK and the MSS that is tasked with restricting what the government considers impure media. Its primary function is to censor content and investigate individuals who have allegedly obtained access to foreign media. This group not only prevents outside information from entering the DPRK, but also scrutinizes officials to prevent confiscated products from being resold or consumed. The committee secretly monitors Jangmadang (North Korean markets) and surveils defectors living in China. According to media reports, Group 114 agents are responsible for kidnapping defectors who escape into China and sometimes even South Korean and Chinese individuals involved in human rights activities. If captured, these individuals are either executed or sent into the political prison camp system, where serious human rights abuses such as torture, deliberate starvation, forced labor, and sexual violence are systematized as a matter of State policy.

**Jong Kyong Thaek** is the Minister of State Security. In this capacity, he oversees the MSS. In the July 6, 2016, report, the Department of State identified the MSS and the National Defense Commission as responsible for serious human rights abuses and censorship. Given the highly centralized and hierarchical nature of the North Korean government and Jong's status as Minister of State Security, it appears Jong plays a role directing the censorship activities and abuses perpetrated by the MSS. Most notably, he is involved in directing abuses committed in the political prison camp system, where serious human rights abuses such as torture, deliberate starvation, forced labor, and sexual violence are systematized as a matter of State policy.

**Choe Ryong Hae** is the vice chairman for organization for the WPK and the director of the WPK Organization and Guidance Department (OGD). He is also vice chairman of the State Affairs Commission, a member of several powerful WPK committees including the WPK Central Committee Political Bureau Presidium, and a deputy to the Supreme People's Assembly. The OGD, a Party oversight body, is possibly the most powerful organization inside the DPRK. As noted in the Department of State's July 6, 2016, report and NGO reports, the OGD is instrumental in implementing the DPRK's censorship policies. When a party official deviates from the official message in public remarks, the OGD will dispatch an official to monitor a self-criticism session. The OGD also assumes oversight responsibilities of organizations undergoing party audits to inspect for ideological discipline.

**Pak Kwang Ho** is the director of the WPK's Propaganda and Agitation Department (PAD), which controls all media produced in the country. In the July 6, 2016, report, the Department of State identified the PAD as responsible for censorship; further, it maintains oppressive information control and is responsible for indoctrinating the people of the DPRK. In his capacity as Director of the PAD, Pak is responsible for maintaining ideological purity and managing the general censorship functions of the PAD, furthering the suppression of freedom of speech, expression, and censorship in the DPRK.

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**c. Nonproliferation**

**(1) UN sanctions**

On March 22, 2018, the United States submitted its report on U.S. measures implementing UN Security Council Resolution 2397 (2017) regarding the DPRK, in particular, paragraphs 3 to 12 and 14. See *Digest 2017* at 639-41 for background on Resolution 2397. The U.S. report is excerpted below and available at <https://www.un.org/securitycouncil/sanctions/1718/implementation-reports>.

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The United States has designated the individuals and the entity listed in annexes I and II to resolution [2397 \(2017\)](#) for an asset freeze under various authorities administered by the Department of the Treasury and the Department of State. Pursuant to public guidance issued by the Office of Foreign Assets Control, this freeze applies to entities that are 50 per cent or more

owned by one or more designated persons. Individuals and entities acting on behalf or at the direction of a designated individual or entity, and entities that are controlled (but are not 50 per cent or more owned) by designated entities, may be subject to derivative designations under the authority used to designate the primary target.

The names of the individuals listed in annex I have been entered into the appropriate consular database for assessment, should an individual apply for a visa or entry. Individuals and entities acting on behalf or at the direction of a designated individual or entity may be subject to derivative designations under the authority used to designate the primary target.

The Department of Homeland Security has the authority to deny aliens entry into or transit through the United States based on grounds specified by the relevant laws and regulations,

...

The Export Administration Regulations of the Department of Commerce prohibit the export from the United States to the Democratic People's Republic of Korea (or re-export from a third country) of all items subject to the Regulations, except food or medicine under classification "EAR99", unless otherwise authorized. An Export Administration Regulations licence requirement applies to all vessels, including tankers, subject to the Regulations, including United States and foreign-origin vessels in which the value of the United States-origin content exceeds 10 per cent of the item's total value, regardless of flag. The Bureau of Industry and Security reviews licence applications for the export or re-export of crude oil, refined petroleum products, industrial machinery, iron, steel or other metals, and vessels subject to the Regulations on a case-by-case basis. A separate export or re-export licence requirement could apply to the vessel (regardless of flag) whether or not the items being transported are subject to the Regulations.

Section 3 (a) (i) of Executive Order 13722, administered by the Department of the Treasury in consultation with the Department of State, prohibits the exportation or re-exportation, directly or indirectly, from the United States or by a United States person, wherever located, of any goods, services or technology to the Democratic People's Republic of Korea, except as otherwise licensed or exempted. Under the Executive Order, the Office of Foreign Assets Control prohibits exports from abroad by United States persons of items not subject to the Regulations.

Since 1998, the Federal Aviation Administration has prohibited civil flight operations by United States-registered aircraft, except where the operator of such aircraft is a foreign air carrier, through the Pyongyang Flight Information Region west of 132 degrees east longitude, which includes the territorial airspace of the Democratic People's Republic of Korea. The flight prohibition also applies to all United States air carriers or commercial operators and all persons exercising the privileges of an airman certificate issued by the Federal Aviation Administration, except such persons operating United States-registered aircraft for foreign air carriers. Exceptions exist for (a) operations authorized by an exemption issued by the Federal Aviation Administration; (b) operations authorized by another agency of the Government of the United States with Federal Aviation Administration approval; and (c) in-flight emergencies. On 3 November 2017, the Federal Aviation Administration issued a notice to airmen expanding its flight prohibition to include all United States civil aviation operations in the Pyongyang Flight Information Region east of 132 degrees east longitude, which were previously allowed under Special Federal Aviation Regulation No. 79.

The United States Customs and Border Protection of the Department of Homeland Security can inspect all cargo on aircraft destined for or departing from the United States (see, e.g., title 19, sections 482 and 1499 of the United States Code) and seize and/or forfeit any article introduced or exported contrary to law or arms or munitions of war exported in violation of law, as well as any associated vessel or aircraft (see, e.g., title 19, section 1595 a and title 22, section 401 of the United States Code).

With respect to United States-flagged vessels, pursuant to title 14, section 89 of the United States Code, the United States Coast Guard of the Department of Homeland Security may board and inspect any United States-flagged vessel anywhere it is located, beyond the territorial sea of another country, to enforce United States laws. Within the United States contiguous zone (up to 24 nautical miles from the coastline of the United States), the United States Coast Guard and the United States Customs and Border Protection may board vessels destined for or departing from the United States, examine manifests and search cargo ....

If a vessel or aircraft is itself of United States origin, regardless of its flag, or if the value of the United States-origin parts of the vessel or aircraft exceeds 10 per cent of its total value, the vessel or aircraft itself is subject to the Export Administration Regulations, and a Bureau of Industry and Security licence would be required for the vessel or aircraft to travel to the Democratic People's Republic of Korea and for its re-export from that country to a third country. These export and re-export rules under the Export Administration Regulations apply even if the prohibited items the vessel or aircraft is transporting are not themselves subject to the Regulations because they do not meet the de minimis threshold for controlled United States-origin content.

...Section 1 of Executive Order 13570, administered by the Department of the Treasury in consultation with the Department of State, prohibits the importation into the United States, directly or indirectly, of any goods, services or technology from the Democratic People's Republic of Korea. Section 2 (a) of Executive Order 13570 prohibits any transaction by a United States person or within the United States that evades or avoids, has the purpose of evading or avoiding, causes a violation of or attempts to violate the prohibitions in Executive Order 13570.

In addition, wherever located, a United States person is prohibited by Executive Order 13722 from dealing in property in which a designated person, including the Government of the Democratic People's Republic of Korea, has any interest.

\* \* \* \*

Currently there are very few nationals of the Democratic People's Republic of Korea who have authorization to work in the United States. The majority of those who do were granted refugee status or asylum status or are currently applying for asylum (see North Korean Human Rights Act of 2004, Public Law No. 108-133).

On 24 September 2017, President Trump issued Proclamation No. 9645, which, among other things, suspends the entry into the United States of nationals of the Democratic People's Republic of Korea, subject to certain exceptions and waivers. The Proclamation restricts entry into the United States of nationals of the Democratic People's Republic of Korea who were outside the United States as at 18 October 2017, if they did not have a valid visa on that date and if they do not qualify for a visa or other valid travel document based on revocation or cancellation of a visa as a result of Executive Order 13769.

The Proclamation provides exceptions to this restriction for nationals of the Democratic People's Republic of Korea who (a) are lawful permanent residents of the United States; (b) are admitted to or paroled into the United States on or after 18 October 2017; (c) have a document other than a visa valid on 18 October 2017 or issued on any date thereafter, that permits them to travel to the United States and seek entry or admission; (d) are dual nationals of a non-designated country traveling on a passport issued by the non-designated country; (e) are travelling on a diplomatic or diplomatic-type visa; or (f) are applying for or have been granted asylum in the United States, are refugees who have already been admitted into the United States, or are applying for or have been granted protection from removal under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Proclamation also provides for case-by-case waivers if it is determined that denying entry would cause undue hardship, that entry would not pose a threat to national security or public safety and that entry would be in the national interest. In addition, bringing individuals who are ordinarily resident in the Democratic People's Republic of Korea to the United States for work is a prohibited importation of services from that country under section 1 of Executive Order 13570.

A national of the Democratic People's Republic of Korea in the United States who does not have and is not seeking asylum status or related protection could be removed under title 8, section 1182 (grounds of inadmissibility) and section 1227 (grounds of removability) of the United States Code, depending on the manner of entry, any criminal activity, fraud or misrepresentation, and any actions or attempted actions that could adversely affect national security or foreign policy.

\* \* \* \*

The United States will implement the vessel freeze provision in paragraph 9 of the resolution under Executive Order 13382, which allows the United States to block or “freeze” the property and assets, subject to United States jurisdiction, of weapons of mass destruction proliferators and their supporters, as well as other North Korea-related Executive Orders, including 13551, 13687, 13722 and 13810, all of which provide the authority to designate persons in connection with North Korea's activities and identify vessels as the blocked property of those persons.

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On March 30, 2018, the UN Security Council's 1718 Committee approved a package of sanctions designations under the North Korea sanctions regime that was advanced by the United States. See March 30, 2018 press release, available at <https://usun.usmission.gov/press-release-ambassador-haley-on-another-historic-un-sanctions-package-on-north-korea/>. As described in the press release,

The UN Security Council's 1718 North Korea Sanctions Committee unanimously approved 49 new UN designations—21 shipping companies, one individual, and 27 ships—all aimed at countering North Korea's illegal maritime smuggling activities to obtain oil and sell coal, and preventing certain entities and ships from aiding them in these efforts.

These new designations were proposed last month by the U.S. Mission to coincide with the announcement of the U.S. Treasury Department's largest-ever North Korea sanctions package, and are part of a coordinated U.S. government effort with our allies and partners to continue the maximum pressure campaign on the North Korean regime and systematically shut down its maritime smuggling activities.

On July 20, 2018, Secretary Pompeo addressed the UN regarding implementation of UN sanctions on North Korea in the context of U.S. talks with North Korea on denuclearization. His remarks are available at <https://usun.usmission.gov/remarks-to-press-by-secretary-pompeo-and-ambassador-haley-at-the-un/> and excerpted below.

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The countries of the Security Council are united on the need for final, fully verified denuclearization of North Korea, as agreed to by Chairman Kim. Strict enforcement of sanctions is critical to our achieving this goal.

Members of the UN Security Council, and by extension all UN member-states, have unanimously agreed to fully enforce sanctions on North Korea, and we expect them to continue to honor those commitments. When sanctions are not enforced, the prospects for the successful denuclearization are diminished. Right now, North Korea is illegally smuggling petroleum products into the country at a level that far exceeds the quotas established by the United Nations. These illegal ship-to-ship transfers are the most prominent means by which this is happening.

These transfers happened at least 89 times in the first five months of this year and they continue to occur. The United States reminds every UN member-state of its responsibility to stop illegal ship-to-ship transfers, and we urge them to step up their enforcement efforts as well.

We must also crack down on other forms of sanctions evasion, including the smuggling of coal by sea, smuggling by overland borders, and the presence of North Korean guest workers in certain countries. North Korean cyber thefts and other criminal activities are also generating significant revenues for the regime, and they must be stopped.

\* \* \* \*

On August 3, 2018, the U.S. Mission to the UN issued a statement on sanctions actions by the UN Security Council's 1718 North Korea Sanctions Committee. The statement follows and is available at <https://usun.usmission.gov/statement-from-the-u-s-mission-to-the-un-on-north-korea-sanctions-actions-at-the-un/>.

The U.S. Mission to the United Nations submitted a list of designation proposals today to the UN Security Council's 1718 North Korea Sanctions Committee as part of the U.S. government's regular sanctions implementation activities. This action coincided with today's Treasury Department actions and is part of a

coordinated U.S. government effort to continue to implement existing sanctions, both domestic and multilateral, and cut off North Korea's illicit financial activities. The United States has been clear that if the international community wants to achieve the final, fully verified denuclearization of North Korea, the best way to support that process is to remain vigilant in applying the current sanctions to their full extent.

On September 22, 2018, the State Department issued a press statement regarding international efforts to implement UN Security Council resolutions on the DPRK's illicit shipping activities. The statement is available at <https://www.state.gov/international-efforts-to-implement-un-security-council-resolutions-on-dprks-illicit-shipping-activities/> and excerpted below.

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The United States welcomes coordination on international efforts to implement UN Security Council Resolutions on North Korea's illicit shipping activities, which prohibit ship-to-ship transfers of any goods or items to or from North Korean vessels of any goods or items going to or coming from North Korea.

The United States applauds the recent announcements from Japan, Australia and New Zealand regarding monitoring and surveillance activities to detect UN-prohibited illicit North Korean maritime activities, with a particular focus on detecting and disrupting ship-to-ship transfers of refined petroleum to North Korean tankers in the East China Sea. We are pleased that this coordinated, multinational initiative includes these countries, along with Canada, France, and the United Kingdom. As part of this effort, we are sharing information and coordinating efforts to ensure that UN Security Council Resolutions are implemented fully and effectively. In support of this initiative, the United States has deployed aircraft and surface vessels to detect and disrupt these activities.

North Korea continues to regularly employ deceptive tactics to evade UN sanctions. Accordingly, UN Member States are required to prohibit persons or entities subject to their jurisdiction from engaging in ship-to-ship transfers of refined petroleum. In addition, the United States will not hesitate to impose sanctions on any individual, entity, or vessel supporting North Korea's illicit activities, regardless of nationality.

The United States and international partners remain committed to achieving the final, fully verified denuclearization of North Korea and believe the full enforcement of North Korean-related UN Security Council Resolutions is crucial to a successful outcome. The international community must continue to enforce and implement UN Security Council Resolutions until North Korea denuclearizes.

\* \* \* \*

On September 27, 2018, Secretary Pompeo addressed the UN Security Council at a meeting on the DPRK. His remarks are excerpted below and available at <https://www.state.gov/remarks-at-a-meeting-on-the-democratic-peoples-republic-of-korea/>.

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Time and time again over the past quarter century, the United Nations has made it clear: the world cannot accept a nuclear-armed North Korea. That's not just the United States position. That is the world's position.

Past diplomatic attempts to halt North Korea's nuclear and ballistic missile development were unsuccessful. But now we're at the dawn of a new day. Since taking office, President Trump has led the international pressure campaign that has resulted in the first significant diplomatic breakthrough in decades.

During President Trump and Chairman Kim's historic Singapore summit, Chairman Kim committed to work towards the complete denuclearization of the Korean Peninsula. The two leaders share a common personal understanding of what must take place for the transformation of the United States-DPRK relations.

The United States continues to engage with North Korea to implement the commitments made in Singapore. Yesterday, I had a very positive meeting with Foreign Minister Ri Yong Ho to discuss how we can move forward on all four commitments in the Singapore joint statement. We also discussed a second summit between President Trump and Chairman Kim Jong-un.

We must not forget what's brought us this far: the historic international pressure campaign that this council has made possible through the sanctions that it imposed. Until the final denuclearization of the DPRK is achieved and fully verified, it is our solemn collective responsibility to fully implement all UN Security Council resolutions pertaining to North Korea.

President Trump has made abundantly clear that if Chairman Kim follows through on his commitments, a much brighter future lies ahead for North Korea and its people, and the United States will be at the forefront of facilitating that bright future.

We want to see that time come as quickly as possible. But the path to peace and a brighter future is only through diplomacy and only denuclearization. That means any other path North Korea may choose will inevitably lead to ever-increasing isolation and pressure.

It is imperative for members of the United Nations to take that to heart. Enforcement of UN Security Council sanctions must continue vigorously and without fail until we realize the fully, final, verified denuclearization. The members of this council must set the example on that effort, and we must all hold each other accountable.

Particularly, we must all be accountable to enforce Resolution 2397, which lowered the annual cap on refined petroleum imports to North Korea. The United States has assessed—and we can say in no uncertain terms—that the cap of 500,000 barrels has been breached this year.

We continue to see illegal imports of additional refined petroleum using ship-to-ship transfers, which are clearly prohibited under the UN resolution. As UN Security Council members, we must convey to the captains of these ships, to their owners, and anyone else involved in these transfers that we are watching them and that they must cease their illicit activity.

We must all be accountable for cutting off North Korea's illegal coal exports, which provide funds that go directly to its WMD programs.

And we must be accountable, too, for curbing the number of North Korean laborers permitted within our borders. The United States is troubled by recent reports that member-states, including members of the Security Council, are hosting new North Korean laborers. This violates the spirit and the letter of the Security Council resolutions that we all agreed to uphold.

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On October 16, 2018, the UN Security Council's 1718 Committee announced designations of vessels SHANG YUAN BAO, NEW REGENT, and KUM UN SAN 3 for transfers of refined petroleum to North Korean ships. See October 26, 2018 State Department press statement, available at <https://www.state.gov/designation-of-vessels-shang-yuan-bao-new-regent-and-kum-un-san-3/>. The United States welcomed the designations in the State Department press statement, adding:

We call on the 1718 Committee to designate any vessels under consideration that have shown to be involved in ship-to-ship transfers. The UN is designating the ships for a port entry ban and deflagging. This action is necessary as North Korea's illicit shipping activities continue, despite UN prohibitions on ship-to-ship transfers of any goods or items to or from North Korean vessels of any goods or items going to or coming from North Korea.

The United States notes that this action follows recent announcements from Canada, France, Japan, and the United Kingdom regarding monitoring and surveillance activities to detect UN-prohibited illicit North Korean maritime activities, with a particular focus on detecting and disrupting ship-to-ship transfers of refined petroleum to North Korean tankers in the East China Sea. The United States is also releasing imagery that demonstrates the results of this coordinated, multinational initiative, which includes these countries, along with Australia and New Zealand. In support of this initiative, the United States has deployed aircraft and surface vessels to detect and disrupt these activities.

(2) *U.S. sanctions*

(a) *Missile proliferation*

On January 31, 2018, the State Department published in the Federal Register the determination that North Korean entities have been involved in missile proliferation activities requiring the imposition of sanctions pursuant to the Arms Export Control Act, the Export Administration Act of 1979, E.O. 12851, and E.O. 13222. 83 Fed. Reg. 4536 (Jan. 31, 2018). The entities subject to sanctions are: Chilsong Trading Corporation (North Korea) and its sub-units and successors and Korea Kuryonggang Trading Corporation (North Korea) and its sub-units and successors. *Id.* The sanctions imposed

for two years include: (A) Denial of all new individual licenses for the transfer to the sanctioned entities of all items on the U.S. Munitions List and all items the export of which is controlled under the Export Administration Act; (B) Denial of all U.S. Government contracts with the sanctioned entities; and (C) Prohibition on the importation into the U.S. of all products produced by the sanctioned entities of the North Korean government affecting the development or production of electronics, space systems or equipment, and military aircraft. *Id.* Similar measures also are applied for two years to the government of North Korea because it has a non-market economy. *Id.*

(b) *Chemical Weapons*

On March 5, 2018, the U.S. Department of State published its determination that the Government of North Korea had used chemical weapons in violation of international law or lethal chemical weapons against its own nationals, triggering sanctions under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (“CBW Act”). 83 Fed. Reg. 9362 (Mar. 5, 2018). As explained in the Federal Register notice, the sanctions imposed pursuant to Sections 306(a), 307(a), and 307(d) of the CBW Act (22 U.S.C. 5604(a) and Sec 5605(a)), are as follows:

1. *Foreign Assistance*: Termination of assistance to North Korea under the Foreign Assistance Act of 1961, except for urgent humanitarian assistance and food or other agricultural commodities or products.
2. *Arms Sales*: Termination of (a) sales to North Korea under the Arms Export Control Act of any defense articles, defense services, or design and construction services, and (b) licenses for the export to North Korea of any item on the United States Munitions List.
3. *Arms Sales Financing*: Termination of all foreign military financing for North Korea under the Arms Export Control Act.
4. *Denial of United States Government Credit or Other Financial Assistance*: Denial to North Korea of any credit, credit guarantees, or other financial assistance by any department, agency, or instrumentality of the United States Government, including the Export-Import Bank of the United States.
5. *Exports of National Security-Sensitive Goods and Technology*: Prohibition on the export to North Korea of any goods or technology on that part of the control list established under section 2404(c)(1) of the Appendix to Title 50.

(c) *E.O. 13687*

See *Digest 2015* at 645 for background on Executive Order 13687, “Imposing Additional Sanctions With Respect To North Korea.” On January 24, 2018, OFAC designated the following officials of the Workers' Party of Korea pursuant to E.O. 13687: Song KIM; Tae Chol RYANG; Kwang Hun PAK; Kwon U HAN; Kyong Hak KIM; Pyong Chan KIM; Ho Kyu KIM; Tong Sok PAK; Man Bok JONG; Man Chun KIM; Tok Jin RI. 83 Fed. Reg. 4770 (Feb. 1,

2018). Also designated under E.O. 13687 at the same time was Myong Hun RI, an official of the Government of North Korea. *Id.*

On August 3, 2018, OFAC designated Jong Won RI pursuant to E.O. 13687 for being a North Korean government official. 83 Fed. Reg. 39,158 (Aug. 8, 2018). On October 4, 2018, OFAC designated Song Un RI, pursuant to section 1(a)(ii) of E.O. 13687 for being an official of the Government of North Korea. 83 Fed. Reg. 51,068 (Oct. 10, 2018).

(d) *E.O. 13722*

See *Digest 2016* at 646 for background on Executive Order 13722, “Blocking Property of the Government of North Korea and the Workers’ Party of Korea, and Prohibiting Certain Transactions With Respect to North Korea.” On January 24, 2018, OFAC designated MINISTRY OF CRUDE OIL INDUSTRY pursuant to E.O. 13722. 83 Fed. Reg. 4770 (Feb. 1, 2018). On February 23, 2018, OFAC designated Yung Yuang Tsang under E.O. 13722, along with the entities linked to him—KINGLY WON INTERNATIONAL CO., LTD and PRO-GAIN GROUP CORPORATION. 83 Fed. Reg. 9085 (Mar. 2, 2018). OFAC designated the following pursuant to both E.O. 13810 and E.O. 13722: Yanbian Silverstar Network Technology Co. Ltd; and Volasys Silver Star. 83 Fed. Reg. 47,410 (Sep. 19, 2018). On August 3, 2018, OFAC designated KOREA UNGUM CORPORATION pursuant to Section 2(a)(vii) of E.O. 13722. 83 Fed. Reg. 39,158 (Aug. 8, 2018). On September 6, 2018, OFAC designated one individual—Jin Hyok PARK—and one entity—KOREA EXPO JOINT VENTURE—pursuant to E.O. 13722. 83 Fed. Reg. 46,255 (Sep. 12, 2018). On November 19, 2018, OFAC designated Vladlen AMTCHENTSEV under E.O. 13722 for links to VELMUR MANAGEMENT PTE. LTD., an entity designated under E.O. 13722. 83 Fed. Reg. 60,557 (Nov. 26, 2018).

(e) *E.O. 13382*

E.O. 13382 (“Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters”) also continued to be used in 2018 to sanction entities and individuals linked to North Korean WMD programs. On August 3, 2018, OFAC designated Dandong Zhongsheng Industry & Trade Co., Ltd. pursuant to EO. 13382. 83 Fed. Reg. 39,158 (Aug. 8, 2018).

(f) *E.O. 13551*

On October 4, 2018, OFAC designated Erhan CULHA and Huseyin SAHIN pursuant to section 1(a)(ii)(F) of Executive Order 13551 of August 30, 2010, “Blocking Property of Certain Persons With Respect to North Korea,” (E.O. 13551) for their links to SIA Falcon International Group, a person whose property and interests in property are blocked pursuant to E.O. 13551. 83 Fed. Reg. 51,068 (Oct. 10, 2018). The entity, SIA Falcon International Group, was designated at the same time. *Id.*

(g) *E.O. 13810 (“Imposing Additional Sanctions with respect to North Korea”)*

On January 24, 2018, OFAC designated the following individuals pursuant to E.O. 13810 for operating in the financial services industry in North Korea: Song Nam CHOE; Chol KIM; Il Hwan Ko; Jong Sam PAEK. 83 Fed. Reg. 4770 (Feb. 1, 2018). OFAC also designated several entities under E.O. 13810 at the same time: HANA ELECTRONICS JVC (for operating in the manufacturing industry in North Korea); BEIJING CHENGXING TRADING CO. LTD. (for having engaged in at least one significant importation from or exportation to North Korea of any goods, services, or technology); DANDONG JINXIANG TRADE CO., LTD. (for having engaged in at least one significant importation from or exportation to North Korea of any goods, services, or technology); CK INTERNATIONAL LTD (for operating in the transportation industry in North Korea); GOORYONG SHIPPING CO LTD (for operating in the transportation industry in North Korea); HWASONG SHIPPING CO LTD (for operating in the transportation industry in North Korea); KOREA KUMUNSAN SHIPPING CO (for operating in the transportation industry in North Korea); KOREA MARINE & INDUSTRIAL TRDG (for operating in the transportation industry in North Korea). *Id.* In addition, OFAC designated several vessels pursuant to E.O. 13810 on the same date. *Id.*

On February 23, 2018, OFAC designated 16 shipping entities pursuant to E.O. 13810 for operating in the transportation industry in North Korea. 83 Fed. Reg. 9085 (Mar. 2, 2018). At the same time, OFAC designated several entities under E.O. 13810 for engaging in importation/exportation with North Korea: Chang An Shipping & Technology; HongXiang Marine Hong Kong Ltd; Huaxin Shipping Hong Kong Ltd; Liberty Shipping Co. Ltd; KOTI CORP; SHANGHAI DONGFENG SHPG CO LTD; Shen Zhong International Shpg; WEIHAI WORLD-SHIPPING FREIGHT; YUK TUNG ENERGY PTE LTD. *Id.* And, at the same time, 28 vessels associated with these designated entities were also designated under E.O. 13810. *Id.*

On August 3, 2018, OFAC designated Commercial Bank Agrosoyuz pursuant to E.O. 13810 for links to Han Jang Su (designated pursuant to E.O. 13382). 83 Fed. Reg. 39,158 (Aug. 8, 2018). On August 15, 2018, OFAC designated the following pursuant to E.O. 13810: Vasili Aleksandrovich KOLCHANOV; DALIAN SUN MOON STAR INTERNATIONAL LOGISTICS TRADING CO., LTD; PROFINET PTE. LTD; and SINSMS PTE. LTD. 83 Fed. Reg. 42,767 (Aug. 23, 2018). On August 21, 2018, OFAC designated two entities—GUDZON SHIPPING CO LLC and PRIMORYE MARITIME LOGISTICS CO LTD—and six vessels pursuant to E.O. 13810. 83 Fed. Reg. 42,979 (Aug. 24, 2018).

On September 13, 2018, OFAC designated Song Hwa JONG pursuant to E.O. 13810. 83 Fed. Reg. 47,410 (Sep. 19, 2018). At the same time, OFAC designated the following pursuant to both E.O. 13810 and E.O. 13722: Yanbian Silverstar Network Technology Co. Ltd; and Volasys Silver Star. *Id.*

Section 4 of E.O. 13810 authorizes the Secretary of the Treasury, in consultation with the Secretary of State, to impose sanctions on foreign financial institutions upon determining that the foreign financial institution has, on or after the effective date of E.O. 13810, knowingly conducted or facilitated any significant transaction, among others, on behalf of any person whose property and interests in property are blocked

pursuant to Executive Order 13551 of August 30, 2010, Executive Order 13687 of January 2, 2015, Executive Order 13722 of March 15, 2016, or E.O. 13810, or of any person whose property and interests in property are blocked pursuant to Executive Order 13382 in connection with North Korea-related activities. On October 11, 2018, OFAC added the reference “Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210” to the SDN list entries for 462 persons (individuals and entities) listed in the Federal Register notice. 83 Fed. Reg. 51,545 (Oct. 11, 2018).

On March 5, 2018, OFAC amended and reissued the North Korea Sanctions Regulations to implement E.O. 13687, E.O. 13722, and E.O. 13810; to reference the North Korea Sanctions and Policy Enhancement Act of 2016 and the Countering America’s Adversaries Through Sanctions Act (“CAATSA”); and to reflect general licenses and make other technical changes. 83 Fed. Reg. 9182 (Mar. 5, 2018).

## 6. Russia

### a. *Chemical and Biological Weapons Control and Warfare Elimination Act Sanctions*

On August 8, 2018, senior State Department officials provided a briefing to preview the imposition of sanctions on Russia under the Chemical and Biological Weapons Control and Warfare Elimination Act. The briefing transcript is available at <https://www.state.gov/imposition-of-chemical-and-biological-weapons-control-and-warfare-elimination-act-sanctions-on-russia/> and excerpted below.

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We are today announcing that we’ve determined under ... the CBW Act, ... that the Government of the Russian Federation has used chemical or biological weapons against international law or against their own nationals. This is a triggering factor under the CBW Act for the imposition of mandatory sanctions.

We notified Congress today that pursuant to this act we intend to impose sanctions against the Russian Federation in a number of respects, the most significant of which is the imposition of a presumption of denial for all national security sensitive goods or technologies that are controlled by the Department of Commerce pursuant to the Export Administration Regulations. These goods are currently subject to ... a case-by-case license determination, but ... henceforth, when these sanctions go into effect, we will be presumptively denying such applications.

We ... anticipate that a Federal Register notice will be put out that will make these official. The congressional notification has gone under the act today. So these things are being set in motion.

There are a number of carve-outs that we are making under the sanctions that are required by the act. Not everything that is mandatory under the act we will be proceeding with at this time. The carve-outs will include a ... waiver for the provision of foreign assistance to Russia

and to the Russian people. Our provision of foreign assistance is a tool of U.S. power and influence, and we're not going to foreswear that just because we have the obligation to impose some sanctions against Russia. So that is going to be a carve-out under ... these new sanctions.

We are also waiving sanctions with respect to space flight activities, because of course there are space flight actions in which we are engaged with the Russian Federation upon which we depend in some regards. Those will be free to continue on a case-by-case licensing basis. And we are also having a carve-out for safety of commercial passenger aviation because some of these national security sensitive goods in question are ones that perhaps might be important for safety of flight issues, so we are allowing ourselves the ability to continue on a case-by-case basis with those items. And there are a couple of more things like purely commercial end users for civilian end uses will be on a case-by-case basis.

Rather than under that presumption of denial, an export license is also with respect to Russian nationals that work with these sorts of goods while employed by firms in the United States as opposed to elsewhere, as well as exports to wholly-owned subsidiaries of U.S. companies and other foreign companies in Russia.

... under [the CBW Act] structure, if a series of criteria are not met within, I believe, 90 days from this point ... we will have to be in a basis of considering whether or not to impose [additional measures] in a second tranche as specified by the structure of the statute. So hopefully we will not get to that point, but that's really a question for Russia than for us.

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... I think we have invoked these sanctions under the act on three [occasions] over the years. [The] previous occasions [were] with Syria in 2013 and with the DPRK ... resulting from North Korea's use of a VX nerve agent in the assassination in Kuala Lumpur...

\* \* \* \*

[Y]ou will be able to see in the U.S. code that if the executive branch cannot certify that Russia has met a series of conditions within three months of the initial round of sanctions, the second round must be imposed. Those conditions are pretty demanding, but you can see them for yourself in the statute. They include, for example, that Russia is no longer using chemical or biological weapons in violation of international law, or using lethal chemical or biological weapons against its own nationals; secondly, that Russia has provided reliable assurances that it will not in the future engage in such activities; and also that Russia is willing to allow on-site inspections by United Nations observers or other internationally recognized impartial observers, or other reliable means exist to ensure that the government is not using chemical or biological weapons in violation of international law, et cetera.

... The second round of sanctions under the CBW Act will require ... at least three of a number of sanctions to be imposed. They are in general more draconian than the first round. It's designed to be a sliding scale of pressure, as I understand the creation of the law. And you can find those in Section 307(B) of the act if you're curious.

\* \* \* \*

[W]e have notified the Russians. ... we also mentioned to our allies as well ... We've been doing a good deal of diplomatic engagement before we talk to you today...

...[W]e are applying these sanctions against essentially all ... Russian state-owned or state-funded enterprises. That's potentially a very great sweep of the Russian economy in terms of the potentially affected end users. ... [I]t may be that ... something on the order of 70 percent of their economy and maybe 40 percent of their workforce falls within those enterprises. So to the degree that they wish to acquire national security controlled goods that fall within the ambit of our prescription here, those are potentially affected. It is possible that ... the trade it affected could reach potentially hundreds of millions of dollars, but it also depends upon what ... Russian entities in fact apply to purchase. So if they don't apply for exports of these goods, of course, we ... don't have to use the presumption of denial to deny it.

So really, it's up to Russia how dramatic the impact is. But let me say that overall, historically something upwards of 50 percent of Commerce Department licenses for Russia have included at least one national security controlled item. So this is a non-trivial set of stuff. By dollar value, the top categories of items historically tend to be things like aero gas turbine engines, ... electronic devices and components, integrated circuits, test and calibration equipment of various sorts, materials, production, equipment, and various things like that. The list is enormously elaborate.

\* \* \* \*

Also on August 8, 2018, the Department issued a press statement announcing the imposition of sanctions for Russia's use of a chemical weapon. The press statement is available at <https://www.state.gov/imposition-of-chemical-and-biological-weapons-control-and-warfare-elimination-act-sanctions-on-russia/> and states as follows:

Following the use of a "Novichok" nerve agent in an attempt to assassinate UK citizen Sergei Skripal and his daughter Yulia Skripal, the United States, on August 6, 2018, determined under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (CBW Act) that the Government of the Russian Federation has used chemical or biological weapons in violation of international law or has used lethal chemical or biological weapons against its own nationals.

Following a 15-day Congressional notification period, these sanctions will take effect upon publication of a notice in the *Federal Register*, expected on or around August 22, 2018.

The Federal Register notice of the determinations regarding Russia's use of Chemical Weapons under the CBW Act appeared on August 27, 2018. 83 Fed. Reg. 43,723 (Aug. 27, 2018). Excerpts follow from the Federal Register notice (with a correction, 83 Fed. Reg. 47,390 (Sep. 19, 2018)).

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\* \* \* \*

Pursuant to Sections 306(a), 307(a), and 307(d) of the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, as amended (22 U.S.C. Section 5604(a) and Section 5605(a)), on August 6, 2018, the Deputy Secretary of State determined that the Government of the Russian Federation has used chemical weapons in violation of international law or lethal chemical weapons against its own nationals. As a result, the following sanctions are hereby imposed:

1. *Foreign Assistance*: Termination of assistance to Russia under the Foreign Assistance Act of 1961, except for urgent humanitarian assistance and food or other agricultural commodities or products.

The Department of State has determined that it is essential to the national security interests of the United States to waive the application of this restriction.

2. *Arms Sales*: Termination of (a) sales to Russia under the Arms Export Control Act of any defense articles, defense services, or design and construction services, and (b) licenses for the export to Russia of any item on the United States Munitions List.

The Department of State has determined that it is essential to the national security interests of the United States to waive the application of this sanction with respect to the issuance of licenses in support of government space cooperation and commercial space launches, provided that such licenses shall be issued on a case-by-case basis and consistent with export licensing policy for Russia prior to the enactment of these sanctions.

3. *Arms Sales Financing*: Termination of all foreign military financing for Russia under the Arms Export Control Act.

4. *Denial of United States Government Credit or Other Financial Assistance*: Denial to Russia of any credit, credit guarantees, or other financial assistance by any department, agency, or instrumentality of the United States Government, including the Export-Import Bank of the United States.

5. *Exports of National Security-Sensitive Goods and Technology*: Prohibition on the export to Russia of any goods or technology on that part of the control list established under Section 2404(c)(1) of the Appendix to Title 50.

The Department of State has determined that it is essential to the national security interests of the United States to waive the application of this sanction with respect to the following:

*License Exceptions*: Exports and reexports of goods or technology eligible under License Exceptions GOV, ENC, RPL, BAG, TMP, TSU, APR, CIV, and AVS.

*Safety of Flight*: Exports and reexports of goods or technology pursuant to new licenses necessary for the safety of flight of civil fixed-wing passenger aviation, provided that such licenses shall be issued on a case-by-case basis, consistent with export licensing policy for Russia prior to enactment of these sanctions.

*Deemed Exports/Reexports*: Exports and re-exports of goods or technology pursuant to new licenses for deemed exports and reexports to Russian nationals, provided that such licenses shall be issued on a case-by-case basis, consistent with export licensing policy for Russia prior to enactment of these sanctions.

**WHOLLY-OWNED U.S. AND OTHER FOREIGN SUBSIDIARIES**: Exports and reexports of goods or technology pursuant to new licenses for exports and reexports to wholly-owned U.S. and other foreign subsidiaries in Russia, provided that such licenses shall be issued on a case-by-case basis, consistent with export licensing policy for Russia prior to enactment of these sanctions.

*Space Flight:* Exports and reexports of goods or technology pursuant to new licenses in support of government space cooperation and commercial space launches, provided that such licenses shall be issued on a case-by-case basis, consistent with export licensing policy for Russia prior to enactment of these sanctions.

*Commercial End-Users:* Exports and reexports of goods or technology pursuant to new licenses for commercial end-users civil end-uses in Russia, provided that such licenses shall be issued on a case-by-case basis, consistent with export licensing policy for Russia prior to enactment of these sanctions.

*SOEs/SFEs:* Exports and reexports of goods or technology pursuant to new licenses for Russian state-owned or state-funded enterprises will be reviewed on a case-by-case basis, subject to a “presumption of denial” policy.

These measures shall be implemented by the responsible departments and agencies of the United States Government and will remain in place for at least one year and until further notice.

\* \* \* \*

On November 6, 2018, the Department informed Congress that it could not certify that the Russian Federation met the conditions required by the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, and that the Department intended to proceed in accordance with the terms of that act, which directs the implementation of additional sanctions.

**b. *Sanctions in response to Russia’s actions in Ukraine***

For background on E.O. 13660, “Blocking Property of Certain Persons Contributing to the Situation in Ukraine,” see *Digest 2014* at 646. For background on E.O. 13662 and Directives 1, 2, and 4, see *Digest 2014* at 647-49. For background on E.O. 13685, “Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to the Crimea Region of Ukraine,” see *Digest 2014* at 651-52. For background on E.O. 13661, “Blocking Property of Additional Persons Contributing to the Situation in Ukraine,” see *Digest 2014* at 646-47. The Countering America’s Adversaries Through Sanctions Act (“CAATSA”) was enacted in 2017 in part to respond to Russia’s malign behavior with respect to the crisis in eastern Ukraine, cyber intrusions and attacks, and human rights abuses. See *Digest 2017* at 656-64.

On January 29, 2018, OFAC designated the following individuals pursuant to E.O. 13660: Igor Yurievich ANTIPOV; Aleksey Ivanovich GRANOVSKY; Elena Nikolaevna KOSTENKO; Svetlana Anatolievna MALAKHOVA; Pavel Vladimirovich MALGIN; Ekaterina Sergeevna MATYUSHCHENKO; Oleksandr MELNYCHUK; Serhiy MELNYCHUK; Natalya Yurievna NIKONOROVA; Dmitry Vladimirovich OVSYANNIKOV; Vladimir Igorevich PASHKOV; Vladimir Nikolaevich PAVLENKO; Elena Vladimirovna RADOMSKAYA; and Aleksandr Yurievich TIMOFEEV. 83 Fed. Reg. 5160 (Feb. 5, 2018). Andrey Vladimirovich CHEREZOV; Evgeniy Petrovich GRABCHAK; Bogdan Valeryevich KOLOSOV; and Aleksandr Yevgenyevich PENTYA were designated at the same time pursuant to E.O. 13661. *Id.*

Also at the same time, Valeri Vyacheslavovich ABRAMOV; Viktor Pavlovich PEREVALOV; and Sergey Anatolyevich TOPOR–GILKA were designated pursuant to E.O. 13685. *Id.* The following entities were designated pursuant to E.O. 13660, also on January 29, 2018: DONCOALTRADE SP Z O O; KOMPANIYA GAZ-ALYANS, OOO; UGOLNYE TEKHNologii, OOO; and ZAO VNESHRTORGSERVIS. *Id.* The following entities were designated pursuant to E.O. 13661 on January 29, 2018: EVRO POLIS LTD. and INSTAR LODZHISTIKS, OOO. *Id.* PJSC POWER MACHINES; LIMITED LIABILITY COMPANY FOREIGN ECONOMIC ASSOCIATION TECHNOPROMEXPORT; and VAD, AO were designated pursuant to E.O. 13685 at the same time. *Id.* On January 26, 2018, OFAC determined that a designated entity (SURGUTNEFTEGAS) owned a sufficient interest in twelve entities to require those entities be subject to the prohibitions of Directive 4 pursuant to E.O. 13662 and be added to the Sectoral Sanctions Identification List. *Id.*

On February 16, 2018, the Department of Commerce added 21 entities to its Entity List based on their designations under executive orders responding to actions by the Russian Federation (Russia) in violation of international law and fueling the conflict in eastern Ukraine. 83 Fed. Reg. 6949 (Feb. 16, 2018). The Department of Commerce added the following four entities and imposed a license requirement for exports to those entities based on their designation under E.O. 13660: Doncoaltrade SP Z O O; Kompaniya Gaz-Alyans; Ugolnye Tekhnologii, OOO; and ZAO Vneshtorgservis. *Id.* Commerce added two entities based on E.O. 13661: Evro Polis Ltd. and Instar Lodzhistik, OOO. *Id.* Twelve entities were added to the Entity List based on E.O. 13662: Kaliningradnefteprodukt OOO; Kinef OOO; Kirishiavtoservis OOO; Lengiproneftekhim OOO; Media-Invest OOO; Novgorodnefteprodukt OOO; Pskovnefteprodukt OOO; SNGB AO; SO Tvernefteprodukt OOO; Sovkhoz Chervishevski PAO; Strakhovove Obshchestvo Surgutneftegaz OOO; and Surgutmebel OOO. *Id.* Three entities were added based on E.O. 13685: Limited Liability Company Foreign Economic Association Technopomexport; PJSC Power Machines; and VAD, AO. *Id.*

On March 15, 2018, OFAC designated several individuals and entities pursuant to Section 224 of CAATSA. 83 Fed. Reg. 12,238 (Mar. 20, 2018). The individuals so designated are: Sergei AFANASYEV; Vladimir Stepanovich ALEXSEYEV; Sergey Aleksandrovich GIZUNOV; Igor Valentinovich KOROBOV; Igor Olegovich KOSTYUKOV; and Grigoriy Viktorovich MOLCHANOV. *Id.* The entities designated are: MAIN INTELLIGENCE DIRECTORATE; and FEDERAL SECURITY SERVICE (a.k.a. FSB). *Id.*

On April 6, 2018, OFAC designated 24 individuals and thirteen entities pursuant to E.O. 13661 and/or E.O. 13662. 83 Fed. Reg. 19,138 (May 1, 2018). The individuals are: Andrey Igorevich AKIMOV; Vladimir Leonidovich BOGDANOV; Oleg Vladimirovich DERIPASKA; Alexey Gennadyevich DYUMIN; Mikhail Efimovich FRADKOV; Sergei FURSENKO; Oleg GOVORUN; Suleiman Abusaidovich KERIMOV; Vladimir Alexandrovich KOLOKOLTSEV; Konstantin KOSACHEV; Andrey Leonidovich KOSTIN; Alexey Borisovich MILLER; Vladislav Matusovich REZNIK; Igor Arkadyevich ROTENBERG; Nikolai Platonovich PATRUSHEV; Kirill Nikolaevich SHAMALOV; Evgeniy Mikhailovich SHKOLOV; Andrei Vladimirovich SKOCH; Alexander Porfiriyevich TORSHIN; Vladimir Vasiliyevich USTINOV; Timur Samirovich VALIULIN; Viktor Feliksovich VEKSELBERG; Alexander Alexandrovich ZHAROV; and Viktor Vasiliyevich ZOLOTOV. *Id.* The entities are: AGROHOLDING KUBAN;

BASIC ELEMENT LIMITED; B–FINANCE LTD; EN+ GROUP PLC; GAZ GROUP; GAZPROM BURENIE, OOO; LADOGA MENEDZHMENT, OOO; NPV ENGINEERING OPEN JOINT STOCK COMPANY; RENOVA GROUP; ROSOBORONEKSPORT OAO;\* RUSSIAN MACHINES; UNITED COMPANY RUSAL PLC. *Id.*

On July 25, 2018, OFAC determined that EESTI KREDIIDIPANK AS would no longer be subject to prohibitions imposed on it pursuant to Directive One under Executive Order 13662 of March 20, 2014, “Blocking Property of Additional Persons Contributing to the Situation in Ukraine.” 83 Fed. Reg. 39,160 (Aug. 8, 2018).

On November 8, 2018, OFAC designated Aleksandr Vasilevich BASOV and Andriy Volodymyrovych SUSHKO, under the Support for the Sovereignty, Integrity, Democracy, and Economic Stability of Ukraine Act, as amended by CAATSA, (“SSIDES”). 83 Fed. Reg. 57,532 (Nov. 15, 2018). At the same time, OFAC designated one individual—Vladimir Nikolaevich ZARITSKY—and seven entities— JOINT STOCK COMPANY SANATORIUM AY–PETRI; JOINT STOCK COMPANY SANATORIUM DYULBER; JOINT STOCK COMPANY SANATORIUM MISKHOR; KRYMTETS, AO; LIMITED LIABILITY COMPANY GARANT–SV; LIMITED LIABILITY COMPANY INFRASTRUCTURE PROJECTS MANAGEMENT COMPANY; and MRIYA RESORT & SPA—pursuant to E.O. 13685. *Id.* OFAC also designated LIMITED LIABILITY COMPANY SOUTHERN PROJECT pursuant to both E.O. 13685 and E.O. 13661. *Id.* And OFAC designated one entity pursuant to SSIDES: MINISTRY OF STATE SECURITY. *Id.* The State Department issued a media note on November 8, 2018 regarding the sanctions on these individuals and associated entities due to their support for Russia’s occupation of Crimea and use of force to control Eastern Ukraine. The note is available at <https://www.state.gov/u-s-government-imposes-sanctions-on-supporters-of-russias-occupation-of-crimea-and-forcible-control-of-eastern-ukraine/> and includes the following:

Today, the United States imposed financial sanctions on three individuals and nine entities that are supporting Russia’s attempt to integrate Crimea region of Ukraine through private investment and privatization projects or those that are engaging in serious human rights abuses in furtherance of Russia’s occupation or control over parts of Ukraine.

The sanctioned individuals are Andriy Volodymyrovych Sushko, Aleksandr Basov, and Vladimir Nikolaevich Zaritsky. The sanctioned entities are the Ministry of State Security of so-called Luhansk People’s Republic, Mriya Resort and Spa, Limited Liability Company Garant-SV, Limited Liability Company Infrastructure Projects Management Company, Joint Stock Company Sanatorium AY-Petri, Joint Stock Company Dyulber, Joint Stock Company Sanatorium Miskhor, KRIMTETS, AO, and Limited Liability Company Southern Project.

On December 19, 2018, OFAC determined that the property and interests in property subject to U.S. jurisdiction of several persons would be blocked under E.O. 13661, E.O. 13662, and Section 224 of CAATSA. 83 Fed. Reg. 66,840 (Dec. 27, 2018).

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\* Editor’s note: Rosoboronekспорт OAO was also designated pursuant to E.O. 13582 regarding Syria.

Victor Alekseyevich BOYARKIN was designated under E.O. 13661 and E.O. 13662. *Id.* Individuals designated under Section 224 of CAATSA are: Anatoliy Vladimirovich CHEPIGA; Alexander Yevgeniyevich MISHKIN; Boris Alekseyevich ANTONOV; Anatoliy Sergeyevech KOVALEV; Nikolay Yuryevich KOZACHEK; Aleksey Viktorovich LUKASHEV; Artem Andreyevich MALYSHEV; Alexey Valerevich MININ; Aleksei Sergeyevech MORENETS; Viktor Borisovich NETYKSHO; Aleksandr Vladimirovich OSADCHUK; Aleksey Aleksandrovich POTEKIN; Evgenii Mikhaylovich SEREBRIAKOV; Oleg Mikhaylovich SOTNIKOV; and Ivan Sergeyevech YERMAKOV.

**c. Section 231 of CAATSA**

On January 30, 2018, senior officials at the State Department provided a special briefing on sanctions pursuant to Section 231 of CAATSA. The transcript of the briefing is available at <https://www.state.gov/background-briefing-on-the-counteracting-americas-adversaries-through-sanctions-act-caatsa-section-231/> and excerpted below. See *Digest 2017* at 656-60 for discussion of the activity in 2017 to implement Section 231 of CAATSA.

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\* \* \* \*

The most important thing ... is to clarify that yesterday, January 29th, was not a deadline under Section 231 ...to impose sanctions; it was actually a start date. ... It was the day on or after which we could start imposing sanctions if we make the determination here at the State Department of activity that falls under the provision. So with that in mind, I wanted to go back a little bit and give you a summary of how we've been implementing this provision since the bill was signed into law on August 2nd, and then where we're going from here, and then, of course, open it up for questions.

As you know, the President signed the bill into law August 2nd. He then delegated this provision 231 to the State Department on September 29th. On October 27th, we issued guidance regarding implementation of 231 of how we were going to go about implementing this provision. And as part of that guidance, we issued a list of persons that we saw or determined as being part of the defense and intelligence sectors of Russia. So the defense and intelligence sectors of Russia, in order to clarify it, in order to explain exactly the term and what we mean, we issued a list – which was not a sanctions list, but a list of persons that we see as comprising those two sectors of Russia.

We have spent, then, since even before our guidance was out but certainly since the delegation on September 29th and through to today, we have spent a considerable amount of time and energy on engaging with partners, with allies, with private industry, and in fact, globally with countries around the world, explaining what Section 231 meant ... and demarcating countries where we thought there could be potential sanctionable activity, explaining to them the consequences, and pushing them to stop potential deals that could run afoul of 231.

We have been doing this in the field with our posts overseas; we've been doing it here in Washington; it's been a global effort. We briefed this effort to Congress yesterday in a classified setting. Our discussions, our diplomatic engagements, are sensitive and we don't talk about them publicly, but we did brief Congress yesterday because it's important, of course, to keep them updated. I can say publicly, though, that the results of our engagement and our demarches globally, we have been able to turn off potential deals that equal several billion dollars. And that is real success, it's real money, and it's real revenue that is not going to the Kremlin and is not going to Russia as part of the intent of this law and the intent of this administration, to remind Russia and remind the Russian Government of the costs of its malign activity, specifically with regard to Ukraine.

So that's real success. As with all sanctions, and this provision included, you cannot only judge the success of sanctions based on public rollout, right. There is a ton of engagement that goes on and a deterrent effect behind the scenes that we lead with countries around the world, and cutting off and stopping potential deals is success even if you don't see the rollout of sanctions. That doesn't mean that if we ... make final determinations that there is sanctionable activity, we, of course, will roll out public sanctions. That's part of our implementation. But it's important not to only focus on public rollouts as we look at the successful use of this tool to further our foreign policy.

\* \* \* \*

[O]ur definition of the term "significant" is a multivariable definition, so it's not only related to dollar figure. It also can include things like significant adverse impact to ... U.S. national security. ...

...I assure you that the Russians know when a deal that they thought was moving forward is all of a sudden falling apart and not moving forward, they know which deals are being turned off. And that is having the intended consequence.

\* \* \* \*

... Certainly, when dealing with the broad array of malign activity that this law outlines and focuses on, we absolutely include Russia's disinformation campaigns undermining democratic processes and cyber activity. That is a focus, that has been a focus, and continues, will be a focus of our engagement with our allies and partners. ...

... I can tell you that part of our global effort is we have a term called an ALDAC, an All Diplomatic and Consular Affair Cable. We ... sent out as part of ... our engagement an ALDAC. So we have engaged everybody, literally, that we can on this. And then as we get information ... on potential deals ..., we then have more tailored demarches and outreach engagement where we either go out to the field, have those discussions in capitals around the world or here in Washington. So it's both global and it's also very focused and tailored when we have particular instances of concern that we want to focus on.

\* \* \* \*

[W]e use the sanctions tool in a flexible way both for deterrence, but we also obviously ... do sanction, right? ...[D]eterrence doesn't always work and you have to be ready, and we are ready to use the tool when we deem it appropriate.

So for example, just on Friday, of course, we issued a significant and large tranche of maintenance designations against a variety of Russian targets, separatists in eastern Ukraine, et cetera. We certainly do issue sanctions. We don't only rely on them to be a deterrent. So it's a variety of things.

The deterrence, also remember, is not just leading to a lack of business, but it actually turns into ... a real loss of money. It can – it has a very tangible impact when deals don't go through. For example, in this situation in 231, in this instance, where money actually doesn't flow into the Kremlin, so that's powerful as are actual sanctions when we choose to use them as well.

\* \* \* \*

[S]tarting when we were delegated this authority on September 29th, we developed a comprehensive approach on how we were going to implement this provision, ... that includes, of course, how we would deploy it, how we would sanction targets, and under what criteria. ... So we have a strong framework through which we're implementing this provision. That's what we've used as we have gone out across the world and engaged countries that may be involved or thinking about being involved in activity that could be sanctionable. So that's a fairly comprehensive and very robust approach that we have.

How we deter ... Russia, we have a variety of tools, right? We're only today talking about Section 231. We have a variety of sanctions tools that CAATSA has given us. We also have close cooperation with our European allies ... where we discuss a variety of ways that we can counter the Russian threat that's a common threat to us all. It's not only about sanctions and it's certainly not only about 231, but it's one tool of many that we have in the toolbox.

\* \* \* \*

On August 21, 2018, Dr. Christopher Ashley Ford, Assistant Secretary of State for International Security and Nonproliferation, testified before the Senate Committee on Banking, Housing and Urban Affairs on implementing CAATSA Section 231. His testimony is excerpted below and available at <https://www.state.gov/remarks-and-releases-bureau-of-international-security-and-nonproliferation/implementing-caatsa-section-231-diplomacy/>.

\* \* \* \*

...Russia has undertaken a campaign of malign activities in its attempt to compete with the United States and our Allies and partners. The array of sanctions the United States has imposed against Russia, and those that materially support its malign activities, respond directly to its aggressive action against our country, our Allies, and our partners.

And this is where CAATSA's Section 231 comes into play. The threat of mandatory sanctions against individuals or entities that have engaged in significant transactions with the Russian defense or intelligence sectors can be so useful, but we need to use this powerful tool surgically—to excise the malignancy without damaging our very important foreign relationships. As we have been implementing Section 231, we began by emphasizing to our allies that transactions with the Russian arms industry could have consequences.

Firstly, these are the same arms that Russia used and continues to use in its aggression against Ukraine. Our implementation of the CAATSA sanctions reinforces this Administration's unwavering commitment to Ukraine's sovereignty and territorial integrity, including over Crimea.

Secondly ...[h]igh-technology military equipment is one of the only competitive sectors of the Russian economy these days, and Moscow makes a great deal of money from selling arms abroad indiscriminately—be it to Iran or the Assad regime. These funds fuel the Kremlin's malign activities, spread its malign influence, and support Russia's development of newer, even more deadly weapons. Accordingly, if Russia is to feel pressure in response to its malign activities, it makes sense to go after these revenues—revenues that may also help offset the costs of developing newer, even more deadly weapons that threaten and undermine the security of the United States and our allies and partners.

More broadly, however, Russia also uses its arms transactions as a tool of geopolitical influence. For Russia, it isn't just about money, but about the relationships that the arms trade creates for Moscow. Scaling back and shutting down Russia's arms deals and deterring such transactions in the future strike directly at the Kremlin's malign activities and *influence* that it seeks to exert in the international community.

That is our central philosophy behind Section 231 implementation. The broadest challenge, of course, is how to manage a relationship with Russia that has both important cooperative aspects and important points of disagreement. As the President and Secretary Pompeo have made clear, we seek to cooperate with Russia on subjects of shared interest wherever we can, because of course there *are* important shared interests on which it would be irresponsible of us not to cooperate. ...

## *II. A Record of Successes to Date*

As we have dispatched our diplomats repeatedly around the world to spread word about Section 231 and encourage Russia's arms clients to wean themselves from Moscow, we have had some notable successes to date. Most of these successes are ones about which it is not possible or advisable to speak in public...

Nevertheless... *we have* had real successes—in the form of something on the order of billions of dollars in announced or expected Russian arms transactions that have quietly been abandoned as a result of our diplomatic outreach about Section 231. That's billions that Putin's war machine *will not* get, and through which the Kremlin's malign influence will not spread, and a slew of strategic relationships between the Kremlin and overseas partners that *will not* broaden and deepen. We're proud of this record, and we're working hard to run up the score further.

So effective has the threat of CAATSA sanctions been to date, moreover, that we have been able to do all this without imposing sanctions on a friend or partner state of our own. I urge you not to look at the scorecard as whether the United States has imposed sanctions. In this case, sanctions reflect our failure to turn off Russian arms deals. The time will come when we will have no choice but to impose sanctions, but we are keenly aware that Congress' purpose in

passing Section 231 was to pressure Russia and incentivize Russia to change its behavior, not to hurt U.S. friends and allies who might happen to purchase arms from Moscow.

### *III. Six Principles for Implementation*

Mr. Chairman, I will be happy to answer any questions you have about these matters – at least as best I can in an open forum. I am also very happy to participate in or send briefers for a closed session. Before I conclude, however, let me say a few more words about our approach to Section 231. In particular, I'd like to outline six principles that help guide our work:

1. First, as I said earlier, the target of Section 231 sanctions is *Russia*, not the countries that happen to purchase arms from Russia. Our interlocutors and partners need to know that although CAATSA may compel us to have challenging conversations with them, the underlying problem is *not* with them. Rather, our problem lies with Moscow and its own destabilizing role in the international community. I am sure that this is not always a great consolation, but it is vital that our interlocutors understand it all the same.
2. Second, we are not usually concerned with Russia's mere provision of spare parts or its maintenance of military equipment that another country already possesses. We know that many states still possess some Russian arms, and we are certainly not in the business of trying to insist that such countries give up on defending themselves. For CAATSA purposes, we are comfortable with the maintenance of equipment or the provision of spare parts not generally being considered a transaction that is considered significant under Section 231.

Our concerns begin where and when something more consequential occurs – something such as a major transfer of foreign funds to the Russian defense sector, for instance, or a new shipment of equipment representing a qualitative upgrade in capability, such as an S-400. In such cases, the issue of “significance” becomes more problematic, and the risk of mandatory sanctions thus increases. This is the message we have been relaying to interlocutors in our diplomatic outreach, and it is one of which we hope Congress will approve.

3. Third, we have also been sending the message that a transaction generally won't be considered significant unless and until a major change in the *status quo* actually *occurs*. Just *talking* about or *announcing* a Russian arms deal, in other words, is not generally in itself a trigger for Section 231 sanctions. The problem arises when new Russian equipment starts to show up or perhaps when large sums of money begin to change hands.

We don't expect Russia's arms clients to disavow or renounce their deals. In truth, Russia is not a very good or reliable arms partner on a good day, and even with global suppliers more reputable and reliable than Russia, consummation of a purchase of sophisticated equipment can take a long time and experience detours, obstacles, or reasons to fall apart. If in this new CAATSA environment, Russia's major arms clients never quite finalize their purchase, then the State Department will have nothing about which to have to assess “significance” under Section 231 in the first place.

4. And speaking of off-ramping, another piece of our diplomatic message has been that even with respect to new equipment, we are not necessarily asking countries immediately to go “cold turkey” on Russian arms. We understand that can be very difficult. As long as new deliveries of more advanced equipment don't occur, we have room for some flexibility vis-a-vis new purchases, provided that the overall trend line is demonstrably “down.” That is, that such countries are weaning themselves off of the arms transactions that help

fund Moscow’s adventurism and that create geopolitical partnerships that the Kremlin can thereafter exploit for destabilizing ends.

5. With respect to the new CAATSA waiver language in the NDAA, we are glad to have greater flexibility on these issues. At Secretary Pompeo’s hearing before the Senate Foreign Relations Committee on July 25, Chairman Corker and Senator Cardin emphasized to him that Congress views the new waiver language as narrow—in their words, Mr. Chairman, “to allow countries that we’re dealing with that we wish to buy American military equipment to be weaned off Russian equipment.” Secretary Pompeo, in turn, made clear his agreement—noting that the new waiver is a way to avoid driving countries with historical Russian entanglements *more* into Moscow’s arms while permitting them “the capacity of spare parts” or to “round out th[e] process” of weaning themselves of their dependency on Russia. We will use this understanding to guide implementation of Section 231.
6. Finally, it’s worth pointing out that Section 231 only applies to *Russian* arms transactions. To the extent that a country contemplating a purchase of advanced Russian equipment can pursue alternative sources of supply in meeting its defense needs, therefore, this is an excellent way to avoid sanctions liability. Purchases from European or other international suppliers of sophisticated weaponry, for instance, would raise no Section 231 concern. Nor, of course, would purchases from the United States—and we are always happy to try to facilitate discussions with relevant U.S. interlocutors about such possibilities.

\* \* \* \*

On October 5, 2018, the State Department announced sanctions pursuant to Section 231(a) of CAATSA and Executive Order 13849 of September 20, 2018, and additions to its CAATSA Section 231(d) guidance. 83 Fed. Reg. 50,433 (Oct. 5, 2018). The Department determined that the Chinese entity Equipment Development Department of the Central Military Commission (“EDD”), formerly known as the General Armaments Department (“GAD”), had knowingly, on or after August 2, 2017, engaged in a significant transaction with a person that is part of, or operates for or on behalf of, the defense or intelligence sectors of the Government of the Russian Federation. Sanctions imposed upon EDD, effective September 20, 2018, are as follows:

- United States Government departments and agencies shall not issue any specific license or grant any other specific permission or authority under any statute that requires the prior review or approval of the United States Government as a condition for the export or re-export of goods or technology to EDD;
- A prohibition on any transactions in foreign exchange that are subject to the jurisdiction of the United States and in which EDD has any interest;
- A prohibition on 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 EDD;

- All property and interests in property of EDD 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 any United States person are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in; and

Sanctions imposed upon Li Shangfu, EDD's Director, are:

- A prohibition on any transactions in foreign exchange that are subject to the jurisdiction of the United States and in which Li Shangfu has any interest;
- A prohibition on 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 Li Shangfu;
- All property and interests in property of Li Shangfu 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 any United States person are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in; and
- The Secretary of State shall deny a visa to Li Shangfu, and the Secretary of Homeland Security shall exclude Li Shangfu from the United States, by treating Li Shangfu as a person covered by section 1 of Proclamation 8693 of July 24, 2011 (Suspension of Entry of Aliens Subject to United Nations Security Council Travel Bans and International Emergency Economic Powers Act Sanctions).

OFAC also implemented sanctions under CAATSA and E.O. 13849 on both EDD and Li Shangfu. 83 Fed. Reg. 52,051 (Oct. 15, 2018).

In the same Federal Register notice, the Department identified additional persons in the defense and intelligence sectors of the Russian government, in accordance with CAATSA Section 231(d):

- Komsomolsk-na-Amur Aviation Production Organization (KNAAPO)
- Oboronlogistika, OOO
- PMC Wagner
- Gizunov, Sergey Aleksandrovich
- Internet Research Agency LLC
- Kaverzina, Irina Viktorovna
- Korobov, Igor Valentinovich
- Kovalev, Anatoliy Sergeevich
- Kozachek, Nikolay Yuryevich
- Krylova, Aleksandra Yuryevna
- Lukashev, Aleksey Viktorovich
- Malyshev, Artem Andreyevich
- Morgachev, Sergey Aleksandrovich
- Netyksho, Viktor Borisovich

- Osadchuk, Aleksandr Vladimirovich
- Podkopaev, Vadim Vladimirovich
- Polozov, Sergey Pavlovich
- Potemkin, Aleksey Aleksandrovich
- Prigozhin, Yevgeniy Viktorovich
- Vasilchenko, Gleb Igorevich
- Venkov, Vladimir
- Yermakov, Ivan Sergeevich
- Yershov, Pavel Vyacheslavovich

On September 20, 2018, the Department issued a fact sheet and provided a special briefing by senior officials regarding the measures taking effect on that day pursuant to Section 231 of CAATSA. The fact sheet, available at <https://www.state.gov/caatsa-section-231-addition-of-33-entities-and-individuals-to-the-list-of-specified-persons-and-imposition-of-sanctions-on-the-equipment-development-department/>, is excerpted below.

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\* \* \* \*

Today, the President issued a new [Executive Order](#) “Authorizing the Implementation of Certain Sanctions Set Forth in the Countering Americas Adversaries Through Sanctions Act” to further the implementation of certain sanctions in the Countering America’s Adversaries Through Sanctions Act of 2017 (CAATSA) with respect to the Russian Federation. In addition, the Secretary of State is taking two actions today to implement his delegated authorities pursuant to section 231 of CAATSA and to further impose costs on the Russian Government for its malign activities.

First, the Secretary of State added 33 additional persons to the CAATSA section 231 List of Specified Persons (LSP) for being a part of, or operating for or on behalf of, the defense or intelligence sectors of the Government of the Russian Federation. This action increases the number of persons identified on the LSP to 72. Any person who knowingly engages in a significant transaction with any of these persons is subject to mandatory sanctions under CAATSA section 231.

Second, in consultation with the Secretary of the Treasury, the Secretary of State imposed sanctions on the Chinese entity Equipment Development Department (EDD) and its director, Li Shangfu, for engaging in significant transactions with persons on the LSP. These transactions involved Russia’s transfer to China of Su-35 combat aircraft and S-400 surface-to-air missile system-related equipment.

Section 231 of CAATSA and today’s actions are not intended to undermine the military capabilities or combat readiness of any country, but rather to impose costs on Russia in response to its interference in the United States election process, its unacceptable behavior in eastern Ukraine, and other malign activities. Today’s actions further demonstrate the Department of State’s continuing commitment to fully implement CAATSA section 231, which has already deterred billions of dollars-worth of potential arms exports from Russia. State encourages all

persons to avoid engaging in transactions with entities on the LSP that may risk sanctions, including high-value, major transactions for sophisticated weapons systems.

\* \* \* \*

...[T]he Secretary of State, in consultation with the Secretary of the Treasury, determined that EDD, formerly known as the General Armaments Department (GAD), knowingly engaged in significant transactions with a person that is a part of, or operates for or on behalf of, the defense sector of the Government of the Russian Federation. China took delivery from Russia of ten Su-35 combat aircraft in December 2017 and an initial batch of S-400 (a.k.a. SA-21) surface-to-air missile system-related equipment in 2018. Both transactions resulted from pre-August 2, 2017, deals negotiated between EDD and Rosoboronexport (ROE), Russia's main arms export entity.

CAATSA section 231 requires that at least five of the twelve sanctions described in CAATSA section 235 be imposed on a person that President Donald J. Trump determines has knowingly engaged in a significant transaction with a person that is a part of, or operates for or on behalf of, the defense or intelligence sectors of the Government of the Russian Federation. This authority was delegated to the Secretary of State, in consultation with the Secretary of the Treasury, on September 29, 2017. ROE is included on the LSP as a person that is part of, or operates for or on behalf of, the defense sector of the Government of the Russian Federation. In addition to being identified on the LSP, ROE was designated by Treasury on April 6, 2018, pursuant to Executive Order 13582, for support to the Government of Syria. ROE has provided billions of dollars in weapons sales over the past decade to the Syrian regime.

\* \* \* \*

The Office of Foreign Assets Control has added EDD and Li Shangfu to its Specially Designated Nationals and Blocked Persons List. As a result of this action, all property and interests in property of this entity and individual within United States jurisdiction are blocked, and United States persons are generally prohibited from transacting with them.

\* \* \* \*

Also on September 20, 2018, the State Department issued a press statement regarding the measures imposed on that date pursuant to Section 231 of CAATSA. The press statement is available at <https://www.state.gov/sanctions-under-section-231-of-the-counteracting-americas-adversaries-through-sanctions-act-of-2017-caatsa/> and includes the following:

These Department of State sanctions actions are the result of United States' implementation of Title II of CAATSA, which Congress passed in response to Russia's aggression in Ukraine, annexation of Crimea, cyber intrusions and attacks, interference in the 2016 elections, and other malign activities. We will continue to vigorously implement CAATSA and urge all countries to curtail relationships with Russia's defense and intelligence sectors, both of which are linked to malign activities worldwide.

The special briefing by senior State Department officials previewing the Section 231 measures is available at <https://www.state.gov/previewing-sanctions-under-section-231-of-the-countering-americas-adversaries-through-sanctions-act-of-2017-caatsa/> and excerpted below.

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\* \* \* \*

[T]he Russia portions of [CAATSA] were passed by Congress in response to a range of Russian malign activities that include meddling in the U.S. elections. Part of the statute includes provisions that mandate the imposition of sanctions upon anyone engaging in what is called a “significant transaction” with any entity that appears on a list of persons associated with the Russian defense or intelligence sectors.

...[T]oday the President signed a new executive order authorizing the State Department to implement certain sanctions that are set forth in the CAATSA statute. ...

The second thing that happened today is the Secretary of State took two actions. First of all, he added 33 additional persons to that list that I mentioned before. It’s the so-called “List of Specified Persons” that are acting on behalf of the Russian defense or intelligence sectors. So that so-called LSP, that list, it got longer today by 33 names.

In addition to that, however, the Secretary, in consultation with the Secretary of the Treasury—so Secretary Pompeo and Secretary Mnuchin—imposed sanctions on a Chinese entity, the Equipment Development Department, otherwise known as EDD, and also upon its director, Li Shangfu. EDD and Mr. Li are being added to the Treasury’s Specially Designated Nationals and Blocked Persons List, which is a complicated way of referring to what we usually just informally call the SDN list. This list has now been updated on the Treasury website.

We want to stress that the legislative standard here is a significant transaction with an entity that appears on the List of Specified Persons. We took these actions because China took delivery of 10 Sukhoi fighter aircraft, specifically Su-25s, in December of 2017 ..., after the CAATSA statute came into force. And it also took delivery of a batch of S-400—sometimes known as SA-21—surface-to-air missile systems or related equipment in January of this year. Both these transactions, which I repeat occurred after the CAATSA sanctions statute came into force, were deals that were negotiated between the Equipment Development Department, or EDD, on the one hand, and Rosoboronexport, which is Russia’s main arms export entity. And it, Rosoboronexport, is on the List of Specified Persons.

I want to emphasize that the ultimate target of these sanctions is Russia. CAATSA sanctions in this context are not intended to undermine the defense capabilities of any particular country. They are instead aimed at imposing costs upon Russia in response to its malign activities. And of course, those malign activities are many that it’s undertaken in its attempt to compete with the U.S. and our allies and our partners. The array of sanctions the United States has imposed against Russia and those who ... materially support its malign activities are undertaken in direct response to Russia’s aggressive actions against our country, our allies, and our partners.

This is also the first time that we have ever sanctioned anyone under Section 231 of CAATSA, which focuses upon, as I’ve been explaining, those who engage in significant transactions with entities that appear on the LSP. We have not done this before; we are doing this

now. We want to stress that our enforcement of Section 231 is an ongoing process. We've been engaging with our partners and our allies for quite some time on this, because the ultimate goal of this legislation is to prevent revenue from flowing to the Russian Government. Russia uses its arms sales not only to raise revenue, ... but to build relationships which, of course, it then attempts to exploit in furtherance of its interests and almost invariably in ways that goes against ours.

So we've been using ... the possibility of CAATSA legislation to deter arms transfers for many months now. We've ... had some good results in probably preventing the occurrence of several billion dollars' worth of transfers simply by having the availability of this sanctions tool in our pocket. But since China has now gone ahead and, in fact, done what is clearly a significant transaction by acquiring these Sukhois and S-400 missiles, ... we are required by the law ... to take this step today.

So I want to stress again: This is the first time we've ever sanctioned anyone under Section 231 of CAATSA, so ... this is a significant step. ...

\* \* \* \*

Some of you who perhaps will look these names up when you check them out on the website will find that a number of these names [added to the LSP] correspond to people who have been indicted in connection with Russian election meddling.

\* \* \* \*

... If I might just also quickly ..., the List of Specified Persons is not itself a sanctions imposition. Nothing specifically happens to someone by virtue of being on that list. The implications of it, however, are that if anyone else engages in what is deemed to be a significant transaction with such a person, the person who engages in that action may well be subject to mandatory sanctions pursuant to Section 231.

So partly this ..., we hope, will be something of a signal to avoid engagement with those folks for that very reason. We work very closely with people around the world to minimize their exposure to sanctions for engaging in significant Russian arms transfers. And with this new build-out of the list to cover the Russian intelligence sector to some extent as well, we are sending a signal that dealings with these people may well subject one to sanctions, and therefore we hope that people, if they come across that opportunity, will think twice.

\* \* \* \*

Under the law, once a determination of a significant transaction is made, we're required to impose at least five from a menu of—I think it's actually twelve options that are set forth in the statute. One could impose five, six, eleven, twelve, what have you, depending upon the circumstances, and that is itself a complicated question, as part of our decision-making process.

In this case, the sanctions that are being imposed upon EDD .... We are denying U.S. export licenses to EDD. We are ... imposing a prohibition upon foreign exchange transactions under U.S. jurisdiction; also imposing a prohibition on transactions with the U.S. financial system. We are blocking all property or interests in property within ... within U.S. jurisdiction. And we are imposing sanctions on an EDD principal executive officer. That's the fellow, Mr. Li

Shangfu, who we mentioned before. And these sanctions include a prohibition on foreign exchange transactions under U.S. jurisdiction, a prohibition on transactions with the U.S. financial system, and blocking of all property or interests Mr. Li's—in property within the U.S. jurisdiction, as well as a visa ban.

\* \* \* \*

The EO specifically is allowing us to implement the ...actions that the State Department has taken today under CAATSA. First, it delegates the listed sanctions menu ..., the menu of 12 in section 235 of CAATSA, and also the separate menu in the Ukraine Freedom Support Act of 2014—it delegates those sanctions to be implemented.

It also authorizes the Secretary of the Treasury to employ all powers granted under IEEPA. Some of those powers that this executive order now allows us to take will be to do things like promulgate regulations, issue administrative subpoenas, issue licenses, and take the full range of civil enforcement actions that we can. So what the executive order does today is it amplifies and makes implementable the good authority that Congress has given us in the Countering America's Adversaries Through Sanctions Act, or CAATSA.

\* \* \* \*

The CAATSA was not intended to take down the economy of third party countries. It's intended to impose appropriate pressures on Russia in response to Russian malign acts, and we have it on very good authority from the office of the statute itself that they expect that we will implement it in ways that are appropriate in light of consultations with all of the parties involved. So we think this time was necessary in order to do the homework that we needed to do to make sure that this action was measured and appropriate, as well as being stern and responsive to a real challenge presented by facts on the ground.

As to other potential recipients of the S-400, we haven't made any determinations yet with respect to what to do about those, but you can be confident that we have spent an enormous amount of time talking about prospective purchases of things such as S-400s and Sukhois with people all around the world who may have been interested in such things and some who may still be. We have made it very clear to them that these – that systems like the S-400 are a system of key concern with potential CAATSA implications. Members of Congress have also publicly said that they believe any transfer of an S-400 to anybody would constitute a significant transaction, and of course that's something we have to bear in mind in these as well. So while decisions on other cases have yet to be made, and indeed other transactions have yet to occur, we hope that at least this step will send a signal of our seriousness and perhaps encourage others to think twice about their own engagement with the Russian defense and intelligence sectors, which would of course be precisely what we hope Congress intended, and what we are required to do pursuant to the fact.

\* \* \* \*

The executive order issued on September 20, 2018, and referenced above, is E.O. 13849, "Authorizing the Implementation of Certain Sanctions Set Forth in the Countering America's Adversaries Through Sanctions Act." 83 Fed. Reg. 48,195 (Sep. 20,

2018). The order refers to the national emergencies declared in E.O. 13660, E.O. 13694, and E.O. 13757. Section 1 of the order authorizes Treasury to take further actions (enumerating six measures) to implement sanctions imposed pursuant to sections 224(a)(2), 231(a), 232(a), or 233(a) of CAATSA. Section 2 directs Treasury to take additional actions where necessary to implement sanctions imposed pursuant to sections 224(a)(2), 231(a), 232(a), or 233(a) of CAATSA (enumerating measures such as denying Export-Import Bank guarantees or credit and prohibiting licenses or permission for exports to the sanctioned person). Section 3 authorizes the Treasury to take enumerated actions where necessary to implement sanctions imposed pursuant to section 224(a)(3) of CAATSA or sections 4(a) or 4(b) of Ukraine Freedom Support Act (“UFSA”). And Section 4 directs Treasury to take additional actions where necessary to implement sanctions imposed pursuant to section 224(a)(3) of CAATSA or sections 4(a) or 4(b) of UFSA (enumerating measures).

## **7. Nonproliferation**

### ***a. Country-specific sanctions***

See each country listed above for sanctions related to proliferation activities.

### ***b. Iran, North Korea, and Syria Nonproliferation Act (“INKSNA”)***

On April 30, 2018 the U.S. Government applied the measures authorized in Section 3 of the Iran, North Korea, and Syria Nonproliferation Act (Pub. L. 109–353) (“INKSNA”) against several foreign individuals and entities (and their successors, sub-units, or subsidiaries) identified in the report submitted pursuant to Section 2(a) of the Act. 83 Fed. Reg. 21,812 (May 10, 2018). INKSNA applies to foreign entities and individuals for the transfer to or acquisition from Iran since January 1, 1999; the transfer to or acquisition from Syria since January 1, 2005; or the transfer to or acquisition from North Korea since January 1, 2006, of goods, services, or technology controlled under multilateral control lists (Missile Technology Control Regime, Australia Group, Chemical Weapons Convention, Nuclear Suppliers Group, Wassenaar Arrangement) or otherwise having the potential to make a material contribution to the development of weapons of mass destruction (WMD) or cruise or ballistic missile systems. *Id.*

The list of those sanctioned on April 30, 2018 follows: Abascience Tech Co., Ltd. (China); Emily Liu (Chinese individual); Karl Lee [aka Li Fangwei] (Chinese individual); Raybeam Optronics Co., Ltd (China); Shanghai Rotech Pharmaceutical Engineering Company (China); Sinotech (Dalian) Carbon and Graphite Corporation (SCGC) (China); Sunway Tech Co., Ltd (China); T-Rubber Co. Ltd (China); Sakr Factory for Developmental Industries (Egypt); Mojtaba Ghasemi (Iranian individual); Islamic Revolutionary Guard Corps Qods Force (IRGC QF) (Iran); Pars Aviation Service Company (PASC) (Iran); Defense Industries Organization (DIO) (Iran); Saeng Pil Trading Corporation (SPTC) (North Korea); Second Economic Committee (SEC) Korea Ryonbong General Corporation (North Korea); 183rd Guard Air Defense Missile Regiment (Russia); Instrument Design Bureau (KBP)

Tula (Russia); Gatchina Surface-to-Air Missile Training Center (Russia); Russian General Staff Main Intelligence Directorate (GRU) (Russia); 18th Central Scientific Research Institute (18th TsNII) Scientific Research Center (NITs) (Kursk) (Russia); Russian Research and Production Concern (BARL); Scientific Studies and Research Center (SSRC) (Syria); Lebanese Hizballah (Syria); Megatrade (Syria); Syrian Air Force (Syria); Seden Denizcilik Hizmetleri Sanayi de Ticaret Limited (Turkey); and Yona Star International (United Arab Emirates). *Id.*

The measures imposed on these persons are a U.S. Government procurement ban; a ban on U.S. Government assistance; a ban on U.S. Government sales of defense and munitions items; and a prohibition on export licenses. *Id.* The measures remain in force for two years. *Id.*

Also on April 30, 2018, the State Department applied INSKNA sanctions to Rosoboronexport (ROE) (Russia) and any successor, sub-unit, or subsidiary thereof. 83 Fed. Reg. 21,333 (May 9, 2018).

## **8. Terrorism**

### ***a. UN and other coordinated multilateral action***

In large part, the United States implements its counterterrorism obligations under UN Security Council resolutions concerning ISIL, al-Qaida and Afghanistan sanctions, as well as its obligations under UN Security Council resolutions concerning counterterrorism, through Executive Order 13224 of September 24, 2001. Among the resolutions with which the United States has addressed domestic compliance through E.O. 13224 designations are Resolutions 1267 (1999), 1373 (2001), 1988 (2011), 1989 (2011), 2253 (2015), and 2255 (2015). Executive Order 13224 imposes financial sanctions on persons who have been designated in the annex to the order; persons designated by the Secretary of State for having committed or for posing a significant risk of committing acts of terrorism; and persons designated by the Secretary of the Treasury for acting for or on behalf of, or providing material support for, or being otherwise associated with, persons designated under the order. See 66 Fed. Reg. 49,079 (Sept. 25, 2001); see also *Digest 2001* at 881–93 and *Digest 2007* at 155–58.

### ***b. U.S. targeted financial sanctions***

#### ***(1) Department of State***

##### ***(a) State Department designations***

In 2018, the Department of State announced the Secretary of State’s designation of numerous entities and individuals (including their known aliases) pursuant to E.O. 13224. For an up-to-date list of State Department designations under E.O. 13224 by date, see <https://www.state.gov/executive-order-13224/#state>.

On January 9, 2018, the Department of State published the designations of Abukar Ali Adan, and Wanas al-Faqih, as Specially Designated Global Terrorists (“SDGTs”) under E.O. 13224. 83 Fed. Reg. 1092 (Jan. 9, 2018). The Department also published the designation of Muhammad al-Ghazali, on January 9, 2018. 83 Fed. Reg. 1093 (Jan. 9, 2018). The Department issued a media note on these three designations on January 4, 2018, available at <https://www.state.gov/state-department-terrorist-designations-of-muhammad-al-ghazali-abukar-ali-adan-and-wanas-al-faqih/>. The media note provides the following information on Muhammad al-Ghazali, Abukar Ali Adan, and Wanas al-Faqih

... these three individuals are associated with al-Qa’ida affiliates al-Qa’ida in the Arabian Peninsula (AQAP), al-Shabaab, and al-Qa’ida in the Islamic Maghreb (AQIM), all of which have been designated by the United States as Foreign Terrorist Organizations pursuant to section 219 of the Immigration and Nationality Act and as SDGT entities under E.O. 13224. Al-Ghazali is a senior member of AQAP who is involved in internal security and training of the group’s operatives. Abukar Ali Adan is deputy leader of al-Shabaab. Wanas al-Faqih is an AQIM associate who planned the March 18, 2015 Bardo Museum attack in Tunis, Tunisia that killed at least 20 people.

On January 24, 2018, the Department of State published the designation under E.O. 13224 of Khalid Batarfi. 83 Fed. Reg. 3387 (Jan. 24, 2018). The media note on the designation, dated January 23, 2018, and available at <https://www.state.gov/state-department-terrorist-designation-of-khalid-batarfi/>, provides the following background:

Khalid Batarfi is a senior member in AQAP, a designated Foreign Terrorist Organization (FTO) and SDGT. Batarfi was the top commander for AQAP in Abyan Governate, Yemen, and was a former member of AQAP’s shura council. In April 2015, Batarfi was released from the Central Prison of al-Mukalla in Yemen when AQAP militants attacked the prison.

Also on January 24, 2018, the designations of Abdelatif Gaini and Siddhartha Dhar as SDGTs appeared in the Federal Register. 83 Fed. Reg. 3388 & 3389 (Jan. 24, 2018). The State Department issued a media note regarding the designations of Dhar and Gaini on January 23, 2018, which is available at <https://www.state.gov/state-department-terrorist-designations-of-siddhartha-dhar-and-abdelatif-gaini/>, and includes the following:

Siddhartha Dhar was a leading member of now-defunct terrorist organization Al-Muhajiroun. In late 2014, Dhar left the United Kingdom to travel to Syria to join ISIS. He is considered to have replaced ISIS executioner Mohammad Emwazi, also known as “Jihadi John.” Dhar is believed to be the masked leader who appeared in a January 2016 ISIS video of the execution of several prisoners ISIS accused of spying for the UK.

Abdelatif Gaini is a Belgian-Moroccan citizen believed to be fighting for ISIS in the Middle East. Gaini is connected to UK-based ISIS sympathizers Mohamad Ali Ahmed and Humza Ali, who were convicted in the UK in 2016 of terrorism offenses.

On February 6, 2018, the State Department published the designation of Harakat al-Sabireen under E.O. 13224. 83 Fed. Reg. 5290 (Feb. 6, 2018). The designations of the individual Ismail Haniyeh and the entities known as Liwa al-Thawra and HASM appeared on the same day. 83 Fed. Reg. 5289 (Feb. 6, 2018). The State Department had announced the designations of Ismail Haniyeh, Harakat al-Sabireen, Liwa al-Thawra, and Harakat Sawa'd Misr ("HASM") in a January 31, 2018 media note, available at <https://www.state.gov/state-department-terrorist-designations-of-ismail-haniyeh-harakat-al-sabireen-liwa-al-thawra-and-harakat-sawad-misr-hasm/>. The media note includes the following:

Ismail Haniyeh is the leader and President of the Political Bureau of Hamas, which was designated in 1997 as a Foreign Terrorist Organization and in 2001 as an SDGT. Haniyeh has close links with Hamas' military wing and has been a proponent of armed struggle, including against civilians. He has reportedly been involved in terrorist attacks against Israeli citizens. Hamas has been responsible for an estimated 17 American lives killed in terrorist attacks.

Harakat al-Sabireen is an Iranian backed terrorist group that was established in 2014. The group operates primarily in Gaza and the West Bank and is led by Hisham Salem, a former leader of the Palestine Islamic Jihad (PIJ), a State Department designated FTO and SDGT. Harakat al-Sabireen has carried out terrorist activities targeting Israel, pursues an anti-American agenda, and has attracted members and supporters of PIJ. These planned and executed terrorist attacks include firing rockets into Israel in September 2015 and detonating an explosive device targeting an Israeli army patrol in December 2015. Harakat al-Sabireen also previously established a rocket factory in Gaza that was destroyed in the summer of 2014, and the group had plans to carry out attacks against Israel in February 2016. Palestinian Authority security forces arrested five Harakat al-Sabireen operatives who were working under Iranian orders and received funding in Gaza to carry out their attacks.

Liwa al-Thawra is a terrorist group active in the Qalyubia and Monofeya governorates of Egypt. After announcing its formation in August 2016, the group claimed responsibility for the October 2016 assassination of brigadier general Adel Ragai, commander of the Egyptian army's Ninth Armored Division, outside his home in Cairo. In 2017, the group claimed responsibility for a bombing outside a police training center in the Egyptian city of Tanta.

HASM is a terrorist group also active in Egypt. Formed in 2015, the group claimed responsibility for the assassination of Egyptian National Security Agency officer Ibrahim Azzazy, as well as the attempted assassination of Egypt's former Grand Mufti Ali Gomaa. HASM also claimed responsibility for a September 30,

2017 attack on Myanmar's embassy in Cairo. Some of the leaders of the violent splinter groups, Liwa al-Thawra and Hasm, were previously associated with the Egyptian Muslim Brotherhood.

Ansarul Islam's designation under E.O. 13224 as an SDGT was published on February 26, 2018. 83 Fed. Reg. 8314 (Feb. 26, 2018). The designations of Abu Musab al-On and Mahad Moalim were published on February 28, 2018. 83 Fed. Reg. 8728, 8729 (Feb. 28, 2018). Also on February 28, 2018, the State Department published the designations of ISIS-Egypt, ISIS-Philippines, ISIS-West Africa, ISIS-Somalia, ISIS-Bangladesh. 83 Fed. Reg. 8727, 8728, 8729, 8730 (Feb. 28, 2018). And the designation of Maute Group, also known as IS-Ranao, also known as Islamic State of Lanao, also appeared on February 28, 2018, as did the designation of the individual, Abu Musab al-Barnawi. 83 Fed. Reg. 8728 (Feb. 28, 2018).

On February 27, 2018, the State Department published a fact sheet summarizing the E.O. 13224 designations of ISIS branches and affiliates. The fact sheet, available at <https://www.state.gov/state-department-terrorist-designations-of-isis-affiliates-and-senior-leaders/>, lists 40 ISIS leaders and operatives designated to date, including the 2018 designations of al-Barnawi of ISIS-West Africa and Mahad Moalim of ISIS-Somalia. The fact sheet also lists ISIS affiliates designated under E.O. 13224, including the 2018 designations of ISIS-Bangladesh, ISIS-Philippines, ISIS-West Africa, ISIS-Somalia, Jund al-Khilafah-Tunisia, and ISIS-Egypt.

On March 1, 2018, the State Department's designation under E.O. 13224 of Jund al-Khilafah in Tunisia, also known as ISIS-Tunisia, appeared in the Federal Register. 83 Fed. Reg. 8918 (Mar. 1, 2018). The designation of Ahmad Iman Ali as an SDGT appeared in the Federal Register on March 12, 2018. 83 Fed. Reg. 10,762 (Mar. 12, 2018). Also on March 12, 2018, the Department published the designation of Abdifatah Abubakar Abdi as an SDGT. 83 Fed. Reg. 10,762 (Mar. 12, 2018). A March 8, 2018 State Department media note, available at <https://www.state.gov/state-department-terrorist-designations-of-ahmad-iman-ali-and-abdifatah-abubakar-abdi/>, includes the following information about Ahmad Iman Ali and Abdifatah Abubakar Abdi:

Ahmad Iman Ali is a prominent al-Shabaab commander who has served as the group's leader in Kenya since 2012. He is director of the group's Kenyan operations, which has targeted Kenyan African Union Mission in Somalia (AMISOM) troops in Somalia, such as the January 2016, attack in El Adde, Somalia. Ali is also responsible for al-Shabaab propaganda targeting the Kenyan government and civilians, such as a July 2017, video in which he issues threats to Muslims serving in Kenya's security forces. Ali has also served as an al-Shabaab recruiter, focusing on poor youth in Nairobi slums, and has fundraised at mosques to support al-Shabaab activities.

In 2015, Abdifatah Abubakar Abdi was placed on the Kenyan government's wanted list of terrorists known or suspected to be members of al-Shabaab. Abdi is wanted in connection with the June 2014, attack in Mpeketoni, Kenya that claimed more than 50 lives.

The March 23, 2018 Federal Register includes the designation of Joe Asperman under E.O. 13382. The State Department issued a media note on March 22, 2018 regarding the designation of Asperman, which is available at <https://www.state.gov/state-department-terrorist-designation-of-joe-asperman/>, and includes the following: “French national Joe Asperman is a senior chemical weapons expert for ISIS. Asperman oversaw chemical operations production within Syria for ISIS and the deployment of these chemical weapons at the battlefield.” The designation of Katibat al-Imam al-Bukhari as an SDGT appeared on March 28, 2018. 83 Fed. Reg. 13,337 (Mar. 28, 2018). On March 22, 2018, the State Department issued a media note, available at <https://www.state.gov/state-department-terrorist-designation-of-katibat-al-imam-al-bukhari/>, providing background on al-Bukhari:

Katibat al-Imam al-Bukhari is the largest Uzbek fighting force in Syria. The group has played a significant role in the fighting in northwestern Syria, fighting alongside groups including al-Nusrah Front—al-Qa’ida’s affiliate in Syria and a State Department designated Foreign Terrorist Organization (FTO) and SDGT group. In April 2017, KIB published a video showing armed men taking part in clashes, and in December 2015, posted a video of a training camp for children, where children are taught to handle and fire weapons.

On May 23, 2018, the State Department published the designation of ISIS in the Greater Sahara. 83 Fed. Reg. 23,987 (May 23, 2018). Also on May 23, 2018, the Department published the designation under E.O. 13224 of Adnan Abu Walid al-Sahrawi. 83 Fed. Reg. 23,988 (May 23, 2018). A May 16, 2018 State Department media note, available at <https://www.state.gov/state-department-terrorist-designations-of-isis-in-the-greater-sahara-isis-gs-and-adnan-abu-walid-al-sahrawi/>, provides background on the designations of al-Sahrawi and ISIS in the Greater Sahara:

ISIS-GS emerged when Adnan Abu Walid al-Sahrawi and his followers split from Al-Mourabitoun, an al-Qa’ida splinter group and U.S.-designated FTO and SDGT. Al-Sahrawi first pledged allegiance to ISIS in May 2015, and in October 2016, ISIS acknowledged it received a pledge of allegiance from the group under al-Sahrawi. ISIS-GS is primarily based in Mali operating along the Mali-Niger border and has claimed responsibility for several attacks under al-Sahrawi’s leadership, including the October 4, 2017 attack on a joint U.S.-Nigerien patrol in the region of Tongo Tongo, Niger, which killed four U.S. soldiers and five Nigerien soldiers.

On July 11, 2018, the Department published the designation of al-Ashtar Brigades (“AAB”), as an SDGT. 83 Fed. Reg. 32,179 (July 11, 2018). On August 6, 2018, the Department published the designation of Abdul Rehman al-Dakhil. 83 Fed. Reg. 38,450 (Aug. 6, 2018). In a July 31, 2018 media note, available at <https://www.state.gov/state-department-terrorist-designation-of-abdul-rehman-al-dakhil/>, the Department provided the following information on this designation:

Abdul Rehman al-Dakhil is a longtime member of the U.S. designated Foreign Terrorist Organization (FTO) and SDGT Lashkar e-Tayyiba (LeT) and was an operational leader for LeT's attacks in India between 1997 and 2001. In 2004, Dakhil was captured in Iraq by UK forces, then held in U.S. custody in Iraq and Afghanistan until his transfer to Pakistan in 2014. After his release from Pakistani custody, Dakhil returned to work for LeT. In 2016, Dakhil was the LeT divisional commander for the Jammu region in the state of Jammu and Kashmir. As of early 2018, Dakhil remained a senior commander in LeT.

The Department published the designation of Qassim Abdullah Ali Ahmed, as an SDGT on August 17, 2018. 83 Fed. Reg. 41,139 (Aug. 17, 2018). The State Department provided background information on Ahmed (aka Qassim al-Muamen) in an August 13, 2018 media note, available at <https://www.state.gov/state-department-terrorist-designation-of-qassim-abdullah-ali-ahmed-aka-qassim-al-muamen/>:

Al-Muamen is an Iran-based leader of al-Ashtar Brigades (AAB), a U.S.-designated Foreign Terrorist Organization (FTO) and SDGT that seeks to overthrow the Bahraini government. Al-Muamen has recruited terrorists in Bahrain, facilitated training on weapons and explosives for AAB members, and supplied AAB members with funding, weapons, and explosives to carry out attacks. In November 2017, Bahraini authorities identified al-Muamen as being involved in an AAB plot to assassinate prominent figures in Bahrain and target three oil pipelines.

On September 6, 2018, the designation of Jama'at Nusrat al-Islam wal-Muslimin ("JNIM") appeared in the Federal Register. 83 Fed. Reg. 45,298 (Sep. 6, 2018). On September 5, 2018, the State Department issued a media note regarding the designation of JNIM, which is available at <https://www.state.gov/state-department-terrorist-designation-of-jamaat-nusrat-al-islam-wal-muslimin-jnim/>, includes the following:

JNIM has described itself as al-Qaida's official branch in Mali, and it has claimed responsibility for numerous attacks and kidnappings since it was formed in March 2017. JNIM carried out the June 2017 attack at a resort frequented by Westerners outside of Bamako, Mali; several deadly attacks on Malian troops; and the large-scale coordinated attacks in Ouagadougou, Burkina Faso, on March 2, 2018. JNIM is led by Iyad ag Ghaly, a U.S.-designated SDGT.

On November 14, 2018, the State Department published the designation of the Al-Mujahidin Brigades as an SDGT. 83 Fed. Reg. 56,894 (Nov. 14, 2018). Jawad Nasrallah was designated at the same time. *Id.* On November 13, 2018, the State Department issued a media note, available at <https://www.state.gov/state-department-terrorist-designations-of-jawad-nasrallah-al-mujahidin-brigades-and-hizballah/>, providing

information on the designations of Jawad Nasrallah and al-Mujahidin Brigades:

Jawad Nasrallah is the son of Hizballah's leader and SDGT Hassan Nasrallah, as well as a rising leader of Hizballah. Jawad Nasrallah has previously recruited individuals to carry out terrorist attacks against Israel in the West Bank. In January 2016, he tried to activate a suicide bombing and shooting cell based in the West Bank, but the Israeli government arrested the five Palestinians he recruited to the cell.

AMB is a military organization that has operated in the Palestinian Territories since 2005 and whose members have plotted a number of attacks against Israeli targets. AMB has ties to Hizballah, and Hizballah has provided funding and military training to AMB members.

On November 27, 2018, the designation under E.O. 13224 of Hajji 'Abd al-Nasir appeared in the Federal Register. 83 Fed. Reg. 60,937 (Nov. 27, 2018). A November 20, 2018 State Department media note, available at <https://www.state.gov/state-department-terrorist-designation-of-hajji-abd-al-nasir/>, provides background on al-Nasir:

Hajji 'Abd al-Nasir has held several leadership positions in the Islamic State of Iraq and Syria (ISIS), a U.S.-designated Foreign Terrorist Organization (FTO) and SDGT. Within the past five years, al-Nasir has served as an ISIS Military Amir in Syria as well as chair of the ISIS Delegated Committee, the council that reports to ISIS leader Abu Bakr al-Baghdadi and exercises administrative control of the terrorist organization's affairs. The Delegated Committee is responsible for planning and issuing orders related to ISIS's military operations, tax collections, religious police, and commercial and security operations.

Secretary Pompeo also addressed the press on November 20, 2018 regarding recent terrorism designations. His remarks are available at <https://www.state.gov/remarks-to-the-press-14/> and include the following:

[T]he United States today sanctioned an international network that the Iranian regime and Russia are using to provide millions of barrels of oil to the Assad regime. This is in exchange for the movement of hundreds of millions of dollars to the IRGC Quds Force. That money is then passed on to terrorist organizations like Hizballah and Hamas. The United States in its continued efforts will not allow these dirty dealings to flourish. Iran will not be allowed to exploit the international financial system, to hide revenue streams it uses to fund terrorist activity, support sectarian militias, abusing civilian populations, or to destabilize the region.

An additional media note on November 20, 2018 also announced the sanctions on the Iranian-Russian-Syrian network and is available at <https://www.state.gov/sanctions-announcement-on-iran/>.

(b) *State Department amendments*

Several designations by the State Department under E.O. 13224 were amended in 2018. The designation of Lashkar-e-Tayyiba was amended to add additional aliases, such as Tehreek-e-Azadi-e-Kashmir, Kashmir Freedom Movement, TAJK, and MML. 83 Fed. Reg. 14,538 (Apr. 4, 2018). The Department amended the designation of Al-Nusrah Front as an SDGT to include additional aliases such as Hay'at Tahrir al-Sham. 83 Fed. Reg. 25,496 (June 1, 2018). The designation of al-Shabaab was amended in July to add the aliases al-Hijra, Al Hijra, Muslim Youth Center, MYC, Pumwani Muslim Youth, Pumwani Islamist Muslim Youth Center. 83 Fed. Reg. 34,907 (July 23, 2018). The amendment to the designation of al-Shabaab was announced in a July 19, 2018 media note, available at <https://www.state.gov/amendments-to-the-terrorist-designations-of-al-shabaab/>, which provides the following additional information on al-Hijra:

Al-Hijra, formed in 2008 in Nairobi, Kenya serves as a wing of al-Shabaab. Al-Hijra, which is extensively interconnected with al-Shabaab both organizationally and operationally, consists primarily of Kenyan and Somali followers of al-Shabaab in East Africa. It has openly engaged in al-Shabaab recruiting in Kenya and facilitated travel of al-Shabaab members to Somalia for terrorism purposes.

(2) *OFAC*

OFAC designated numerous individuals (including their known aliases) and entities pursuant to Executive Order 13224 during 2018. The designated individuals and entities typically are owned or controlled by, act for or on behalf of, or provide support for or services to, individuals or entities the United States has designated as terrorist organizations pursuant to the order.

OFAC designated nine individuals and seven entities in the first quarter of 2018. See 83 Fed. Reg. 5512 (Feb. 7, 2018) (six individuals—Nabil Mahmoud ASSAF; Muhammad BADR-AL-DIN; Jihad Muhammad QANSU; Ali Muhammad QANSU; Issam Ahmad SAAD; and Abdul Latif SAAD—and seven entities—BLUE LAGOON GROUP LTD; DOLPHIN TRADING COMPANY LIMITED; GOLDEN FISH LIBERIA LTD; GOLDEN FISH S.A.L. (OFFSHORE); KANSO FISHING AGENCY LIMITED; SKY TRADE COMPANY; and STAR TRADE GHANA LIMITED); 83 Fed. Reg. 6310 (Feb. 13, 2018) (three individuals—Rahman Zeb Faqir MUHAMMAD; Hizb Ullah Astam KHAN; and Dilawar Khan Nadir KHAN).

OFAC designated 37 individuals and 21 entities in the second quarter of 2018. See 83 Fed. Reg. 14,317 (Apr. 3, 2018) (three individuals—Mohamed Mire Ali YUSUF; Yunus Emre SAKARYA; and Abdulpatta Escalon ABUBAKAR—and three entities—AL-MUTAFAQ COMMERCIAL COMPANY; LIIBAAN TRADING; and PROFESYONELLER ELEKTRONIK); 83 Fed. Reg. 14,954 (Apr. 6, 2018) (seven individuals—Fayyaz AHMAD;

Muhammad Harris DAR; Muhammad EHSAN; Muzammil Iqbal HASHIMI; Saifullah KHALID; Faisal NADEEM; and Tabish QAYYUUM); 83 Fed. Reg. 19,856 (May 4, 2018) (one individual, Myrna Ajijul MABANZA; 83 Fed. Reg. 22,578 (May 15, 2018) (six individuals—Meghdad AMINI; Mohammad Hasan KHODA'I; Sa'id NAJAFPUR; Mas'ud NIKBAKHT; Foad SALEHI; and Mohammadreza Khedmati VALADZAGHARD—and three entities—JAHAN ARAS KISH; JOINT PARTNERSHIP OF MOHAMMADREZA KHEDMATI AND ASSOCIATES; and RASHED EXCHANGE); 83 Fed. Reg. 23,337 (May 18, 2018) (four individuals—Aras Habib KAREEM; Muhammad QASIR; Valiollah SEIF; and Ali TARZALI—and one entity, AL-BILAD ISLAMIC BANK FOR INVESTMENT AND FINANCE P.S.C.); 83 Fed. Reg. 23,764 (May 22, 2018) (five individuals—Husayn AL-KHALIL; Ibrahim Amin AL-SAYYID; Naim QASIM; Muhammad YAZBAK; and Hasan NASRALLAH); 83 Fed. Reg. 23,765 (May 22, 2018) (two individuals—Jeffrey John James ASHFIELD and John Edward MEADOWS—and four entities—AVIATION CAPITAL SOLUTIONS LTD.; AIRCRAFT, AVIONICS, PARTS & SUPPORT LTD.; GRANDEUR GENERAL TRADING FZE; and HSI TRADING FZE)\*; 83 Fed. Reg. 23,997 (May 23, 2018) (two individuals—Abdallah SAFI-AL-DIN; and Mohammad Ibrahim BAZZI—and five entities—AFRICA MIDDLE EAST INVESTMENT HOLDING SAL; CAR ESCORT SERVICES S.A.L. OFF SHORE; EURO AFRICAN GROUP LTD; GLOBAL TRADING GROUP NV; and PREMIER INVESTMENT GROUP SAL); 83 Fed. Reg. 24,391 (May 25, 2018) (four individuals—Mehdi AZARPISHEH; Mohammad Agha JA'FARI; Mahmud Bagheri KAZEMABAD; and Javad Bordbar SHIR AMIN; 83 Fed. Reg. 27,828 (June 14, 2018) (three individuals—Gulnihal YEGANE (linked to MAHAN AIR); Iraj RONAGHI (linked to MERAJ AIR); and Touraj ZANGANEH (linked to MERAJ AIR) and six entities—BLUE AIRWAYS (linked to MAHAN AIR); OTIK AVIATION (linked to: MAHAN AIR); TRIGRON LOJISTIK KARGO LIMITED SIRKETI (linked to MAHAN AIR and Gulnihal YEGANE); 3G LOJISTIK VE HAVACILIK HIZMETLERI LTD. (linked to MAHAN AIR); RA HAVACILIK LOJISTIK VE TASIMACILIK TICARET LIMITED SIRKETI (linked to MAHAN AIR); DENA AIRWAYS (linked to MERAJ AIR; Iraj RONAGHI; and Touraj ZANGANEH)—plus their associated aircraft);

OFAC designated one entity and three individuals in the third quarter of 2018. See 83 Fed. Reg. 34,301 (July 19, 2018) (MAHAN TRAVEL AND TOURISM SDN BHD); 83 Fed. Reg. 38,764 (Aug. 7, 2018) (two individuals—Abdul JABBAR and Hameed ul HASSAN); 83 Fed. Reg. 46,255 (Sep. 12, 2018) (one individual, Waleed Ahmed ZEIN);

OFAC designated sixteen individuals and 32 entities in the fourth quarter of 2018. See 83 Fed. Reg. 55,451 (Nov. 5, 2018) (one entity, AFAQ DUBAI); 83,359 (Oct. 22, 2018) (two entities linked to Mahan Air—MY AVIATION COMPANY LIMITED, and updated information for MAHAN TRAVEL AND TOURISM SDN BHD); 83 Fed. Reg. 53,360 (Oct. 22, 2018) (three individuals linked to ISIL—Mohammed Karim Yusop FAIZ; Mohammad Reza Lahaman KIRAM; and Mohamad Rafi UDIN); 83 Fed. Reg. 54,175 (Oct. 26, 2018) (eight individuals—Abdullah Samad FAROQUI; Abdul Rahim MANAN; Mohammad Daoud MUZZAMIL; Sadr IBRAHIM; Hafiz Abdul MAJID; Abdul AZIZ;

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\*\* Editor's note: In the same May 22, 2018 Federal Register notice, OFAC published designations made in 2016 of the following individuals: Abu Bakr Muhammad Muhammad GHUMAYN; Faisal Jassim Mohammed al-Amri AL-KHALIDI; and Yisra Muhammad Ibrahim BAYUMI. 83 Fed. Reg. 23,997 (May 23, 2018).

Mohammad Ebrahim OWHADI; and Esma'il RAZAVI); 83 Fed. Reg. 57,529 (Nov. 15, 2018) (22 entities—TADBIRGARAN ATIYEH IRANIAN INVESTMENT COMPANY; TAKTAR INVESTMENT COMPANY; CALCIMIN; QESHM ZINC SMELTING AND REDUCTION COMPANY; BANDAR ABBAS ZINC PRODUCTION COMPANY; ZANJAN ACID PRODUCTION COMPANY; NEGIN SAHEL ROYAL INVESTMENT COMPANY; IRAN ZINC MINES DEVELOPMENT COMPANY; TECHNOTAR ENGINEERING COMPANY; IRAN TRACTOR MANUFACTURING COMPANY; PARSIAN CATALYST CHEMICAL COMPANY; ANDISHEH MEHVARAN INVESTMENT COMPANY; BAHMAN GROUP; ESFAHAN'S MOBARAHEH STEEL COMPANY; MEHR-E EQTESAD-E IRANIAN INVESTMENT COMPANY; BASIJ RESISTANCE FORCE; BONYAD TAAVON BASIJ; BANK MELLAT; MEHR EQTESAD BANK; MEHR EQTESAD FINANCIAL GROUP; SINA BANK; and PARSIAN BANK);\*\*\* 83 Fed. Reg. 57,531 (Nov. 15, 2018) (one individual—Muhammad 'Abdallah AL-AMIN—and seven entities—IMPULSE INTERNATIONAL S.A.L. OFFSHORE; IMPULSE S.A.R.L.; LAMA FOODS INTERNATIONAL OFFSHORE S.A.L.; LAMA FOODS S.A.R.L.; M. MARINE S.A.L. OFFSHORE; SIERRA GAS S.A.L. OFFSHORE; and THAINGUI S.A.L. OFFSHORE); 83 Fed. Reg. 57,802 (four individuals—Shibl Muhsin 'Ubayd AL-ZAYDI; Yusuf HASHIM; Muhammad 'Abd-Al- Hadi FARHAT; and Adnan Hussein KAWTHARANI).

**c. Annual certification regarding cooperation in U.S. antiterrorism efforts**

See Chapter 3 for discussion of the Secretary of State's 2017 determination regarding countries not cooperating fully with U.S. antiterrorism efforts.

**9. Cyber Activity and Election Interference**

**a. Malicious Cyber-Enabled Activities**

For background on E.O. 13694 of April 1, 2015, "Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities," see *Digest 2015* at 677-78. Several persons from multiple countries were sanctioned in 2018 pursuant to E.O. 13694.

On March 15, 2018, OFAC designated the following individuals under E.O. 13694 (all linked to Internet Research Agency LLC): Dzheykhun Nasimi Ogly ASLANOV; Anna Vladislavovna BOGACHEVA; Maria Anatolyevna BOVDA; Robert Sergeevich BOVDA; Mikhail Leonidovich BURCHIK; Mikhail Ivanovich BYSTROV; Irina Viktorovna KAVERZINA; Aleksandra Yuryevna KRYLOVA; Vadim Vladimirovich PODKOPAEV; Sergey Pavlovich POLOZOV; Yevgeniy Viktorovich PRIGOZHIN; Gleb Igorevich VASILCHENKO; and Vladimir VENKOV. 83 Fed. Reg. 12,239 (Mar. 20, 2018). At the same time, OFAC designated the following entities under E.O. 13694: INTERNET RESEARCH AGENCY LLC (for tampering with, altering, or causing a misappropriation of information with the purpose or effect

\*\*\* Editor's note: The Treasury department provided additional background on these designations of a network of businesses providing financial support to the Basij Resistance Force (Basij), a paramilitary force subordinate to Iran's Islamic Revolutionary Guard Corps (IRGC), at <https://home.treasury.gov/news/press-releases/sm524>.

of interfering with or undermining election processes or institutions); CONCORD CATERING (linked to INTERNET RESEARCH AGENCY LLC); and LIMITED LIABILITY COMPANY CONCORD MANAGEMENT AND CONSULTING (linked to INTERNET RESEARCH AGENCY LLC). *Id.*

On March 23, 2018, OFAC designated the following individuals pursuant to E.O. 13694: Behzad MESRI; Ehsan MOHAMMADI; Abuzar GOHARI MOQADAM; Abdollah KARIMA; Gholamreza RAFATNEJAD; Roozbeh SABAH; Mohammed Reza SABAH; Mostafa SADEGHI; Seyed Ali MIRKARIMI; and Sajjad TAHMASEBI. 83 Fed. Reg. 13,344 (Mar. 28, 2018). At the same time, the following entity was designated pursuant to E.O. 13694: MABNA INSTITUTE.

On June 14, 2018, OFAC published designations of three individuals pursuant to E.O. 13694: Oleg Sergeevich CHIRIKOV; Vladimir Yakovlevich KAGANSKIY; and Aleksandr Lvovich TRIBUN. 83 Fed. Reg. 27,831 (June 14, 2018). At the same time, OFAC published designations of five entities pursuant to E.O. 13694: DIGITAL SECURITY; EMBED; ERPSCAN; KVANT SCIENTIFIC RESEARCH INSTITUTE (also designated pursuant to section 224(a)(1)(B) of CAATSA); and DIVETECHNOSERVICES. *Id.*

On August 21, 2018, OFAC published designations of two individuals under E.O. 13694: Anton Aleksandrovich NAGIBIN and Marina Igorevna TSAREVA. 83 Fed. Reg. 42,978 (Aug. 24, 2018). OFAC designated two entities under E.O. 13694 at the same time: LACNO S.R.O. and VELA–MARINE LTD. *Id.*

On December 4, 2018, OFAC published the designations of Mohammad GHORBANIYAN and Ali KHORASHADIZADEH pursuant to E.O. 13694 (for involvement in the SamSam ransomware attacks). 83 Fed. Reg. 62,672 (Dec. 4, 2018).

On December 19, 2018, OFAC determined that the property and interests in property subject to U.S. jurisdiction of several persons would be blocked under various authorities, including E.O. 13694. 83 Fed. Reg. 66,840 (Dec. 27, 2018). Two individuals—Elena Alekseevna KHUSYAYNOVA and Alexander Aleksandrovich MALKEVICH—were designated under E.O. 13694, along with four entities—ECONOMY TODAY LLC; FEDERAL NEWS AGENCY LLC; NEVSKIY NEWS LLC; and USA REALLY. *Id.*

On December 20, 2018, Secretary Pompeo and Secretary of Homeland Security Kirstjen Nielsen issued a media note regarding Chinese actors who have compromised global managed service providers. The media note is available at <https://www.state.gov/joint-statement-by-secretary-of-state-michael-r-pompeo-and-secretary-of-homeland-security-kirstjen-nielsen-chinese-actors-compromise-global-managed-service-providers/> and excerpted below.

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Since at least 2014, Chinese cyber actors associated with the Chinese Ministry of State Security have hacked multiple U.S. and global managed service and cloud providers. These Chinese actors used this access to compromise the networks of the providers' clients, including global companies located in at least 12 countries.

The United States is concerned that this activity violates the 2015 U.S.-China cyber commitments made by President Xi Jinping to refrain from conducting or knowingly supporting “cyber-enabled theft of intellectual property, including trade secrets or other confidential business information, with the intent of providing competitive advantages to companies or commercial sectors.” China has also made this commitment with G20 and APEC members as well as in other bilateral statements.

Stability in cyberspace cannot be achieved if countries engage in irresponsible behavior that undermines the national security and economic prosperity of other countries. These actions by Chinese actors to target intellectual property and sensitive business information present a very real threat to the economic competitiveness of companies in the United States and around the globe. We will continue to hold malicious actors accountable for their behavior, and today the United States is taking several actions to demonstrate our resolve. We strongly urge China to abide by its commitment to act responsibly in cyberspace and reiterate that the United States will take appropriate measures to defend our interests.

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**b. Election Interference**

On September 12, 2018, the President issued E.O. 13848, “Imposing Certain Sanctions in the Event of Foreign Interference in a United States Election.” 83 Fed. Reg. 46,843 (Sep. 14, 2018). Among other things, the order requires an assessment of and a report about any election interference and mandates and authorizes certain sanctions in light of the assessment and report.

On September 14, 2018, Secretary Pompeo discussed E.O. 13848 with the media. His remarks are excerpted below and available at <https://www.state.gov/remarks-to-the-media-2/>.

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...[O]n Wednesday, President Trump signed an executive order that made clear that our administration will not tolerate foreign interference in our democratic processes. Elections are the foundation of our democracy, and preserving their integrity is a matter of protecting sovereignty and American national security.

Foreign malicious actors have used information technology and social media to open new fronts in their efforts to undermine our democracy and our core institutions. These actors want to turn Americans against one another and convince us that our institutions, our ideals, are defective. But we are resolved to defeat these efforts and make clear that those who interfere with our liberties will pay a price.

In the last few years, Russia has been particularly aggressive in using its cyber capabilities, disinformation, and other covert means to attempt to sow instability in America. As this executive order makes clear, if Russia or any other foreign government or persons acting on their behalf interfere in the United States election, there will be swift and severe consequences.

The order provides for mandatory sanctions against foreign persons determined to have participated in interference in our elections. It also provides for additional measures that could be capable of devastating or interfering in our country's economy. And if the government of that country authorized, directed, or sponsored, or supported election interference, we're going to come after them.

The State Department will continue to work closely with other agencies to identify ...and expose foreign interference directed against American elections, no matter which entity initiated it. We'll also continue to work with our partners around the world to stand against these threats to democracy wherever—and however—they rear their head.

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## 10. Global Magnitsky Act and Measures Aimed at Corruption and Human Rights Violations

### a. *Global Magnitsky Act and E.O. 13818*

On December 23, 2016, the Global Magnitsky Human Rights Accountability Act (Pub. L. 114–328, Subtitle F) (the “Global Magnitsky Act” or “Act”) was enacted, authorizing the President to impose financial sanctions and visa restrictions on foreign persons in response to certain human rights violations and acts of corruption. The administration is required by the Act to submit a report on implementation of the Act and efforts to encourage other governments to enact similar sanctions. On December 20, 2017, the President issued E.O. 13818, “Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption.” 82 Fed. Reg. 60,839 (Dec. 26, 2017). E.O. 13818 implements and builds upon the Global Magnitsky Act. See *Digest 2017* at 669-71 for background on E.O. 13818.

The report detailing implementation of the Global Magnitsky Act in 2017 was published in the Federal Register on February 2, 2018. 83 Fed. Reg. 4950 (Feb. 2, 2018). Excerpts follow from the report.

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### **Financial Sanctions**

Over the last year, various departments and agencies of the United States Government have actively collected information from multiple sources—including the Intelligence Community, U.S. missions around the world, non-governmental organizations, and Congress—to support sanctions designations under the executive order.

In the executive order, the President issued sanctions and visa restrictions on several persons around the world for human rights abuse or corruption. Simultaneously, the Department of the Treasury issued a number of designations targeting individuals and entities engaged in human rights abuse or corruption or supporting those sanctioned by the President. The Annex and designations issued this year pursuant to the executive order are detailed below:

*Yahya Jammeh:* Yahya Jammeh (Jammeh), the former President of The Gambia who came to power in 1994 and stepped down in 2017, has a long history of engaging in serious

human rights abuses and corruption. Jammeh created a terror and assassination squad called the Junglers that answered directly to him. Jammeh used the Junglers to threaten, terrorize, interrogate, and kill individuals whom Jammeh assessed to be threats. During Jammeh's tenure, he ordered the Junglers to kill a local religious leader, journalists, members of the political opposition, and former members of the government, among others. Jammeh used the Gambia's National Intelligence Agency (NIA) as a repressive tool of the regime—torturing political opponents and journalists. Throughout his presidency, Jammeh routinely ordered the abuse and murder of those he suspected of undermining his authority.

During his tenure, Jammeh used a number of corrupt schemes to plunder The Gambia's state coffers or otherwise siphon off state funds for his personal gain. Ongoing investigations continue to reveal Jammeh's large-scale theft from state coffers prior to his departure. According to The Gambia's Justice Ministry, Jammeh personally, or through others acting under his instructions, directed the unlawful withdrawal of at least \$50 million of state funds. The Gambian Government has since taken action to freeze Jammeh's assets within The Gambia.

Related to Jammeh's designation, the Department of the Treasury also designated *Africada Airways, Kanilai Group International, Kanilai Worni Family Farms Ltd, Royal Africa Capital Holding Ltd, Africada Financial Service & Bureau de Change Ltd, Africada Micro-Finance Ltd, Africada Insurance Company, Kora Media Corporation Ltd, Atlantic Pelican Company Ltd, Palm Grove Africa Dev't Corp. Ltd, Patriot Insurance Brokers Co. Ltd, and Royal Africa Securities Brokerage Co Ltd.*

*Roberto Jose Rivas Reyes:* As President of Nicaragua's Supreme Electoral Council, drawing a reported government salary of \$60,000 per year, Roberto Jose Rivas Reyes (Rivas) has been accused in the press of amassing sizeable personal wealth, including multiple properties, private jets, luxury vehicles, and a yacht. Rivas has been described by a Nicaraguan Comptroller General as "above the law," with investigations into his corruption having been blocked by Nicaraguan government officials. He has also perpetrated electoral fraud undermining Nicaragua's electoral institutions.

*Dan Gertler:* Dan Gertler (Gertler) is an international businessman and billionaire who amassed his fortune through hundreds of millions of dollars' worth of opaque and corrupt mining and oil deals in the Democratic Republic of the Congo (DRC). Gertler has used his close friendship with DRC President Joseph Kabila to act as a middleman for mining asset sales in the DRC, requiring some multinational companies to go through Gertler to do business with the Congolese state. As a result, between 2010 and 2012 alone, the DRC reportedly lost over \$1.36 billion in revenues from the underpricing of mining assets that were sold to offshore companies linked to Gertler. The failure of the DRC to publish the full details of one of the sales prompted the International Monetary Fund to halt loans to the DRC totaling \$225 million. In 2013, Gertler sold to the DRC government for \$150 million the rights to an oil block that Gertler purchased from the government for just \$500,000, a loss of \$149.5 million in potential revenue. Gertler has acted for or on behalf of Kabila, helping Kabila organize offshore leasing companies.

Related to Gertler's designation, the Department of the Treasury designated *Pieter Albert Deboutte, Fleurette Properties Limited, Fleurette Holdings Netherlands B.V., Gertler Family Foundation, Oil of DR Congo SPRL, Jarvis Congo SARL, International Diamond Industries, D.G.D. Investments Ltd., D.G.I. Israel Ltd, Proglan Capital Ltd, Emaxon Finance International Inc., Africa Horizons Investment Limited, Caprikat Limited, Foxwhelp Limited, Caprikat and Foxwhelp SARL, Lora Enterprises Limited, Zuppa Holdings Limited, Orama Properties Ltd, DGI Mining Ltd, and Rozaro Development Limited.*

*Slobodan Testic:* Slobodan Testic (Testic) is among the biggest dealers of arms and munitions in the Balkans; he spent nearly a decade on the United Nations (UN) Travel Ban List for violating UN sanctions against arms exports to Liberia. In order to secure arms contracts with various countries, Testic would directly or indirectly provide bribes and financial assistance to officials. Testic also took potential clients on high-value vacations, paid for their children's education at western schools or universities, and used large bribes to secure contracts. Testic owns or controls two Serbian companies, Partizan Tech and Technoglobal Systems DOO Beograd, and two Cyprus-based companies Grawit Limited and Charso Limited. Testic negotiates the sale of weapons via Charso Limited and used Grawit Limited as a mechanism to fund politicians.

Related to Testic's designation, the Department of the Treasury designated *Preduzece Za Trgovinu Na Veliko I Malo Partizan Tech DOO Beograd- Savski Venac* ("Partizan Tech"), *Charso Limited*, *Grawit Limited*, and *Technoglobal Systems DOO Beograd*.

*Maung Maung Soe:* In his former role as chief of the Burmese Army's Western command, Maung Maung Soe oversaw the military operation in Burma's Rakhine State responsible for widespread human rights abuse against Rohingya civilians in response to attacks by the Arakan Rohingya Salvation Army. The Secretary of State determined on November 22 that the situation in northern Rakhine state in Burma constituted ethnic cleansing. The United States Government examined credible evidence of Maung Maung Soe's activities, including allegations against Burmese security forces of extrajudicial killings, sexual violence, and arbitrary arrest as well as the widespread burning of villages. Security operations have led to hundreds of thousands of Rohingya refugees fleeing across Burma's border with Bangladesh. In August 2017, witnesses reportedly described mass killings and arson attacks by the Burmese Army and Burmese Border Guard Police, both then under Maung Maung Soe's command in northern Rakhine State. In August 2017, soldiers described as being from the Western Command allegedly entered a village and reportedly separated the inhabitants by gender. According to witnesses, soldiers opened fire on the men and older boys and committed multiple acts of rape. Many of the women and younger children were reportedly also shot. Other witnesses described soldiers setting huts on fire with villagers inside.

*Benjamin Bol Mel:* Benjamin Bol Mel (Bol Mel) is the President of ABMC Thai-South Sudan Construction Company Limited (ABMC), and has served as the Chairman of the South Sudan Chamber of Commerce, Industry, and Agriculture. Bol Mel has also served as South Sudanese President Salva Kiir's principal financial advisor, has been Kiir's private secretary, and was perceived within the government as being close to Kiir and the local business community. Several officials were linked to ABMC in spite of a constitutional prohibition on top government officials transacting commercial business or earning income from outside the government.

Bol Mel oversees ABMC, which has been awarded contracts worth tens of millions of dollars by the Government of South Sudan. ABMC allegedly received preferential treatment from high-level officials, and the Government of South Sudan did not hold a competitive process for selecting ABMC to do roadwork on several roads in Juba and throughout South Sudan. Although this roadwork had been completed only a few years before, the government budgeted tens of millions of dollars more for maintenance of the same roads.

Related to Bol Mel's designation, the Department of the Treasury designated *ABMC Thai-South Sudan Construction Company Limited* and *Home and Away LTD*.

*Mukhtar Hamid Shah:* Mukhtar Hamid Shah (Shah) is a Pakistani surgeon specializing in kidney transplants who Pakistani police believe to be involved in kidnapping, wrongful confinement, and the removal of and trafficking in human organs. As an owner of the Kidney Centre in Rawalpindi, Pakistan, Shah was involved in the kidnapping and detention of, and removal of kidneys from, Pakistani laborers. Shah was arrested by Pakistani authorities in connection with an October 2016 incident in which 24 individuals from Punjab were found to be held against their will. Impoverished and illiterate Pakistanis from the countryside were reportedly lured to Rawalpindi with the promise of a job, and imprisoned for weeks. Doctors from the Kidney Centre were allegedly planning to steal their kidneys in order to sell them for a large profit. Police state that one of the accused arrested in connection with the events estimated that more than 400 people were imprisoned in the apartment at various times.

*Gulnara Karimova:* Gulnara Karimova (Karimova), daughter of former Uzbekistan leader Islam Karimov, headed a powerful organized crime syndicate that leveraged state actors to expropriate businesses, monopolize markets, solicit bribes, and administer extortion rackets. In July 2017, the Uzbek Prosecutor General's Office charged Karimova with directly abetting the criminal activities of an organized crime group whose assets were worth over \$1.3 billion. Karimova was also charged with hiding foreign currency through various means, including the receipt of payoffs in the accounts of offshore companies controlled by an organized criminal group, the illegal sale of radio frequencies and land parcels, siphoning off state funds through fraudulent dividend payments and stock sales, the illegal removal of cash, the non-collection of currency earnings, and the import of goods at inflated prices. Karimova was also found guilty of embezzlement of state funds, theft, tax evasion, and concealment of documents. Karimova laundered the proceeds of corruption back to her own accounts through a complex network of subsidiary companies and segregated portfolio funds. Karimova's targeting of successful businesses to maximize her gains and enrich herself in some cases destroyed Uzbek competitors. Due in part to Karimova's corrupt activities in the telecom sector alone, Uzbeks paid some of the highest rates in the world for cellular service.

*Angel Rondon Rijo:* Angel Rondon Rijo (Rondon) is a politically connected businessman and lobbyist in the Dominican Republic who funneled money from Odebrecht, a Brazilian construction company, to Dominican officials, who in turn awarded Odebrecht projects to build highways, dams, and other projects. According to the U.S. Department of Justice, Odebrecht is a Brazil-based global construction conglomerate that has pled guilty to charges of conspiracy to violate the anti-bribery provisions of the Foreign Corrupt Practices Act, and agreed to a criminal fine of \$4.5 billion. In 2017, Rondon was arrested by Dominican authorities and charged with corruption for the bribes paid by Odebrecht.

*Artem Chayka:* Artem Chayka (Chayka) is the son of the Prosecutor General of the Russian Federation and has leveraged his father's position and ability to award his subordinates to unfairly win state-owned assets and contracts and put pressure on business competitors. In 2014, reconstruction of the <sup>1</sup>SEP highway began, and Chayka's competitor for supplying materials to the project suddenly fell under prosecutorial scrutiny. An anonymous complaint letter with a fake name initiated a government investigation against the competitor. Government inspectors did not produce any documents confirming the legality of the inspections, and did not inform subjects of the investigation of their rights. Traffic police were deployed along the route to the competitor, weight control stations were suddenly dispatched, and trees were dug up and left to block entrances. The competitor was forced to shut down, leaving Chayka in a position to non-competitively work on the highway project. Also in 2014, Chayka bid on a state-owned stone

and gravel company, and was awarded the contract. His competitor contested the results and filed a lawsuit. Prosecutors thereafter raided his home. After Chayka's competitor withdrew the lawsuit, prosecutors dropped all charges.

*Gao Yan:* Gao Yan (Gao) was the Beijing Public Security Bureau Chaoyang Branch director. During Gao's tenure, human rights activist Cao Shunli was detained at Beijing Municipal Public Security Bureau Chaoyang Branch where, in March 2014, Cao fell into a coma and died from organ failure, her body showing signs of emaciation and neglect. Cao had been arrested after attempting to board a flight to attend human rights training in Geneva, Switzerland. She was refused visitation by her lawyer, and was refused medical treatment while she suffered from tuberculosis.

*Sergey Kusiuk:* Sergey Kusiuk (Kusiuk) was commander of an elite Ukrainian police unit, the Berkut. Ukraine's Special Investigations Department investigating crimes against activists identified Kusiuk as a leader of an attack on peaceful protesters on November 30, 2013, while in charge of 290 Berkut officers, many of whom took part in the beating of activists. Kusiuk has been named by the Ukrainian General Prosecutor's Office as an individual who took part in the killings of activists on Kyiv's Independence Square in February 2014. Kusiuk ordered the destruction of documentation related to the events, and has fled Ukraine and is now in hiding in Moscow, Russia, where he was identified dispersing protesters as part of a Russian riot police unit in June 2017.

*Julio Antonio Juarez Ramirez:* Julio Antonio Juarez Ramirez (Juarez) is a Guatemalan Congressman accused of ordering an attack in which two journalists were killed and another injured. Guatemalan prosecutors and a UN-sponsored commission investigating corruption in Guatemala allege that Juarez hired hit men to kill Prensa Libre correspondent Danilo Efrain Zapan Lopez, whose reporting had hurt Juarez's plan to run for reelection. Fellow journalist Federico Benjamin Salazar of Radio Nuevo Mundo was also killed in the attack and is considered a collateral victim. Another journalist was wounded in the attack.

*Yankuba Badjie:* Yankuba Badjie (Badjie) was appointed as the Director General of The Gambia's NIA in December 2013 and is alleged to have presided over abuses throughout his tenure. During Badjie's tenure as Director General, abuses were prevalent and routine within the NIA, consisting of physical trauma and other mistreatment. In April 2016, Badjie oversaw the detention and murder of Solo Sandeng, a member of the political opposition. In February 2017, Badjie was charged along with eight subordinates with Sandeng's murder. Prior to becoming Director General, Badjie served as the NIA Deputy Director General for Operations. Prior to becoming a member of the NIA's senior leadership, Badjie led a paramilitary group known as the Junglers to the NIA's headquarters to beat a prisoner for approximately three hours, leaving the prisoner unconscious and with broken hands. The following day, Badjie and the Junglers returned to beat the prisoner again, leaving him on the verge of death.

### **Visa Restrictions**

Although no visa restrictions were imposed under the Act during the first year of its enactment, persons designated pursuant to the executive order may be subject to the visa restrictions articulated in Sec. 2. Sec. 2 contains restrictions pursuant to Presidential Proclamation 8693, which establishes a mechanism for imposing visa restrictions on Specially Designated Nationals and Blocked Persons (SDNs) designated under the executive order and certain other executive orders, as well as individuals designated otherwise for travel bans in UN Security Council resolutions. In addition, the Department of State continues to take action, as appropriate, to implement authorities pursuant to which it can impose visa restrictions on those

responsible for human rights violations and corruption, including Presidential Proclamations 7750 and 8697, and Section 7031(c) of the FY2017 Consolidated Appropriations Act.\* The Department of State continues to make visa ineligibility determinations pursuant to the Immigration and Nationality Act (INA), including Section 212(a)(3)(E) which makes individuals who have participated in acts of genocide or committed acts of torture, extrajudicial killings, and other human rights violations ineligible for visas.

### **Termination of Sanctions**

No sanctions imposed under the Act were terminated.

### **Efforts To Encourage Governments of Other Countries To Impose Sanctions Similar to Those Authorized by the Act**

The United States is committed to encouraging other countries to impose sanctions on a similar basis to those provided for by the Act. The Departments of State and Treasury have consulted closely with United Kingdom and Canadian government counterparts over the last year to encourage development and implementation of statutes similar to the Act by those governments. Both countries have enacted similar laws. The Departments of State and Treasury shared information with various foreign partners regarding sanctions and other actions that might be taken against persons pursuant to the Act, as implemented by the E.O., in parallel with other governments' relevant authorities.

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On June 12, 2018, OFAC designated Felix Ramon Bautista ROSARIO pursuant to E.O. 13818 for corruption, also designating his businesses—Constructora Hadom SA, Constructora Rofi SA, Inmobiliaria Rofi SA, Seymeh Ingenieria SRL, and Soluciones Electricas y Mecanicas Hadom S.R.L. 83 Fed. Reg. 29,615 (June 25, 2018). In the same notice, OFAC designated Hing Bun HIENG under E.O. 13818 for serious human rights abuse.

On June 15, 2018, OFAC designated the following under E.O. 13818: AFRICAN TRANS INTERNATIONAL HOLDINGS B.V.; ALMERINA PROPERTIES LIMITED; FLEURETTE AFRICA RESOURCES; FLEURETTE AFRICAN TRANSPORT B.V.; FLEURETTE ENERGY I B.V.; INTERLOG DRC; IRON MOUNTAIN ENTERPRISES LIMITED; KARIBU AFRICA SERVICES SA; KITOKO FOOD FARM; MOKU GOLDMINES AG; MOKU MINES D'OR SA; ORIENTAL IRON COMPANY SPRL; SANZETTA INVESTMENTS LIMITED; VENTORA DEVELOPMENT SASU. 83 Fed. Reg. 29,616 (June 25, 2018).

On June 29, 2018, OFAC published regulations implementing the Global Magnitsky Act and E.O. 13818. 83 Fed. Reg. 30,541 (June 29, 2018).

On July 5, 2018, the State Department announced designations under the Global Magnitsky Act of three Nicaraguans involved in serious human rights abuse or engaged in corruption: Francisco Javier Diaz Madriz (commander of Nicaragua's National Police); Fidel Antonio Moreno Briones (leader of Sandinista Youth and pro-government armed groups); and Jose Francisco Lopez Centeno (Vice President of ALBANISA, the President of Petronic, and the Treasurer of the ruling FSLN party). See State Department press statement, available at <https://www.state.gov/global-magnitsky-designations-for->

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\* Editor's note: The provision originally enacted in the FY2017 appropriations act has been continued in every subsequent appropriations act for the Department of State.

[nicaragua/](https://www.state.gov/senior-administration-officials-previewing-global-magnitsky-designations/). The Department also held a briefing by senior administration officials regarding the Global Magnitsky designations. The transcript is excerpted below and available at <https://www.state.gov/senior-administration-officials-previewing-global-magnitsky-designations/>.

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[T]oday's actions are in connection with the horrific activities that we're seeing in Nicaragua. The United States is deeply concerned about the ongoing crisis in Nicaragua, and the violence perpetrated by security forces against demonstrators. The Nicaraguan Government's violent response has included beatings of journalists, attacks against local TV and radio stations, and assault on mothers mourning the death of their children.

And so at the Treasury Department, in coordination with our State Department colleagues, we are taking immediate action to address the serious abuses of human rights and corruption in Nicaragua under our Global Magnitsky authorities. Specifically, today Treasury's Office of Foreign Assets Control, or OFAC, is designating three individuals—two for their involvement in serious human rights abuse or being the leader of an organization involved in serious human rights abuses, and one for corruption. Specifically, we are designating Francisco Javier Diaz Madriz, who's the commissioner of Nicaragua's National Police, or NNP, and has been referred to as the de facto head director of day-to-day business of the NNP. Under Diaz's command, the NNP has engaged in serious human rights abuse against the people of Nicaragua, including extrajudicial killings.

As an example, in June, masked gunmen, accompanied by individuals identified by witnesses as Nicaraguan police, reportedly set fire to a family home in Managua, killing six, including two young children. When neighbors attempted to help, the police allegedly shot at them, preventing the would-be rescuers from reaching the family. The Nicaraguan police have also approached gang leaders in Nicaragua for support in attacking anti-government protesters and have been accused of indiscriminately firing on and killing peaceful protesters.

We are also designating Fidel Antonio Moreno Briones, who serves as the main link between municipal governments and the Sandinista National Liberation Front, or FSLN, and has also acted as a leader of the Sandinista Youth, their youth organization. The Sandinista Youth has been implicated in numerous serious human rights abuses related to the ongoing protests against the Nicaraguan Government, including the beating of protesters in April 2018, and alleged participation in that June attack that killed the family of six in Managua. Moreno has been personally implicated in ordering attacks on protesters as far back as 2013, when elderly and young people who were peacefully protesting reduced retirement pensions were violently dislodged from their encampment by members of the Sandinista Youth. Moreno has also been accused of stealing large sums of money from Managua municipal projects and using municipal funds to pay for FSLN's party activities.

Finally, but very importantly, we are designating Jose Francisco Lopez Centeno. He is the vice president of Albanisa, the company that imports and sells Venezuelan petroleum products. He's also the president of the Nicaraguan state-owned oil company, Petronic. Lopez has used his position to benefit himself and his family, including using companies they own to

win government contracts. As described in our press release, Lopez has had access to large amounts of funds collected by the government in the form of taxes and fines that he could exploit, including for the personal use of Nicaraguan leaders. When involved in infrastructure projects, Lopez would siphon funds by negotiating personal fees, has placed numerous individuals throughout the government who have helped him steal millions of dollars on an annual basis, and has used his position to his and his family's benefit by using companies they own to win government contracts.

With this action, the United States is targeting the horrendous human rights abuses and corruption perpetrated by the government of Nicaraguan President Daniel Ortega. President Ortega and his inner circle continue to curtail freedoms and enrich themselves while ignoring the Nicaraguan people's calls for the democratic reforms they demand, including free, fair, and transparent elections. This situation is simply unacceptable.

As a result of today's actions, all property and interest in property of those designated by OFAC within U.S. jurisdiction are blocked. Additionally, U.S. persons are generally prohibited from engaging in transactions with blocked persons, including entities 50 percent or more owned by them.

At the Treasury Department, we are continuing to monitor the situation in Nicaragua and we will work to isolate from the U.S. financial system those that engage in serious human rights abuses and corrupt activity. Today's actions in Nicaragua are part of our ongoing effort to curtail human rights abuse and corruption across the globe through the strategic use of our sanctions authorities.

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Very importantly, the Global Magnitsky program's purpose is to disrupt and deter human rights abuse and corruption, promote accountability, and protect and promote and enforce longstanding international norms. We as an interagency in the U.S. Government have taken an expansive view of the implementation of the Global Magnitsky Human Rights Accountability Act. We engage every diplomatic post and bureau here at the State Department. We work very closely with U.S. intelligence and law enforcement communities, very closely with the Department of the Treasury, and also with NGOs and with Congress. In addition, an important step for this program is to build an international group of partners who together can take action against the world's worst human rights abusers and corrupt ...actors. Our objective is to leverage this global tool to pursue tangible and significant consequences for the entire spectrum of those who commit human rights abuse and engage in public corruption.

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I also want to mention we continue to support the Catholic Church-led efforts to advance negotiations to resolve the crisis. As part of that support, we urge full implementation of the June 15th National Dialogue agreement on human rights as a critical component of these negotiations. Finally, we support calls for early, free, fair, and transparent elections. Nicaragua must find a peaceful and democratic way forward from this crisis.

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They were actually two separate actions. The first actions we did on June 7th are the visa restrictions on those Nicaraguan persons that were responsible for some of these human rights abuses and undermining the democracy in Nicaragua. And then this is a separate action that only reinforces the message that we are sending across the board as the U.S. Government.

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... [T]he use of our Global Magnitsky program, it's a very active program for us. We just issued a number of other designations in connection with the DRC, with the DR, and Cambodia about two or three weeks ago, in addition to the numerous other designations that we've had in this program since December, and generally, the hundreds of designations that we've had related to human rights abuses and/or corruption since the beginning of this administration.

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On August 1, 2018, OFAC designated Suleyman SOYLU (a leader or official of Turkey's Ministry of Interior, for serious human rights abuse) and Abdulhamit GUL (a leader or official of Turkey's Ministry of Justice, for serious human rights abuse) pursuant to E.O. 13818. 83 Fed. Reg. 38,763 (Aug. 7, 2018). On August 17, 2018, OFAC designated four individuals—KHIN HLAING, AUNG KYAW ZAW, THURA SAN LWIN, and KHIN MAUNG SOE—and two entities—33RD LIGHT INFANTRY DIVISION OF THE BURMESE ARMY and 99TH LIGHT INFANTRY DIVISION OF THE BURMESE ARMY—pursuant to E.O. 13818. 83 Fed. Reg. 45,751 (Sep. 10, 2018).

On September 5, 2018, OFAC designated Francisco DIAZ, Fidel MORENO, and Jose Francisco LOPEZ pursuant to E.O. 13818 and the Act. 83 Fed. Reg. 45,754 (Sep. 10, 2018).

On November 2, 2018, OFAC removed the designations under E.O. 13818 of Abdulhamit GUL and Suleyman SOYLU. 83 Fed. Reg. 55,928 (Nov. 8, 2018).

On November 15, 2018, OFAC designated seventeen individuals pursuant to E.O. 13818 for involvement in serious human rights abuse: Mansour Othman M. ABAHUSSAIN; Naif Hassan S. ALARIFI; Fahad Shabib A. ALBALAWI; Meshal Saad M. ALBOSTANI; Thaar Ghaleb T. ALHARBI; Abdulaziz Mohammed M. ALHAWSAWI; Mustafa Mohammed M. ALMADANI; Khalid Aedh G. ALOTAIBI; Badr Lafi M. ALOTAIBI; Mohammad AL-OTAIBI; Saif Saad Q. ALQAHTANI; Waleed Abdullah M. ALSEHRI; Turki Muserref M. ALSEHRI; Mohammed Saad H. ALZHRANI; Maher Abdulaziz M. MUTREB; Saud AL-QAHTANI; Salah Muhammed A. TUBAIGY. 83 Fed. Reg. 58,814 (Nov. 21, 2018). The State Department issued a press statement by Secretary Pompeo on November 15, 2018 regarding the Global Magnitsky sanctions on these individuals for their involvement in the killing of journalist Jamal Khashoggi. The press statement is available at <https://www.state.gov/secretary/remarks/2018/11/287376.htm> and includes the following:

Today, the United States imposed sanctions on seventeen Saudi Arabian individuals for serious human rights abuse resulting from their roles in the killing of Jamal Khashoggi at the Consulate of the Kingdom of Saudi Arabia in Istanbul, Turkey, on October 2. ... At the time of Khashoggi's killing, these individuals occupied positions in the Royal Court and several ministries and offices of the Government of Saudi Arabia.

Our action today is an important step in responding to Khashoggi's killing. The State Department will continue to seek all relevant facts, consult Congress, and work with other nations to hold accountable those involved in the killing of Jamal Khashoggi.

On December 28, 2018, the State Department published in the Federal Register the annual report required by the Global Magnitsky Act, covering implementation of the Act in 2018. 83 Fed. Reg. 67,460 (Dec. 28, 2018). Excerpts follow from the report.

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... As of December 10, 2018, the United States has designated 101 foreign persons (individuals and entities) under E.O. 13818. ...

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Actions taken in 2018 demonstrated the reach, flexibility, and broad scope of Global Magnitsky. The United States responded to an evolving crisis in Nicaragua, promoted accountability for serious human rights abuse constituting ethnic cleansing in Burma, addressed serious human rights abuse and corruption in the Democratic Republic of Congo, the Dominican Republic, Turkey, Cambodia, and Saudi Arabia, and clearly demonstrated the resolve of the Administration to leverage this important tool, when appropriate, to target individuals and entities engaging in specified conduct.

When considering financial sanctions under Global Magnitsky, the United States prioritizes actions that are expected to produce a tangible and significant impact on the sanctioned persons and their affiliates, so as to prompt changes in behavior or disrupt the activities of malign actors. Persons sanctioned pursuant to this authority appear on the Office of Foreign Assets Control's (OFAC) List of Specially Designated Nationals and Blocked Persons (SDN List). As a result of these actions, any property or interests in property of the sanctioned persons within or transiting U.S. jurisdiction is blocked. Additionally, U.S. persons are generally prohibited from engaging in transactions with blocked persons, including entities 50 percent or more owned by designated persons. The Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, imposed financial sanctions on the following persons pursuant to Global Magnitsky:

**Financial Sanctions Imposed**

*1. Felix Ramon Bautista Rosario: Bautista was designated on June 12, 2018, for engaging in corrupt acts, including in relation to reconstruction efforts in Haiti. Bautista is a Senator from the Dominican Republic who has engaged in significant acts of corruption in both the Dominican Republic and Haiti, and who has been publicly accused of money laundering and*

*embezzlement. Bautista has reportedly engaged in bribery in relation to his position as a Senator, and is alleged to have engaged in corruption in Haiti, where he used his connections to win public works contracts to help rebuild Haiti following several natural disasters, including one case where his company was paid over \$10 million for work it had not completed. In a related action, OFAC designated five entities in the Dominican Republic that are owned or controlled by Bautista: Constructora Hadom SA, Soluciones Electricas Y Mecanicas Hadom S.R.L., Seymeh Ingenieria SRL, Inmobiliaria Rofi SA, and Constructora Rofi SA.*

*2. Hing Bun Hieng: Bun Hieng was designated on June 12, 2018, for being the leader of an entity involved in serious human rights abuse. Bun Hieng is the commander of Cambodia's Prime Minister Bodyguard Unit (PMBU), a unit in the Royal Cambodian Armed Forces that has engaged in serious acts of human rights abuse against the people of Cambodia. The PMBU has been implicated in multiple attacks on unarmed Cambodians over the span of many years, including in 2013 at Wat Phnom and in 2015 in front of the National Assembly. In the 2015 incident, only three members of the PMBU were sent to jail after they confessed to participating in an attack on opposition lawmakers, and were promoted upon their release. Bun Hieng and the PMBU have been connected to incidents where military force was used to harass gatherings of protesters and the political opposition going back at least to 1997, including an incident where a U.S. citizen received shrapnel wounds.*

*3. Dan Gertler Affiliated Entities: Dan Gertler was named in the Annex to E.O. 13818 in December 2017, for his role as an international businessman and billionaire who amassed his fortune through hundreds of millions of dollars' worth of opaque and corrupt mining and oil deals in the Democratic Republic of the Congo (DRC). The entities designated on June 15, 2018, for being affiliated with Dan Gertler are as follows: Moku Mines D'or SA, Moku Goldmines AG, Fleurette Energy I B.V., Fleurette Africa Resources I B.V., African Trans International Holdings B.V., Fleurette African Transport B.V., Oriental Iron Company SPRL, Iron Mountain Enterprises Limited, Sanzetta Investments Limited, Almerina Properties Limited, Interlog DRC, Kitoko Food Farm, Karibu Africa Services SA, and Ventora Development Sasu.*

*4. Francisco Javier Diaz Madriz: Diaz was designated on July 5, 2018, for being responsible for, or the leader of entities involved in, serious human rights abuse in Nicaragua. Diaz is a Commissioner of Nicaragua's National Police (NNP) and has been referred to as the de facto head of, and has directed the day-to-day business of, the NNP. Under Diaz's command, the NNP has engaged in serious human rights abuse against the people of Nicaragua, including extrajudicial killings. In June, masked gunmen accompanied by individuals identified by witnesses as Nicaraguan police reportedly set fire to a family home in Managua, killing six, including two young children. When neighbors attempted to help, the police allegedly shot at them, preventing the would-be rescuers from reaching the family. The Nicaraguan police have approached gang leaders in Nicaragua for support in attacking anti-government protesters and have been accused of indiscriminately firing on and killing peaceful protesters.*

*5. Fidel Antonio Moreno Briones: Moreno was designated on July 5, 2018, for being responsible for, or the leader<sup>[SEP]</sup> of entities involved in, serious human rights abuse in Nicaragua. Moreno serves as the main link between municipal governments and the Sandinista National Liberation Front (FSLN), and has also acted as a leader of the Sandinista Youth, the FSLN's youth organization. The Sandinista Youth has been implicated in numerous serious human rights abuses related to the ongoing protests against the Nicaraguan government, including in the beating of protesters in April 2018 and allegedly participating in the June attack that killed a family of six in Managua. Moreno was personally implicated in ordering attacks on protesters as*

far back as 2013, when elderly and young people who were peacefully protesting reduced retirement pensions, were violently dislodged from their encampment by members of the Sandinista Youth. In 2013, Moreno also orchestrated the use of motorcyclists to violently attack individuals protesting the flawed rollout of a Nicaraguan government program, and in early 2017 recruited others to join a group of motorcyclists to take part in measures to counter anti-government marches. Moreno has been accused of stealing large sums of money from Managua municipal projects, as well as using municipal funds to pay for FSLN party activities.

6. *Jose Francisco Lopez Centeno*: Lopez was designated on July 5, 2018, for engaging in corrupt activities. Lopez is the Vice President of ALBANISA, the Nicaraguan company that imports and sells Venezuelan petroleum products, and is President of the Nicaraguan state-owned oil company Petronic. Lopez has had access significant funds collected by the government in the form of taxes and fines that he could exploit, including for the personal use of Nicaraguan leaders. When involved in infrastructure projects, Lopez would syphon funds by negotiating personal fees, has positioned numerous individuals throughout the government who have helped him steal millions of dollars on an annual basis, and has used his position to his and his family's benefit by using companies they own to win government contracts. ALBANISA is 49% owned by Petronic, and 51% owned by Venezuela's national oil company, Petroleos de Venezuela (PDVSA). Senior officials within the Nicaraguan government and the FSLN have used ALBANISA funds to purchase television and radio stations, hotels, cattle ranches, electricity generation plants, and pharmaceutical laboratories.

7. *Abdulhamit Gul*: Gul, the Turkish Minister of Justice, was designated on August 1, 2018, for being the leader of an entity that has engaged in, or whose members have engaged in, serious human rights abuse.

8. *Suleyman Soylu*: Soylu, the Turkish Minister of Interior, was designated on August 1, 2018, for being the leader of an entity that has engaged in, or whose members have engaged in, serious human rights abuse.

9. *Aung Kyaw Saw*: Aug Kyaw Saw was designated on August 17, 2018, for having been the leader of the Bureau of Special Operations (BSO) 3, an entity whose members have engaged in serious human rights abuse during his tenure. As commander of BSO 3, Aung Kyaw Saw controlled military and border guard police operations in Western, Southern, and Southwestern Commands from 2015 to early 2018. Operations in regions controlled by Western Command, were led by his subordinate Maung Maung Soe. The President sanctioned Soe for widespread human rights abuse on December 20, 2017, including military operations in Rakhine State in and after August 2017. Subordinates under his command played leading roles in a crisis in Rakhine State, which included widespread human rights abuses that killed thousands and drove hundreds of thousands of Rohingya to Bangladesh, a situation the Secretary of State concluded constitutes ethnic cleansing.

10. *Khin Maung Soe*: Khin Maung Soe was designated on August 17, 2018, for having been a leader of Military Operations Command (MOC) 15, an entity whose members engaged in serious human rights abuse during his tenure. Members of MOC 15 participated in the Maung Nu massacre on August 27, 2017, and other abuses in Rakhine State. In Maung Nu, soldiers reportedly beat, sexually assaulted, and summarily executed or otherwise killed dozens of Rohingya villagers.

11. *Thura San Lwin*: Thura San Lwin was designated on August 17, 2018, for having been the leader of the Border Guard Police (BGP), an entity whose members have engaged in serious human rights abuse during his tenure. Thura San Lwin commanded the BGP from

October 2016 to October 2017, during which time his subordinates engaged in widespread extrajudicial killings, sexual violence, assault, and other abuses of human rights.

12. *Khin Hlaing*: Khin Hlaing was designated on August 17, 2018, for leading the 99th Light Infantry Division (LID), a military entity whose members engaged in serious human rights abuse during his tenure. The 99th LID participated in abuses, including in November 2016, when 99th LID soldiers in Mong Ko, Shan State, detained ethnic Kachin and Chinese minority villagers. For 13 days, the villagers were forced to serve as human shields by lying down between rows of fences encircling the 99th LID element's outpost. The villagers were forced to stay lying down, exposed to the elements, gunfire, and grenade attacks while 99th LID soldiers sheltered behind them while fighting with militia forces. The 99th LID also engaged in beatings, killings, forced disappearances, and other serious abuses in Shan State.

13. *The Burmese 99th LID*: The 99th LID was designated on August 17, 2018, for engaging in serious human rights abuses. The 99th LID participated in abuses in Mong Ko and elsewhere in Shan State detailed above. In 2017, the 99th LID was deployed to Rakhine State and participated in serious human rights abuses alongside the 33rd LID and other security forces. In one operation in Min Gyi Village, hundreds of men, women, and children were reportedly forced to the nearby river bank where the 99th LID opened fire, executing many of the men, and forced women and girls to nearby houses where they were sexually assaulted. A number of these women and children were later stabbed and beaten, with the houses set on fire while they were inside.

14. *The Burmese 33rd LID*: The 33rd LID was designated on August 17, 2018, for engaging in serious human rights abuse. The 33rd LID participated in abuses in Rakhine State, including the August 27, 2017, operation in Chut Pyin village. This operation included extrajudicial executions, forced disappearances, and sexual violence, as well as firing on fleeing villagers. Hundreds were reportedly killed in this one operation alone. Members of the 33rd LID, along with other security forces, also participated in operations in Inn Din in August and September of 2017. Nearly all of the thousands of Rohingya residing in Inn Din were driven out of the village. Ten Rohingya men and boys were captured, bound, and executed by security forces and militia. Two journalists remain detained for investigating the incident.

15. *Saud Al-Qahtani*: Saud Al-Qahtani was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He is a senior official of the Government of Saudi Arabia who was part of the planning and execution of the operation that led to the killing of Jamal Khashoggi in the Saudi Consulate in Istanbul, Turkey on October 2, 2018.

16. *Maher Mutreb*: Maher Mutreb was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He coordinated and executed the operations resulting in the killing of Jamal Khashoggi in the Saudi Consulate General in Istanbul, Turkey on October 2, 2018.

17. *Salah Tubaigy*: Salah Tubaigy was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.

18. *Meshal Albostani*: Meshal Albostani was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.

19. *Naif Alarifi: Naif Alarifi was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.*

20. *Mohammed Alzahrani: Mohammed Alzahrani was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.*

21. *Mansour Abahussain: Mansour Abahussain was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.*

22. *Khalid Alotaibi: Khalid Alotaibi was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.*

23. *Abdulaziz Alhawsawi: Abdulaziz Alhawsawi was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.*

24. *Waleed Alsehri: Waleed Alsehri was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.*

25. *Thaar Alharbi: Thaar Alharbi was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.*

26. *Fahad Albalawi: Fahad Albalawi was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.*

27. *Badr Alotaibi: Badr Alotaibi was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.*

28. *Mustafa Almadani: Mustafa Almadani was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.*

29. *Saif Alqahtani: Saif Alqahtani was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.*

30. *Turki Alsehri: Turki Alsehri was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. He played a role in the killing of Jamal Khashoggi on October 2, 2018.*

31. *Mohammed Alotaibi: Mohammed Alotaibi was designated on November 15, 2018, for being responsible for, or complicit in, or having directly or indirectly engaged in serious human rights abuse. Alotaibi played a role in the killing of Jamal Khashoggi and, in his capacity as Consul General, oversaw the Consulate General of Saudi Arabia in Istanbul where the killing occurred.*

### **Visa Restrictions Imposed**

Although no visa restrictions were imposed under the Act during 2018, persons designated pursuant to E.O. 13818 shall be subject to the visa restrictions articulated in section 2, unless an exception applies. Section 2 provides that the entry of persons designated under section 1 of the order is suspended pursuant to Presidential Proclamation 8693. In addition, the

Department of State continues to take action, as appropriate, to impose visa restrictions on those responsible for certain human rights violations and corruption pursuant to other authorities, including Presidential Proclamations 7750 and 8697, and Section 7031(c) of the FY2018 Consolidated Appropriations Act. In addition, section 212(a)(3)(E) of the Immigration and Nationality Act renders aliens ineligible for visas if a consular officer has reason to believe that they participated in acts of genocide, torture or extrajudicial killings. The Department of State also continues to share information on an ongoing basis about the operation of Presidential Proclamation 7750 and section 7031(c) with interested governments.

### **Termination of Sanctions**

The Secretary of the Treasury, in consultation with the Secretary of State, terminated financial sanctions on the following persons previously designated for serious human rights abuse:

1. *Abdulhamit Gul*: On November 2, 2018, the Department of the Treasury terminated sanctions with respect to Abdulhamit Gul.
2. *Suleyman Soyly*: On November 2, 2018, the Department of the Treasury terminated sanctions with respect to Suleyman Soyly.

### **Efforts To Encourage Governments of Other Countries To Impose Sanctions Similar to Those Authorized by the Act**

In 2018, the Administration undertook an expansive outreach campaign in Europe, Canada, and the United Kingdom to lay the groundwork for a multilateral, trans-Atlantic human rights sanctions regime. After consulting closely with Canada, the United Kingdom, France, Germany, Spain, The Netherlands, Belgium, Estonia, Lithuania, and the European Union, the Administration has identified champions, partners, and potential spoilers of the objectives established by Congress within the Act. Subsequent to our outreach, the Foreign Ministers of Canada and the Netherlands, and the Prime Minister of the United Kingdom each publicly endorsed the establishment of a human rights sanctions program at the European Union. The United States joins our Canadian, Dutch, and British partners in calling for such a program, and continues to provide both public and private support for this initiative. The Departments of State and Treasury have, over the last year, shared information, coordinated messaging, and provided technical assistance to this end.

\* \* \* \*

### **b. *Visa Restrictions pursuant to Section 7031(c) of the 2017 Consolidated Appropriations Act***

As mentioned in the Magnitsky report, *supra*, the Department of State acts pursuant to multiple authorities to impose visa restrictions on those responsible for certain human rights violations and corruption, including Section 7031(c) of the Department of State's annual appropriations act, originally enacted in the Fiscal Year 2017 appropriations act and continued in subsequent appropriation acts. On February 14, 2018, the State Department announced the designation of former Albanian Prosecutor General (Mr.) Adriatik Llalla under Section 7031(c) due to his involvement in significant corruption. As explained in the media note, available at <https://www.state.gov/public-designation-of-adriatik-llalla-under-section-7031c-of-the-fy-2017-consolidated-appropriations-act/>:

Section 7031(c) provides that, in cases where the Secretary of State has credible information that foreign officials have been involved in significant corruption or gross violations of human rights, those individuals and their immediate family members are ineligible for entry into the United States. The law also requires the Secretary of State to publicly or privately designate such officials and their family members. In addition to the designation of Mr. Llalla, the Secretary is also publicly designating Mr. Llalla's spouse, Ardjana Llalla, his daughter, Eni Llalla, and his other, non-U.S. citizen child.

On April 16, 2018, the State Department announced in a media note that it was designating Albanian Member of Parliament Mr. Tom Doshi under Section 7031(c), due to his involvement in significant corruption. As explained in the media note, available at <https://www.state.gov/public-designation-of-tom-doshi-under-section-7031c-of-the-fy-2017-consolidated-appropriations-act/>: "In addition to the designation of Mr. Doshi, the Department is also publicly designating Mr. Doshi's spouse, Xhovana Doshi, his adult daughter, Briana Doshi, his adult son, James Doshi, and his minor children."

On June 12, 2018, the State Department announced the designation of Dominican Republic Senator Felix Ramon Bautista Rosario under Section 7031(c) along with his spouse, Sarah Haydee Rojas Pena, their minor children, and his other children including Felix Ramon Bautista Abreu, Felix Jose Bautista Abreu, Felix Augusto Bautista Abreu, Felix Miguel Bautista Soler, Felix Fidel Bautista Grullon, and Yanilssa Bautista Bencosme. The media note announcing the designation is available at <https://www.state.gov/public-designation-of-dominican-republic-senator-felix-bautista-under-the-fy-2018-department-of-state-foreign-operations-and-related-programs-appropriations-act-div-k-p-l-115-141/>.

On June 21, 2018, the State Department announced the designation of several senior officials from the Democratic Republic of Congo ("DRC") under Section 7031(c) due to their involvement in significant corruption related to the DRC's electoral process. See State Department media note, available at <https://www.state.gov/designation-of-senior-officials-from-the-democratic-republic-of-congo-drc/>.

On September 10, 2018, the State Department announced the designation of Nikola Spiric under Section 7031(c) for his involvement in significant corruption. See State Department media note, available at <https://www.state.gov/public-designation-of-nikola-spiric-under-section-7031c-of-the-department-of-state-foreign-operations-and-related-programs-act-of-2018/>. The media note explains that Spiric:

engaged in and benefited from public corruption, including the acceptance of improper benefits in exchange for the performance of public functions and interference with public processes, during his tenure as a member of the House of Representatives in Bosnia and Herzegovina.

The Department also designated Mr. Spiric's spouse, Nada Spiric, his son, Aleksandar Spiric, and his daughter, Jovana Spiric.

On December 10, 2018, the State Department designated former president of The Gambia, Yahya Jammeh, under Section 7031(c), as well as Jammeh's spouse, Zineb Yahya Jammeh, his daughter, Mariam Jammeh, and his son, Muhammad Yahya Jammeh. The media note making public the designations is available at <https://www.state.gov/public-designation-of-the-gambias-yahya-jammeh/>.

On December 12, 2018, the State Department designated the President of Nicaragua's Supreme Electoral Council, Roberto Jose Rivas Reyes, under Section 7031(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act of 2018. The media note making public the designation, available at <https://www.state.gov/public-designation-due-to-significant-corruption-of-nicaraguas-roberto-jose-rivas-reyes/>, also relates that Rivas had previously been designated in December 2017 under E.O. 13818. The Department also publicly designated Mr. Rivas' spouse, Ileana Patricia Lacayo Delgado de Rivas.

On December 18, 2018, the Department announced the designation of Goran Radosavljevic of Serbia under Section 7031(c), due to his involvement in gross violations of human rights. The media note announcing the designation, which is available at <https://www.state.gov/public-designation-of-goran-radosavljevic-under-section-7031c-of-the-fy-2018-department-of-state-foreign-operations-and-related-programs-appropriations-act/>, explains: "Radosavljevic was credibly implicated in the 1999 murder of the Bytyqi brothers, three Albanian-American brothers killed in Serbia after the Kosovo War." The media note also announced the designation of family members, Mr. Radosavljevic's spouse, Svetlana Radosavljevic, and his daughter, Ana Radosavljevic.

## **11. Targeted Sanctions Relating to Threats to Democratic Process and Restoration of Peace, Security, and Stability**

### ***a. Nicaragua***

On November 27, 2018, the President issued E.O. 13851, "Blocking Property of Certain Persons Contributing to the Situation in Nicaragua." 83 Fed. Reg. 61,505 (Nov. 29, 2018). The order responds to

the violent response by the Government of Nicaragua to the protests that began on April 18, 2018, and the Ortega regime's systematic dismantling and undermining of democratic institutions and the rule of law, its use of indiscriminate violence and repressive tactics against civilians, as well as its corruption leading to the destabilization of Nicaragua's economy.

Also on November 27, 2018, OFAC identified Rosario Maria Murillo De Ortega as an official of the Government of Nicaragua and Nestor Moncada Lau, as having acted on behalf of Rosario Maria Murillo De Ortega, and designated them pursuant to the new E.O. 13851. 83 Fed. Reg. 62,401 (Dec. 3, 2018). The State Department issued a media

note regarding the designations of these associates of Nicaraguan President Ortega. The note is available at <https://www.state.gov/the-united-states-sanctions-two-close-associates-of-nicaraguan-president-ortega/> and includes the following:

Today, President Trump signed an Executive Order (E.O.) designed to counter the worst abuses of the Ortega regime in Nicaragua, including its dismantling of democratic institutions and serious human rights violations and abuses. The E.O. is a new U.S. tool to expose and promote accountability of those responsible for the abuses taking place in Nicaragua, in support of the people of Nicaragua in their continued calls for democracy and rule of law. This action sends a clear signal that the United States will not tolerate the exploitation of the people and public resources of Nicaragua for private gain.

Pursuant to the E.O., the United States imposed financial sanctions on Nicaraguan President Daniel Ortega's closest associates, namely the Vice President of Nicaragua, Rosario Maria Murillo De Ortega (Murillo), and Nestor Moncada Lau (Moncada), who has acted as a national security advisor to Nicaragua's President and Vice President.

Now is the time for those within the ruling party to change their ways and for the private sector to make their voices heard in support of democratic reforms and an end to violence. Attacks and threats against peaceful protestors and the general population violate the human rights of the Nicaraguan people, and must cease. Those who remain silent or are otherwise complicit may face significant consequences as all officials of the Government of Nicaragua and private sector actors who continue to aid and abet the Ortega regime's repression could be subject to the sanctions outlined in the Executive Order.

Excerpts follow from E.O. 13851.

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\* \* \* \*

**Section 1.** (a) All property and interests in property 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 any United States person of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

(i) to be responsible for or complicit in, or to have directly or indirectly engaged or attempted to engage in, any of the following:

- (A) serious human rights abuse in Nicaragua;
- (B) actions or policies that undermine democratic processes or institutions in Nicaragua;
- (C) actions or policies that threaten the peace, security, or stability of Nicaragua;
- (D) any transaction or series of transactions involving deceptive practices or corruption by, on behalf of, or otherwise related to the Government of Nicaragua or a current or former official of the Government of Nicaragua, such as the misappropriation of public assets or

expropriation of private assets for personal gain or political purposes, corruption related to government contracts, or bribery;

(ii) to be a leader or official of an entity that has, or whose members have, engaged in any activity described in subsection (a)(i) of this section or of an entity whose property and interests in property are blocked pursuant to this order;

(iii) to be an official of the Government of Nicaragua or to have served as an official of the Government of Nicaragua at any time on or after January 10, 2007;

(iv) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of:

(A) any activities described in subsection (a)(i) of this section; or

(B) any person whose property and interests in property are blocked pursuant to this order; or

(v) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order. (b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, 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 date of this order.

**Sec. 2.** The unrestricted immigrant and nonimmigrant entry into the United States of aliens determined to meet one or more of the criteria in section 1 of this order would be detrimental to the interests of the United States, and the entry of such persons into the United States, as immigrants or nonimmigrants, is hereby suspended, except where the Secretary of State determines that the person's entry is in the national interest of the United States. Such persons shall be treated as persons covered by section 1 of Proclamation 8693 of July 24, 2011 (Suspension of Entry of Aliens Subject to United Nations Security Council Travel Bans and International Emergency Economic Powers Act Sanctions).

\* \* \* \*

**b. Burma**

See *Digest 2016* at 658-60 regarding termination of the national emergency with respect to Burma that provided the foundation for the Burma sanctions program. As a result of that termination, OFAC removed from the Code of Federal Regulations the Burmese Sanctions Regulations. 82 Fed. Reg. 27,613 (June 16, 2017).

While continuing to support the democratic transition in Burma, the United States also expressed concern with human rights abuses endured by Rohingya in Rakhine State. On June 25, 2018, the State Department issued a press statement offering support for Burma sanctions by Canada and the European Union. The press statement, available at <https://www.state.gov/support-for-canada-and-european-union-sanctions-regarding-burma/>, includes the following:

The Department of State is working closely with our allies and partners to promote accountability for those responsible for the ethnic cleansing in Rakhine State, and for serious human rights abuses against members of other minority

groups, including in Kachin and Shan States. To that end, we have taken a number of steps, including: ceasing issuance of visas to current and former senior leaders of the Burmese military; assessing that there is credible information implicating all military units and officers involved in operations in northern Rakhine State, as well as their full chain of command, in the commission of gross violations of human rights, such that those units and individuals are ineligible to receive U.S. assistance; and supporting the mandate of the UN Fact-Finding Mission on Burma. In December of 2017, the President sanctioned former Western Command Major General Maung Maung Soe for his role in the events related to the ethnic cleansing of the Rohingya, and publicly discussed the possibility of further targeted sanctions, among other actions, against those responsible for human rights abuses.

**c. Sudan**

Effective June 29, 2018, OFAC removed regulations regarding sanctions on Sudan because of determinations by the Executive Branch that sanctions under relevant executive orders should be lifted. 83 Fed. Reg. 30,539 (June 29, 2018). The Federal Register notice of the action includes the background excerpted below.

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On November 3, 1997, the President issued Executive Order 13067, “Blocking Sudanese Government Property and Prohibiting Transactions With Sudan” (E.O. 13067) ...

On July 1, 1998, OFAC issued the Sudanese Sanctions Regulations, 31 CFR part 538 (SSR), as a final rule to implement E.O. 13067. The SSR were amended on various occasions to, among other things, implement further Executive orders and add additional authorizations.

On April 26, 2006, in Executive Order 13400 (E.O. 13400), the President determined that the conflict in Sudan’s Darfur region posed an unusual and extraordinary threat to the national security and foreign policy of the United States, expanded the scope of the national emergency declared in E.O. 13067 to deal with that threat, and ordered the blocking of property of certain persons connected to the conflict. On May 28, 2009, OFAC issued the Darfur Sanctions Regulations, 31 CFR part 546 (DSR), as a final rule to implement E.O. 13400. On October 13, 2006, the President issued Executive Order 13412 (E.O. 13412) to take additional steps with respect to the national emergency and to implement the Darfur Peace and Accountability Act of 2006, Public Law 109–344, 120 Stat. 1869.

On January 13, 2017, President Obama issued Executive Order 13761, “Recognizing Positive Actions by the Government of Sudan and Providing for the Revocation of Certain Sudan-Related Sanctions” (E.O. 13761). In E.O. 13761, President Obama found that the situation that gave rise to the actions taken in E.O.s 13067 and 13412 related to the policies and actions of the Government of Sudan had been altered by Sudan’s positive actions over the prior six months. These actions included a marked reduction in offensive military activity, culminating in a pledge

to maintain a cessation of hostilities in conflict areas in Sudan, and steps toward the improvement of humanitarian access throughout Sudan, as well as cooperation with the United States on addressing regional conflicts and the threat of terrorism. Given these developments, and in order to see these efforts sustained and enhanced by the Government of Sudan, President Obama ordered that, effective July 12, 2017, sections 1 and 2 of E.O. 13067 be revoked, and E.O. 13412 be revoked in its entirety, provided that a review before that date determined certain criteria were met.

On July 11, 2017, President Trump issued Executive Order 13804, “Allowing Additional Time for Recognizing Positive Actions by the Government of Sudan and Amending Executive Order 13761” (E.O. 13804). In E.O. 13804, President Trump amended E.O. 13761, extending until October 12, 2017, the review period established by E.O. 13761. This review period provided for the revocation of certain sanctions if the Government of Sudan sustained the positive actions that gave rise to E.O. 13761, including carrying out a pledge to maintain a cessation of hostilities in conflict areas in Sudan; continuing improvement of humanitarian access throughout Sudan; and maintaining its cooperation with the United States on addressing regional conflicts and the threat of terrorism.

On October 11, 2017, the Secretary of State, in consultation with the Secretary of the Treasury, the Director of National Intelligence, and the Administrator of the U.S. Agency for International Development, published notice in the Federal Register stating that the Government of Sudan had sustained the positive actions that gave rise to E.O. 13761. That notice also stated that the Secretary of State had provided to the President the report described in section 10 of E.O. 13761, fulfilling the requirement set forth in E.O. 13761, as amended by E.O. 13804, that make effective the revocation of certain economic sanctions related to Sudan. As such, effective October 12, 2017, pursuant to E.O. 13761, as amended by E.O. 13804, sections 1 and 2 of E.O. 13067 were revoked and E.O. 13412 was revoked in its entirety. As a result of the revocation of these sanctions provisions, U.S. persons are no longer prohibited from engaging in transactions that were previously prohibited solely under the SSR. Consistent with the revocation of these sanctions provisions, OFAC is removing the SSR from the Code of Federal Regulations.

The emergency declared by the President with respect to Sudan in E.O. 13067, and expanded in E.O. 13400, has not been terminated. These authorities remain the basis for the DSR, which remain in effect with respect to Darfur and continues to block the property and interests in property of certain persons connected with the conflict in Darfur.

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On November 7, 2018, the State Department issued a press statement regarding the ongoing U.S.-Sudan cooperative engagement to maintain progress toward stability in Sudan. The press statement is available at <https://www.state.gov/sudan-commits-to-strengthening-cooperation-and-meaningful-reforms/> and appears below. See *Digest 2017* at 675-84 regarding previous U.S. determinations on Sudan’s progress.

Yesterday, during bilateral meetings in Washington, D.C., Deputy Secretary of State John J. Sullivan and the Sudanese Foreign Minister Dirdeiry Mohamed Ahmed discussed the launch of the “Phase II” framework for our bilateral engagement. Phase II is designed to expand our bilateral cooperation, facilitate meaningful reforms to enhance stability in Sudan, and achieve further progress

in a number of areas of longstanding concern. The United States welcomes Sudan's commitment to making progress in key areas. Those key areas include expanding counterterrorism cooperation, enhancing human rights protections and practices, including freedoms of religion and press, improving humanitarian access, ceasing internal hostilities and creating a more conducive environment for progress in Sudan's peace process, taking steps to address certain outstanding terrorism-related claims, and adhering to UN Security Council resolutions related to North Korea. As part of this process, the United States is prepared to initiate the process of rescinding Sudan's designation as a State Sponsor of Terrorism if the determination is made that all of the relevant statutory criteria have been met, and if Sudan makes progress in addressing each of the six key areas of mutual concern prioritized by the Phase II framework. The United States is ready to cooperate with Sudan and to monitor progress as we seek meaningful developments for the benefit of the Sudanese people and the region.

**d. South Sudan**

See Section B.4 *infra* for discussion of U.S. export controls on South Sudan. On May 31, 2018, Ambassador Haley provided the U.S. explanation of vote before the adoption of UN Security Council Resolution 2418, which extended sanctions on South Sudan. Ambassador Haley's remarks are excerpted below and available at <https://usun.state.gov/remarks/8456>.

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...Armed groups, including government forces, are assaulting, robbing, and slaughtering civilians almost every single day. Four million people have been displaced by fighting. Another 2.5 million people have become refugees. And the fighting is getting worse.

\* \* \* \*

The Security Council has not imposed an arms embargo, even though the need is obvious. The Security Council has not sanctioned a single individual since 2015, even as the violence associated with the renewed civil war has killed thousands of people.

The South Sudanese government actually promoted one of the handful of individuals the Council previously sanctioned, to Chief of Defense Forces. This is not just an insult to the Council—this is a farce.

The United States has lost its patience. The status quo is unacceptable. It is long past time for all of us to demand better for the South Sudanese people.

\* \* \* \*

Last December, the parties in South Sudan signed the Agreement on the Cessation of Hostilities. A few days ago, they supposedly recommitted to this agreement with church leaders. So far, these are just words on paper. The parties have violated this agreement from day one. Neither the Intergovernmental Authority on Development nor the African Union ha[s] applied consequences for these violators. What we need now is concrete action by the full international community to hold these warring parties accountable.

The resolution before us today is a modest step in this direction. It extends the sanctions regime for 45 days. It demands that the parties fully adhere to the cessation of hostilities. We hope they seize this opportunity for the sake of the South Sudanese people. This is a resolution we should all support.

\* \* \* \*

On July 13, 2018, Ambassador Haley provided the U.S. explanation of vote before the adoption of UN Security Council Resolution 2428, establishing new sanctions and an arms embargo on South Sudan. Ambassador Haley's remarks are excerpted below and available at <https://usun.state.gov/remarks/8516>.

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\* \* \* \*

...South Sudan's people have endured unimaginable suffering and unspeakable atrocities. Their leaders have failed them. They are desperate to get the most basic food, medicine, and shelter. But above all, they just want the violence to stop.

\* \* \* \*

Today, the United States has introduced a resolution that would impose an arms embargo and new sanctions against some of the people responsible for the violence. The goal of this resolution is simple. If we're going to help the people of South Sudan, we need the violence to stop. And to stop the violence, we need to stop the flow of weapons to armed groups, that they are using to fight each other and to terrorize the people. Stop the weapons, stop the violence. It is a resolution that everyone on this Council should support.

Sadly, the idea of an arms embargo for South Sudan is not a new one. In 2016, the United States proposed it. We certainly should have imposed the embargo at the time, and probably a lot earlier. But the proposal failed. Since then, we can only imagine how many weapons made their way to parties in South Sudan, and how many more people had to die. These are the weapons that armed groups used to shoot fathers in front of their wives and children, to hold up convoys of food aid, or to assault women and girls.

The Security Council had an opportunity to help put a stop to this, but we failed. We carry that burden with us. The United States is determined that we will not turn our backs on South Sudan's people again. We have tried everything to achieve a real ceasefire in South Sudan. We have given the parties many chances to change their behavior and it's impossible to keep track. We have waited, and waited, for negotiations to make a difference. Time passes, but the fighting in South Sudan never stops.

The UN recently came out with a report that looked at violence only from April 16 until May 24 of this year in just one state. Over these six weeks, the UN found that armed forces attacked 40 villages; 120 women and girls were raped or gang-raped; 232 civilians were killed, including 35 children; 25 people were killed by hanging; 63 children, elderly, and people with disabilities were burned alive. Armed groups in South Sudan are literally burning people alive and hanging them from trees. This is barbaric. And again, all of this violence happened over just six weeks in one state.

The irony here is that all of this fighting took place after the parties signed a cessation of hostilities agreement in December. Every few months, it seems, we see announcements that the parties have agreed to a new ceasefire. Sometimes, they even call these ceasefires quote-unquote permanent. These ceasefires have never held. The only certainty about a ceasefire in South Sudan is that the parties will violate them in a few hours.

So the question before us today is quite simple. Why would we possibly want to give the people responsible for this madness more weapons? Why would we give the parties more opportunities to attack the people of South Sudan?

How do we explain to the people of South Sudan that we are willing to let their tormentors get new weapons? More arms for South Sudan cannot be the answer.

We have heard the argument that an arms embargo might undermine the peace process. To be clear, the United States supports the peace process in South Sudan. We want nothing more than to see this dialogue work out.

The arms embargo is a measure to protect civilians and help stop the violence. For negotiations to work, we must end the cycle of broken promises to stick to a ceasefire. Peace in South Sudan will not come by letting the parties get their hands on more weapons. The opposite is true. Supporting an arms embargo will show the parties that we are fed up with the delays and the stalling. It will show our resolve to make life better for the people of South Sudan.

\* \* \* \*

On December 14, 2018, the State Department issued a media note regarding sanctions on three individuals for threatening the peace in South Sudan. The note is available at <https://www.state.gov/r/pa/prs/ps/2018/12/288097.htm> and includes the following:

Today, the United States imposed sanctions on three individuals for their roles in the conflict in South Sudan. Israel Ziv and Obac William Olawo were designated by the Department of Treasury's Office of Foreign Asset Control (OFAC) for being leaders of entities whose actions expanded or extend the conflict in South Sudan. Gregory Vasili was designated by OFAC for actions that have undermined peace, stability, and security in South Sudan. OFAC further designated a total of six entities owned and/or controlled by Ziv and Olawo. The United States is sending a message that the behavior of these persons is unacceptable and contrary to the ongoing and significant U.S. efforts to assist the people of South Sudan and establish a lasting peaceful resolution to the current conflict.

The December 14, 2018 designations appeared in the Federal Register on December 20, 2018. 83 Fed. Reg. 65,395 (Dec. 20, 2018). Dmitry, Ziv, and Olawo were designated under E.O. 13664. *Id.* The entities linked to them and designated under E.O. 13664 at the same time are: GLOBAL IZ GROUP LTD; GLOBAL N.T.M LTD; AFRICANA GENERAL TRADING LTD; CROWN AUTO TRADE; and GOLDEN WINGS AVIATION. *Id.*

**e. *Libya***

On April 19, 2016, the President issued E.O. 13726, “Blocking Property and Suspending Entry into the United States of Persons Contributing to the Situation in Libya.” On February 26, 2018, OFAC designated the following individuals pursuant to E.O. 13726 for involvement in “the illicit exploitation of crude oil or any other natural resources in Libya”: Darren DEBONO; Gordon DEBONO; Fahmi BEN KHALIFA; Ahmed Ibrahim Hassan Ahmed ARAFA; Rodrick GRECH; and Terence MICALLEF. 83 Fed. Reg. 9089 (Mar. 2, 2018). OFAC also designated the following entities at the same time under E.O. 13726: SEABRASS LIMITED; TARA LIMITED; KRAKERN LIMITED; ADJ TRADING LIMITED; MALTA DIRECTORIES LTD.; PETROPARK S.R.L.; HI-LOW PROPERTIES LTD.; MR HANDYMAN LTD; S-CAPE YACHT CHARTER LIMITED; S-CAPE LIMITED; OCEANO BLU TRADING LIMITED; ANDREA MARTINA LIMITED; PETROPLUS LTD; SCOGLITTI RESTAURANT; THE BUSINESS CENTRE LTD.; INOVEST LIMITED; ELEVEN EIGHTY EIGHT LIMITED; MARIE DE LOURDES COMPANY LIMITED; WORLD WATER FISHERIES LIMITED; GORGE LIMITED; TIUBODA OIL AND GAS SERVICES; KB LINES LIMITED; MOTORCYCLE ART LTD.; KB INVESTMENTS LIMITED. *Id.* OFAC also designated vessels that were owned or controlled by one of the designated persons. *Id.* On June 11, 2018, OFAC designated Abd al-Razzak FITWI Musab ABU GREIN, Ermias GHERMAY, Ahmed DABBASHI, Mohamed KOSHLAF, and Abd al-Rahman MILAD pursuant to E.O. 13726. On September 12, 2018, OFAC designated Ibrahim JADHRAN pursuant to E.O. 13726. 83 Fed. Reg. 47,971 (Sep. 21, 2018). On November 19, 2018, OFAC designated Salah BADI, (a.k.a. BADI, Omal Salem Salah; a.k.a. BADI, Saladin; a.k.a. BADI under E.O. 13726. 83 Fed. Reg. 59,448 (Nov. 23, 2018).

On June 7, 2018, the United States welcomed the designation by the UN Security Council’s Libya Sanctions Committee of six individuals for their involvement in human trafficking and smuggling of migrants in Libya. These were the first designations the Committee had made since 2011 and were advanced by the United States along with the Netherlands, France, the United Kingdom, and Germany. The U.S. Mission to the UN press release, available at <https://usun.state.gov/remarks/8474>, includes Ambassador Haley’s statement as follows:

Last fall, images of migrants being sold as slaves in Libya shocked our conscience, and the Security Council vowed to take action. Today’s sanctions send a strong message that the international community is united in seeking accountability for perpetrators of human trafficking and smuggling. There is no place in our world for such abuses of human rights and human dignity.

On September 12, 2018, the UN Security Council's Libya Sanctions Committee and the United States both imposed financial sanctions on Ibrahim Jadhnan, a Libyan militia leader. See State Department media note, available at <https://www.state.gov/the-united-states-and-un-sanction-libyan-militia-leader-ibrahim-jadhran/>. OFAC designated Jadhnan pursuant to E.O. 13726. The media note provides background information on Jadhnan:

In June 2018, forces led by Jadhnan violently attacked and seized control of the Libyan oil ports Ras Lanuf and Al Sidra. This created an economic and political crisis that cost Libya more than \$1.4 billion in revenue and set back efforts to promote political progress and stability in Libya.

On November 5, 2018, U.S. Deputy Permanent Representative to the United Nations Jonathan Cohen delivered remarks after the Security Council adopted resolution 2441 extending sanctions on illicit petroleum exports from Libya and on individuals undermining the political process. His remarks are excerpted below and available at <https://usun.state.gov/remarks/8724>.

Today's vote to renew the mandate authorizing UN Security Council sanctions on illicit petroleum exports from Libya and asset freezes and travel bans on Libyan political spoilers should have been unanimous. It should be sending a clear message to the Libyan people—that we are united behind you and that we on the Security Council will hold Libyan spoilers to account for their actions.

The Security Council unanimously agreed to designate six migrant smugglers earlier this year for their abuses in Libya, which marked the very first time that we've ever used sanctions to respond to migrant trafficking. These criminal gangs cannot operate with impunity, and we remain deeply concerned about the welfare of the migrants they seek to exploit. We also unanimously agreed in September to designate Libyan militia leader Ibrahim Jadhnan for attacking Libya's oil facilities earlier this summer. This should be a warning to others who may try to seize Libya's resources for themselves, and this mandate clearly authorizes the Security Council to act in the future.

On November 19, 2018, the United States and the UN imposed coordinated financial sanctions on Salah Badi, a Libyan militia leader. See State Department media note, available at <https://www.state.gov/the-united-states-and-un-sanction-libyan-militia-leader-salah-badi/>. According to the media note:

In accordance with the UN listing, which the United States, United Kingdom, and France co-sponsored, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) has designated Badi pursuant to Executive Order 13726.

In August 2018, Badi ordered action against rival militias aligned with the Government of National Accord, exacerbating instability in Tripoli. Since 2014, Badi has played a critical role in undermining Libyan peace, security, and

stability. In addition, forces under Badi's command have used Grad rockets in highly populated areas, causing indiscriminate destruction and casualties, including emergency responders and ambulance workers.

**f. *Mid-East Peace Process***

On January 10, 2018, OFAC published its determination to remove the name of one individual—Fathi SHAQAQI—from the SDN list who had been designated pursuant to the executive order issued on January 23, 1995, titled “Prohibiting Transactions with Terrorists Who Threaten to Disrupt the Middle East Peace Process.” 83 Fed. Reg. 1284 (Jan. 10, 2018).

**12. Transnational Crime**

Executive Order 13581, “Blocking Property of Transnational Criminal Organizations,” was signed in 2011. On January 30, 2018, OFAC designated four individuals (Zhao WEI; Guiqin SU; Abbas EBERAHIM; and Nat RUNGTAWANKHIRI) and four entities (ZHAO WEI TCO; KINGS ROMANS INTERNATIONAL (HK) CO., LIMITED; KINGS ROMANS INTERNATIONAL INVESTMENT CO. LIMITED; and KING ROMANS COMPANY LIMITED) pursuant to E.O. 13581. 83 Fed. Reg. 5159 (Feb. 5, 2018). On April 18, 2018, OFAC designated Nasif BARAKAT (an individual) and the BARAKAT TRANSNATIONAL CRIMINAL ORGANIZATION (an entity) pursuant to E.O. 13581. 83 Fed. Reg. 17,897 (Apr. 24, 2018). On October 2, 2018, OFAC designated four individuals (Utao MORIO; Chikara TSUDA; Yasuo TAKAGI; and Katsuaki MITSUYASU) and two entities (K.K. YAMAKI and TOYO SHINYO JITSUGYO K.K.) pursuant to E.O. 13581. 83 Fed. Reg. 50,440 (Oct. 5, 2018)

**B. EXPORT CONTROLS**

**1. Wassenaar Arrangement**

On October 24, 2018, the United States took steps to implement changes to the Wassenaar Arrangement (“WA”) control lists that were approved at a December 2017 meeting of the WA Plenary. 83 Fed. Reg. 53,742 (Oct. 24, 2018). As explained in the notice in the Federal Register regarding corresponding updates to the U.S. Export Administration Regulations (“EAR”):

The Wassenaar Arrangement (Wassenaar or WA) (<http://www.wassenaar.org/>) on Export Controls for Conventional Arms and Dual-Use Goods and Technologies is a group of 42 like-minded states committed to promoting responsibility and transparency in the global arms trade, and preventing destabilizing accumulations of arms. As a Participating State, the United States has committed to controlling for export all items on the WA control lists. The lists were first established in 1996 and have been revised annually thereafter. Proposals for changes to the WA control lists that achieve consensus are approved by

Participating States at annual plenary meetings. Participating States are charged with implementing the agreed list changes as soon as possible after approval. The United States' implementation of WA list changes ensures U.S. companies have a level playing field with their competitors in other WA Participating States.

## 2. Debarments

On April 25, 2018, the State Department provided public notice of the debarment of 168 individuals and entities for violating the Arms Export Control Act ("AECA"). The State Department media note announcing the debarment is available at <https://www.state.gov/u-s-department-of-state-debars-168-persons-for-violating-or-conspiring-to-violate-the-arms-export-control-act/>. The media note explains:

This action, as required by section 127.7(b) of the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120-130), highlights the Department's responsibility to protect U.S. defense articles, including technical data, and defense services from unauthorized exports and brokering.

This notice is provided for purposes of making the public aware that these statutorily debarred persons are prohibited from participating directly or indirectly in activities regulated by the ITAR. This includes any brokering activities and any export from or temporary import into the United States of defense articles, related technical data, or defense services in any situation covered by the ITAR.

The Department's Office of Defense Trade Controls Compliance in the Bureau of Political-Military Affairs, working in collaboration with the Department of Justice and the Federal Bureau of Investigation, and the Department of Homeland Security's Office of Homeland Security Investigations, identified the persons subject to statutory debarment based on their criminal conviction by a court of the United States.

The Federal Register notice identifies the 168 persons. 83 Fed. Reg. 18,112 (Apr. 25, 2018).

## 3. Export Controls on South Sudan

See section A.5.c, *supra*, for export controls on the DPRK related to its proliferation activities and section A.9.a and A.9.b, *supra*, for export controls on Russia related to its use of chemical weapons and its actions in Ukraine. On February 2, 2018, the State Department issued a press statement announcing U.S. arms restrictions on South Sudan. The statement is excerpted below and available at <https://www.state.gov/u-s-arms-restrictions-on-south-sudan/>.

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\* \* \* \*

The United States is appalled by the continuing violence in South Sudan that has created one of Africa's worst humanitarian crises. The government and armed opposition, despite signing the December 21 Agreement on the Cessation of Hostilities and ongoing efforts by the Intergovernmental Authority on Development (IGAD) to advance peace—and despite the suffering of their own people—have continued the use of military force to seek political advantage.

As a result of the conflict, 1.5 million people are now on the brink of famine, despite enormous efforts by the United States and other donors since the conflict began in 2013 to stave off famine and save lives. Approximately 2.4 million South Sudanese have fled as refugees to neighboring countries and 1.9 million South Sudanese are internally displaced. The government and armed opposition have continued offensive military actions, and the government obstructs the UN peacekeeping mission from fulfilling its mandate. Aid workers—at least 95 since the current conflict started in December 2013—continue to be killed trying to help the victims of the warring parties' actions. In response to this continued violence and brutality against civilians and humanitarian workers, the United States is enacting restrictions on arms transfers with South Sudan.

Specifically, the Department of State will amend the International Traffic in Arms Regulations to update the defense trade policy toward South Sudan by application of a policy of denial, with limited exceptions, on the export of defense articles and defense services to South Sudan, including all parties involved in the conflict.

We urge all countries, including South Sudan's neighbors, to promote peace and save innocent lives by cutting off the flow of defense articles and defense services to South Sudan and to halt support to actors who are working to destabilize the country. We encourage IGAD and the African Union to consider sanctions measures against those who undermine the peace process.

Additionally, the United States is seeking support for a UN Security Council embargo on all arms flows into South Sudan and we urge all UNSC members to join us in supporting this action. The message must be clear—the United States, the region, and the international community will not stand idly by as innocent South Sudanese civilians are murdered. We will continue to take actions against those who foment violence and obstruct the peace process.

\* \* \* \*

On March 21, 2018, the State Department announced the addition of fifteen South Sudanese oil-related entities to the Department of Commerce's Entity List. The press statement regarding the action is available at <https://www.state.gov/u-s-adds-south-sudanese-oil-entities-to-department-of-commerce-entity-list/> and excerpted below.

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Today, the United States is taking action against fifteen South Sudanese oil-related entities whose revenues have contributed to the ongoing crisis in South Sudan. This action reflects the U.S. commitment to doing all it can to protect the innocent people of South Sudan.

By placing these entities on the U.S. Department of Commerce's Entity List, the United States will impose a license requirement on all exports, re-exports, and transfers of any U.S.-origin items to those entities. ...

The listed entities are a source of substantial revenue for the Government of South Sudan. Unfortunately, the South Sudanese Government, and corrupt official actors, use this revenue to purchase weapons and fund irregular militias that undermine the peace, security, and stability of South Sudan rather than support the welfare and current emergency food needs of the South Sudanese people. We call on the region and broader international community to join us in limiting the financial flows that fuel the continuing violence in the country.

The Government of South Sudan can do better. The United States expects it, as well as the armed opposition, to fulfill their commitments to the Intergovernmental Authority on Development (IGAD) and to their own people to cease hostilities, allow unimpeded humanitarian access, and pursue a negotiated peace in good faith. As the largest donor of aid to South Sudan, the United States is proud to uphold humanitarian values and deliver vital assistance. The Government of South Sudan must not squander that generosity and should take concrete steps to provide for the vast needs of the South Sudanese people.

Today's actions are part of our ongoing effort to hold to account those who foment violence, commit human rights violations, obstruct the peace process, or engage in illicit financial activities against the interest of the South Sudanese people. We remain prepared to take additional actions, including sanctioning those who threaten the peace and security of South Sudan.

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#### **4. Export Control Litigation**

##### **a. FLIR Systems**

On April 25, 2018, the State Department announced that it had concluded an administrative settlement with FLIR Systems, Inc. of Wilsonville, Oregon, to resolve alleged violations of the AECA and ITAR. The media note regarding the settlement is available at <https://www.state.gov/u-s-department-of-state-concludes-30-million-settlement-of-alleged-export-violations-by-flir-systems-inc/> and includes the following:

The U.S. Department of State and FLIR have reached an agreement pursuant to ITAR § 128.11 to address alleged unauthorized exports of defense articles, including technical data; the unauthorized provision of defense services; violation of the terms of provisos or other limitations of license authorizations; and the failure to maintain specific records involving ITAR-controlled transactions. FLIR's alleged unauthorized exports also included the retransfer of ITAR-controlled technical data and provision of defense services to dual national employees of Iran, Iraq, Lebanon, and Cuba to which the United States restricts exports of defense articles and defense services.

... FLIR will pay a civil penalty of \$30,000,000. The Department has agreed to suspend \$15,000,000 of this amount on the condition that the funds have or

will be used for Department-approved Consent Agreement remedial compliance measures. Also, FLIR must hire an external Designated Official to oversee the Consent Agreement, which would require the company to conduct two external audits to assess and improve its compliance program during the Agreement term as well as implement additional compliance measures.

**b. Defense Distributed**

On July 31, 2018, the United States filed its brief in opposition to the motion for a temporary restraining order (“TRO”) brought by several U.S. states against the U.S. government seeking to block the implementation of a settlement agreement reached by the United States and Defense Distributed. *State of Washington et al. v. U.S. Department of State et al.*, No. 2:18-cv-1115-RSL (W.D. Wa.). See *Digest 2016* at 668-675 for background on *Defense Distributed v. U.S. Dept. of State*. The court granted the TRO on July 31, 2018 and plaintiffs then sought a preliminary injunction. On August 15, 2018, the federal defendants filed their opposition to the motion for a preliminary injunction, reiterating the arguments made in their brief in opposition to the motion for a TRO. Excerpts below from the brief in opposition to the TRO summarize the settlement provisions permitting publication of technical data and explain why domestic concerns about 3D printing of firearms are not within the purview of the State Department’s regulation of munitions exports. The brief in opposition to the TRO as well as the brief in opposition to the preliminary injunction are available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

On August 27, 2018, the court granted the preliminary injunction, reasoning that plaintiffs had shown a likelihood of success on their Administrative Procedure Act (“APA”) claim. Defense Distributed and the other plaintiffs in the case in federal district court in Texas (which had been dismissed due to the settlement) then sought to amend the judgment in that case. The federal defendants filed their opposition to that motion to amend on September 12, 2018.

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**II. The Government’s Settlement With Defense Distributed**

In 2012, Defense Distributed published on the Internet “privately generated technical data regarding a number of gun-related items.” *Def. Distributed v. Dep’t of State*, 121 F. Supp. 3d 680, 687 (W.D. Tex. 2015). In May of 2013, DDTTC [the Department’s Directorate of Defense Trade Controls] sent Defense Distributed a letter stating that Defense Distributed may have released [International Traffic in Arms Regulations or] ITAR-controlled technical data without the required authorization. *See id.* Defense Distributed removed the technical data and submitted a CJ request. *Id.* [In certain cases where it is unclear whether a particular item is a defense article or defense service, the Department makes a “commodity jurisdiction” (“CJ”) determination using a procedure set forth in the ITAR.] The company, however, and in conjunction with another non-profit, the Second Amendment Foundation, ultimately brought a lawsuit against, *inter alia*, the

Department and DDTC, claiming that the requirement to obtain authorization prior to publishing the subject files on its website violated the plaintiffs' rights under the First, Second, and Fifth Amendments and exceeded the Department's statutory authority. *Id.* at 688.

In August of 2015, the U.S. District Court for the Western District of Texas denied Defense Distributed's motion for a preliminary injunction. *Id.* at 701. The district court rejected the Government's arguments that "the computer files at issue do not constitute speech and thus no First Amendment protection is afforded" such files, finding that "First Amendment protection is broad" and Defense Distributed's intent to "distribut[e] the files as 'open source'" warranted treating Defense Distributed's publication of the files as speech. *Id.* at 691-92. Applying intermediate scrutiny, the district court then concluded that "because the AECA and ITAR do not prohibit domestic communications" and plaintiffs remained "free to disseminate the computer files at issue domestically," plaintiffs had not shown a substantial likelihood of success on the merits. *Id.* at 695.

The Fifth Circuit affirmed in a split decision. *See* 838 F.3d 451 (5th Cir. 2016). Focusing narrowly on the question of the public interest and the balancing of public and private interests, the panel majority concluded that the "Department's stated interest in preventing foreign nationals ... from obtaining technical data on how to produce weapons and weapon parts" outweighed plaintiffs' interest in their constitutional rights. *Id.* at 458-59. Under controlling Fifth Circuit precedent, the panel majority "declin[ed] to address the merits" because plaintiffs' failure to meet any single requirement for a preliminary injunction would require affirmance of the district court. *See id.* at 456-57 (citing *PCI Transp., Inc. v. Fort Worth & W.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005)). A dissent from the panel opinion did address the merits. *See id.* at 461 (Jones, J. dissenting). "[F]or the benefit of the district court on remand," the dissent set forth an analysis concluding that "the State Department's application of its 'export' control regulations to this domestic Internet posting appears to violate the governing statute, represents an irrational interpretation of the regulations, and violates the First Amendment as a content-based regulation and a prior restraint." *Id.* at 463-64. Quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015), the dissenting opinion explained that the content-based nature of the Government's regulation rendered it Government's regulation "presumptively unconstitutional... justified only if the government proves they are narrowly tailored to serve compelling state interests." 838 F.3d at 468.

After plaintiffs' petitions for rehearing *en banc* and for certiorari were denied, *see* 138 S. Ct. 638 (2018); 865 F.3d 211 (5th Cir. 2017) (5 dissenting judges), proceedings resumed in district court. In April of 2018, the Government moved to dismiss plaintiffs' second amended complaint. *See* Civ. No. 1:15-cv-372-RP (Dkt. No. 92). Although preserving the argument—previously rejected by the district court—that Defense Distributed's Internet posting did not qualify for First Amendment protection, the Government acknowledged that, under *Reed*, strict scrutiny would apply to plaintiffs' claims. *See generally id.* Meanwhile, the district court ordered the parties to exchange written settlement demands, *see* Civ. No. 1:15-cv-372-RP (Dkt. No. 88), thereby initiating a process under which the parties were able to reach a settlement before briefing on the motion to dismiss was complete. *See* Civ. No. 1:15-cv-372-RP (Dkt. Nos. 93, 95).

Pursuant to the settlement and as relevant here, the Government agreed to the following:

(a) Defendants' commitment to draft and to fully pursue, to the extent authorized by law (including the Administrative Procedure Act), the publication in the Federal Register of a notice of proposed rulemaking and final rule, revising USML Category I to exclude the technical data that is the subject of the Action.

(b) Defendants' announcement, while the above-referenced final rule is in development, of a temporary modification, consistent with the ... (ITAR), 22 C.F.R. § 126.2, of USML Category I to exclude the technical data that is the subject of the Action. The announcement will appear on the DDTC website, [www.pmdtdc.state.gov](http://www.pmdtdc.state.gov), on or before July 27, 2018.

(c) Defendants' issuance of a letter to Plaintiffs on or before July 27, 2018, signed by the Deputy Assistant Secretary for Defense Trade Controls, advising that the Published Files, Ghost Gunner Files, and CAD Files are approved for public release (i.e., unlimited distribution) in any form and are exempt from the export licensing requirements of the ITAR because they satisfy the criteria of 22 C.F.R. § 125.4(b)(13). For the purposes of 22 C.F.R. § 125.4(b)(13) the Department of State is the cognizant U.S. Government department or agency, and the Directorate of Defense Trade Controls has delegated authority to issue this approval.

(d) Defendants' acknowledgment and agreement that the temporary modification of USML Category I permits any United States person, to include DD's customers and SAF's members, to access, discuss, use, reproduce, or otherwise benefit from the technical data that is the subject of the Action, and that the letter to Plaintiffs permits any such person to access, discuss, use, reproduce or otherwise benefit from the Published Files, Ghost Gunner Files, and CAD Files.

The parties executed the Settlement Agreement on June 29, 2018, and the Government complied with items (b) and (c) on July 27, 2018.

### **III. Plaintiffs' Lawsuit And Motion For A Temporary Restraining Order**

On July 30, 2018, Plaintiffs—eight States and the District of Columbia—filed the instant action against, *inter alia*, the Department, the Secretary of State, DDTC, and Defense Distributed. Compl., ECF No. 1. Plaintiffs allege that the Government's settlement with Defense Distributed has adversely affected their public safety laws, in violation of the Administrative Procedure Act ("APA") and the Tenth Amendment to the U.S. Constitution. *Id.* at 21-41. They seek declaratory and injunctive relief, including an injunction requiring the rescission of the terms of the Settlement Agreement. *Id.* at 48. Also on July 30, 2018, Plaintiffs moved for a temporary restraining order against Defendants. Mot. for Temporary Restraining Order ("TRO Mot."), ECF No. 2.

\* \* \* \*

Plaintiffs appear to argue that they will be irreparably harmed by Defense Distributed's publication of the subject files because such publication will undermine their ability to enforce their public safety laws. *See* TRO Mot. at 18-23. But neither the facts nor the law support this claim here, where there has been no change in the application of federal law to the distribution of the subject files domestically and where Plaintiffs concede the speculative nature of their harms.

First, the core inadequacy of Plaintiffs' argument is Plaintiffs' fundamental misconception of the relevant law and the authority of the State Department as the federal agency that administers it. The AECA and ITAR have not conferred upon or delegated to the

Department the authority to regulate 3D printing, domestic communications to U.S. persons, or the domestic manufacture of firearms. Rather, as noted above, the agency's authority pursuant to the AECA and ITAR is limited to *exports* of defense articles and related technical data.

Critically, neither the AECA nor ITAR prohibits the transmission of defense articles from one U.S. person to another U.S. person within the United States, and so the Department has never prohibited Defense Distributed, or any other company or individual, from providing technical data to U.S. persons on U.S. soil, including by, *e.g.*, providing such technical data through the mail, distributing DVDs containing such data, or other means. *See Def. Distributed*, 121 F. Supp. 3d at 695 (“Plaintiffs are free to disseminate the computer files at issue domestically in public or private forums, including via the mail or any other medium that does not provide the ability to disseminate the information internationally.”). To the extent Defense Distributed and others have not previously disseminated the computer files at issue within Plaintiffs’ boundaries, such inaction is attributable to their own decisions and not to the Department’s regulatory authority. Plaintiffs therefore cannot plausibly suggest that the Government’s temporary modification of its exercise of export authority has or imminently will cause any harm to Plaintiffs’ ability to enforce their statutory schemes.

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Plaintiffs next challenge the Department’s determination that the temporary modification is consistent with the United States’ national security and foreign policy. ... However, as evidenced by their lack of supporting authority, ... Plaintiffs offer no basis to challenge the Executive Branch’s findings in this regard. *E.g.*, *United States v. Hawkins*, 249 F.3d 867, 873 n.2 (9th Cir. 2001) (“[C]ourts have long recognized that the Judicial Branch should defer to decisions of the Executive Branch that relate to national security.”). Significantly, the Department’s publication of the NPRM reflects the conclusion that the underlying Category I firearms to which the technical data relates do not “provide the United States with a critical military or intelligence advantage” and are not “inherently for a military end use” and thus should be removed from USML Category I.

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**Cross References**

*U.S. Passports invalid for travel to North Korea*, **Ch. 1.A.3**

*Visa regulations and restrictions*, **Ch. 1.B.2**

*Terrorism*, **Ch. 3.B.1**

*Termination of Treaty of Amity with Iran*, **Ch. 4.B.1**

*Leibovitz v. Iran (regarding JCPOA)*, **Ch. 5.A.3**

*Alleged violations of the 1955 Treaty of Amity (ICJ case relating to JCPOA)*, **Ch. 7.B.1**

*Cuba*, **Ch. 9.A.4**

*Russia*, **Ch. 9.A.5**

*Venezuela*, **Ch. 9.A.8**

*Ukraine*, **Ch. 9.B.1**

*Russia-Georgia conflict*, **Ch. 9.B.2**

*Closure of Seattle Consulate of the Russian Federation*, **Ch. 10.C.1.a**

*Venezuela*, **Ch. 10.C.2**

*Venezuelan Navy's actions in Guyana's EEZ*, **Ch. 12.A.3.b**

*Ukraine*, **Ch. 17.B.3**

*Nicaragua*, **Ch. 17.B.6**

*Libya*, **Ch. 17.B.9**

*Burma*, **Ch. 17.C.1**

*Applicability of international law to activities in cyberspace*, **Ch. 18.A.4.d**

*Conventional weapons*, **Ch. 18.B**

*DPRK interdictions*, **Ch. 19.B.3**

*Iran nonproliferation issues*, **Ch. 19.B.4.b**

*Russia nonproliferation issues*, **Ch. 19.B.4.c**

*Chemical weapons in Syria*, **Ch. 19.D.2**

*Russia's use of chemical weapons*, **Ch. 19.D.4**

## CHAPTER 17

### International Conflict Resolution and Avoidance

#### A. MIDDLE EAST PEACE PROCESS

On August 31, 2018, the State Department issued a press statement regarding U.S. assistance to the United Nations Relief and Works Agency for Palestine Refugees (“UNRWA”). The statement is excerpted below and available at <https://www.state.gov/on-u-s-assistance-to-unrwa/>.

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The Administration has carefully reviewed the issue and determined that the United States will not make additional contributions to UNRWA. When we made a U.S. contribution of \$60 million in January, we made it clear that the United States was no longer willing to shoulder the very disproportionate share of the burden of UNRWA’s costs that we had assumed for many years. Several countries, including Jordan, Egypt, Sweden, Qatar, and the UAE have shown leadership in addressing this problem, but the overall international response has not been sufficient.

Beyond the budget gap itself and failure to mobilize adequate and appropriate burden sharing, the fundamental business model and fiscal practices that have marked UNRWA for years—tied to UNRWA’s endlessly and exponentially expanding community of entitled beneficiaries—is simply unsustainable and has been in crisis mode for many years. The United States will no longer commit further funding to this irredeemably flawed operation. ...

Accordingly, the United States will intensify dialogue with the United Nations, host governments, and international stakeholders about new models and new approaches, which may include direct bilateral assistance from the United States and other partners, that can provide today’s Palestinian children with a more durable and dependable path towards a brighter tomorrow.

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On September 10, 2018, the Trump Administration announced the closure of the office of the General Delegation of the Palestine Liberation Organization (“PLO”) in Washington, D.C. based on the PLO’s failure to take steps to advance the Middle East peace process. The State Department’s press statement on the closure of the PLO office follows and is available at <https://www.state.gov/closure-of-the-plo-office-in-washington/>. Notice of the closure appeared in the Federal Register on September 17, 2018. 83 Fed. Reg. 46,990 (Sep. 17, 2018). The action was taken pursuant to legal authorities, including, inter alia, the Antiterrorism Act of 1987 (title X of Pub. L. 100–204), the Foreign Missions Act of 1982 (22 U.S.C. 4301-4316), and the Department of State’s Designation and Determination of June 21, 1994 (U.S. Department of State, Public Notice 2035, 59 FR 37121, 37122 (July 20, 1994)). *Id.*

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The Administration has determined after careful review that the office of the General Delegation of the Palestine Liberation Organization (PLO) in Washington should close. We have permitted the PLO office to conduct operations that support the objective of achieving a lasting, comprehensive peace between Israelis and the Palestinians since the expiration of a previous waiver in November 2017. However, the PLO has not taken steps to advance the start of direct and meaningful negotiations with Israel. To the contrary, PLO leadership has condemned a U.S. peace plan they have not yet seen and refused to engage with the U.S. government with respect to peace efforts and otherwise. As such, and reflecting Congressional concerns, the Administration has decided that the PLO office in Washington will close at this point. This decision is also consistent with Administration and Congressional concerns with Palestinian attempts to prompt an investigation of Israel by the International Criminal Court.

The United States continues to believe that direct negotiations between the two parties are the only way forward. This action should not be exploited by those who seek to act as spoilers to distract from the imperative of reaching a peace agreement. We are not retreating from our efforts to achieve a lasting and comprehensive peace.

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## **B. PEACEKEEPING AND CONFLICT RESOLUTION**

### **1. Afghanistan**

Principal Deputy Assistant Secretary of State for South and Central Asian Affairs Alice G. Wells addressed the United States Institute of Peace on March 9, 2018 regarding the prospect for Afghanistan peace talks. Her remarks are excerpted below.

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... I really want to congratulate the government of Afghanistan on the Second Kabul Process Conference. And I also want to thank, of course, the Afghan, the U.S. and the NATO forces for continuing to ensure the safety of the conference and all that they do, of course, to ensure the safety of Afghanistan.

I believe that the Second Kabul Process Conference was really a landmark event. President Ghani endorsed a dignified path to a political settlement, and put forward a vision of reconciliation that was both credible and detailed. This was a true pan-Afghan overture to the Taliban with President Ghani's partners in the National Unity Government, including Dr. Abdullah and Foreign Minister Rabbani participating, along with members of civil society including women.

The conference was attended by 25 countries, the UN and EU, and a Joint Declaration adopted by consensus showed the strong international support for a vision of peace shared across Afghan society.

It's now up to the Taliban leaders to respond to this serious offer. This is a peace offer that the United States supports and is prepared to facilitate, but we cannot substitute for the direct negotiations that are required between the Afghan government and the Taliban leadership.

Today in my remarks I want to outline this inter-Afghan peace that was offered by the National Unity Government, the U.S. role in a peace process, the Taliban's stated grievances, Pakistan's role, and the benefits of peace. But I'll do it briefly because I'm looking forward to the questions and answers.

I assume that all of you have reviewed President Ghani's remarks. I was struck by the President's description of peace as both a national and religious responsibility. He made clear that there are no preconditions to negotiations while underscoring that the rights of all citizens, especially Afghan women, must be safeguarded.

He discussed the political framework for talks that produce a ceasefire, the Taliban's registration as a political party, and participation in an electoral process. He noted the important signals that were sent by the Hezbi Islami deal, Hekmatyar's return to the political mainstream, the prisoner releases, the delisting, and the demobilization. He discussed the legal framework for peace, which would include a constitutional review through legal mechanisms as well as legal processes for prisoner releases and sanctions release. He suggested methods for reaching peace, such as official recognition of the Afghan government, respect for rule of law, further efforts for government reform and balanced development, the return of Afghan refugees, programs for social development including for refugees and former insurgents, and security measures for all citizens, particularly the reconciling Taliban. And underscoring the need for a dignified process, I think President Ghani also talked about very important elements—an office for the Taliban, a path towards travel documents, being allowed to travel freely, help in the removal of sanctions, access to the media, repatriation for their families.

When it comes to the United States, our conditions-based South Asia Strategy ensures the Taliban cannot win on the battlefield. But it recognizes that a resolution to the conflict will be through a negotiated political settlement.

The recent Taliban letter to the people of the United States I believe misses the point. For eight years the United States has been prepared to support a peace process, but we cannot be a substitute again for the Afghan people and the Afghan government in a negotiation with the

Taliban. The Taliban was at war with the Afghan people long before U.S. military operations began in 2001.

Now obviously, the United States has a direct interest in the resolution of this conflict, and the Taliban have frequently stated the need for all foreign troops to depart Afghanistan as a precondition for negotiations. We are in Afghanistan as a guest of a sovereign Afghan government that's recognized by the United Nations and international community. With our presence enshrined in the Strategic Partnership Agreement, and a Bilateral Security Agreement which were approved by a traditional Loya Jirga, we'll continue our mission so long as a sovereign, independent Afghan government agrees to host us and work with us.

For those Taliban who have grievances, the legitimate path to resolving their concerns is going to be through negotiation. The Afghanistan of 2018 is not the Afghanistan of 2002. The institutional capacity, governance and security are greater. A technocratic, political and economic leadership is emerging.

While the Taliban are part of the social fabric of Afghanistan, they do not speak for all of the Afghan people, and consistently we see that only a small percentage of the population claim sympathy for them.

The United States does not have any hidden agenda or motives in Afghanistan. We acted in self-defense to bring justice to those who plotted the September 11, 2001 attack. Let us not forget that it was the Taliban who repeatedly refused to hand over Osama bin Laden. And to this day, the Taliban retain relations with al-Qaida and a host of other terrorist organizations.

We will remain in Afghanistan as long as it takes to keep it from becoming a terrorist safe haven. We will help the Afghan people [s]ecure their country, and we envision Afghanistan to have friendly, state-to-state relations with all of its neighbors.

We are not in Afghanistan to acquire its natural resources, to impose our own form of government, to prevent the free practice of Islam, or to destabilize the region.

Pakistan has an important role to play in a peace process and in stabilizing Afghanistan. We believe that Pakistan can help change and shape the calculus of the Taliban. We're engaged with Pakistan on how we can work together, as well as address Pakistan's legitimate concerns through a negotiated process. Pakistani officials have long expressed concerns ranging from border management to refugees to terrorism that emanate from ungoverned spaces in Afghanistan. These are issues that need to be addressed during the course of a reconciliation process.

We've not yet seen decisive or sustained changes in Pakistan's behavior, and as a result we suspended our military assistance. But we're not walking away from Pakistan. This relationship is important to us, and we're continuing our intensive dialogue through both our military and our civilian channels to discuss how we can better work together. Just yesterday the Deputy Secretary Sullivan and I met with Foreign Secretary Janjua.

In conclusion, for those Taliban who seek a peaceful, prosperous and just society, now is the time to step up and chart with the government of Afghanistan a new way forward. The majority of Afghan people refuse to return to the oppression and isolation of Taliban rule.

Today nearly 40 percent of Afghans are under the age of 14. The next generation of Afghan leaders are building trade routes, they're establishing business networks, they're studying abroad at top global universities, and they're connecting with the rest of the world through the internet and social media. Afghans are wealthier, healthier, living longer, and are more educated than at any time in recent decades. The Afghan people want peace, but not at the

cost of their own dignity and advancement. The Afghan people want to maintain the constitutional legal system, representative democracy and strong ties to the rest of the world. Ultimately, the United States wants a peaceful Afghanistan that is part of a stable region with strong connections to the international community and the global economy.

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The government of Afghanistan does not recognize the Islamic Emirate of Afghanistan as the Taliban like to call themselves. The Taliban don't recognize the government of Afghanistan. But at the end of a process is where you achieve that mutual understanding. The Taliban have imposed a precondition that I think has made it impossible so far for them to take up what have been sincere offers from the government of Afghanistan. But I see with this proposal, I think we're seeing signs that the Taliban is assessing and analyzing the proposal, and we certainly believe now is the time for the Taliban to put forward its vision of a road map to peace.

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I think it's clear that the Resolute Support Mission is in Afghanistan as a result of the war and of the continued presence of multiple terrorist organizations, which is why we have the additional 3500 troops that are dedicated to counterterrorism operations. You know, if the war goes away and the terrorist groups are defeated obviously the question of presence can be taken up and will be taken up.

But what I would underscore is that this is not an occupying force. This is not a force that has been imposed on the Afghan government. This is a presence, an international presence and a United States presence that has come at the invitation of the government and that has been affirmed in the traditional way by the Afghan people.

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We look forward to participating in the Tashkent Conference which is coming under the aegis of the Kabul Process where again, we will have I think 21 countries gathering in Tashkent on March 25<sup>th</sup> to I think really reaffirm what came out of Kabul and to provide a regional dimension of support for the vision laid out by President Ghani.

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On April 25, 2018, Acting Secretary of State John J. Sullivan issued a statement condemning the Taliban's announcement of a spring offensive. The statement is available at <https://www.state.gov/on-taliban-announcement-of-spring-offensive/>. Acting Secretary Sullivan said:

The announcement affirms the Taliban's responsibility for the insecurity that destroys the lives of thousands of Afghans each year.

President Ghani recently extended an historic invitation for the Taliban to join a peace process, and there is no justification for the announcement of a new

offensive. There is no need for a new “fighting season.” Still, the Taliban announced another campaign of senseless violence targeting the democratically elected and internationally recognized Afghan government and their fellow Afghans.

The United States stands with the Afghan people in response to the Taliban’s announcement. We support the brave Afghan security forces who are standing against the Taliban and terrorist groups that seek to destroy Afghan society. We commend the Afghan people, who are carrying on their lives, raising families, attending universities, building businesses, preparing for elections, and strengthening their communities despite violence and continued bloodshed.

As President Ghani recently said, the Taliban should turn their bullets and bombs into ballots. They should run for office. They should vote. We encourage Taliban leaders to return to Afghanistan from their foreign safe havens and work constructively for Afghanistan’s future. More violence will not bring peace and security to Afghanistan.

On June 7, 2018, the State Department held a special briefing with a senior official regarding the announcement of a temporary ceasefire in Afghanistan. The briefing is excerpted below and available at <https://www.state.gov/senior-state-department-official-on-afghanistan-ceasefire-announcement/>.

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... This offer of a ceasefire and an intent by the Afghan Government and Afghan Security Forces to temporarily suspend offensive operations against the Taliban during the Eid holiday comes in response to a call earlier in the week from the Afghan Ulema for reductions in violence, an end to the violence and the conflict overall, and I think underscores the Afghan Government’s continued commitment to searching for ways to bring this conflict to a close and, in the meantime, to look for ways to reduce its horrible impact on the Afghan people.

We understand that prior to announcing the ceasefire offer, President Ghani consulted with leaders of the prominent organizations and groupings that participated in the jihad against the Soviets and received pretty much unconditional, uniform support from them for this concept. And in so offering this ceasefire opportunity, I think President Ghani is responding to and indeed reflecting the desire of a wide cross-section of Afghans—both geographically, ethnically, and in terms of both urban and rural populations—in desiring to see a reduction in violence and a way forward to an end to the conflict.

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...[W]e believe anything that reduces the violence in Afghanistan, whether it’s temporarily or more importantly in the long term, is a good thing. Now, in this case, we have the Government of Afghanistan expressing a willingness to reduce violence, because frankly most of

the violence in Afghanistan these days comes in response to operations and violence perpetrated by the Taliban or Daesh, by ISIS Khorasan.

With respect to the Taliban, they have an opportunity here to respond to calls from a wide cross-section of Afghans asking for a reduction in violence, which we think would show that it's possible in the course of this long conflict to reduce violence. Obviously, it would be better in the long term if a ceasefire stemmed from a negotiated political settlement, but a temporary ceasefire for an Eid certainly doesn't preclude that possibility down the road and hopefully helps contribute to realizing that objective.

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We certainly don't want to sustain force levels and operations in Afghanistan any longer than is absolutely necessary. And what we're all focused on is trying to find the right formula that enables us to reduce operations, and that comes from a political settlement where the Taliban is no longer posing a threat to the Afghan people and no longer creating the conditions under which ISIS Khorasan or other international terrorist organizations can take advantage of instability in Afghanistan to plot and plan attacks against the United States or our allies.

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On June 16, 2018, Secretary Pompeo issued a statement welcoming the ceasefire agreed for the period of the celebration of Eid al-Fitr. The statement, which is available at <https://www.state.gov/on-president-ghanis-offer-to-extend-the-ceasefire-and-open-negotiations/>, expressed support for extending the ceasefire and beginning peace talks.

On August 19, 2018, Secretary Pompeo issued a statement welcoming the announcement by the Afghan government of a ceasefire conditioned on Taliban participation. The statement is available at <https://www.state.gov/statement-on-afghan-governments-ceasefire-announcement/>. Secretary Pompeo said:

The last ceasefire in Afghanistan revealed the deep desire of the Afghan people to end the conflict, and we hope another ceasefire will move the country closer to sustainable security. The United States and our international partners support this initiative by the Afghan people and the Afghan government, and we call on the Taliban to participate. It is our hope, and that of the international community, that the Afghan people may celebrate Eid al-Adha this year in peace, free from fear.

The United States supports President Ghani's offer for comprehensive negotiations on a mutually agreed agenda. We remain ready to support, facilitate, and participate in direct negotiations between the Afghan government and the Taliban. There are no obstacles to talks. It is time for peace.

## 2. Syria

On February 24, 2018, U.S. Permanent Representative to the United Nations Nikki Haley delivered remarks on the adoption of UN Security Council resolution 2401 on a ceasefire

in Syria. Her remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-the-adoption-of-un-security-council-resolution-2401-on-a-ceasefire-in-syria/>.

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Today, the Security Council finally took a step toward addressing the[] devastating levels of human suffering in Syria. The United States wants nothing more than to see the ceasefire in this resolution implemented immediately across the country.

It is critical that the Assad regime and its allies comply with our demand to stop the assault on eastern Ghouta and immediately allow food and medicine to reach everyone who needs it.

All of us on this Council must do our part to press the Assad regime as hard as we can to comply.

But we are late to respond to this crisis. Very late. On Wednesday, the Secretary-General made an emotional plea for an immediate ceasefire in Syria to allow the very basic necessities to get to the people. Kuwait and Sweden had a version of this resolution ready to go for a vote. But Russia called for a delay.

On Thursday, in an effort to stall, Russia called for an open meeting on the humanitarian situation in Syria. At that meeting, 14 members of this Council were ready to impose a ceasefire. But Russia obstructed the vote again.

And then yesterday, this Council sat around for hours, ready to vote, only to have Russia delay it again.

Every minute the Council waited on Russia, the human suffering grew. Getting to a vote became a moral responsibility for everyone, but not for Russia, not for Syria, not for Iran. I have to ask, why?

At least 19 health facilities have been bombed since Sunday. Nineteen.

As they dragged out the negotiation, the bombs from Assad's fighter jets continued to fall. In the three days it took us to adopt this resolution, how many mothers lost their kids to the bombing and the shelling? How many more images did we need to see of fathers holding their dead children?

All for nothing, because here we are voting for a ceasefire that could have saved lives days ago.

And after all of this time, hardly anything has changed in the resolution except a few words and some commas.

The Syrian people should not have to die waiting for Russia to organize their instructions from Moscow or to discuss it with the Syrians. And why did the Council allow this? There is no good reason we shouldn't have done this Wednesday, or Thursday, or Friday.

We may not know the faces that we're talking about. We may not know their names, or these people, but they know us. And we all failed them this week. I guess there is unity in that.

Today, Russia has belatedly decided to join the international consensus and accept the need to call for a ceasefire, but only after trying every possible way to avoid it.

This resolution marks a moment of Council unity that we must seize and maintain beyond the 30-day timeframe. We hope this resolution will be a turning point, where Russia will join us

in pushing for the political settlement to this conflict and take action to re-establish real accountability for the use of chemical weapons in Syria.

Progress starts by adhering to the ceasefire with no excuses. After so many years of defying this Council's demands, the Assad regime must change course.

None of us should be so naïve as to accept that the Assad regime can continue indiscriminately bombing schools, hospitals, and homes under the fake excuse of "counterterrorism."

Assad's bombing must stop. The ceasefire must be given a chance to work.

We look to the Assad regime's backers, especially Russia and Iran, to address what the Secretary-General rightly called a "hell on Earth." All eyes will now be on the Syrian regime, Iran, and Russia.

Our goal with this resolution is clear: The Assad regime needs to stop its military activities around eastern Ghouta, and for once, allow humanitarian access to all of those who need it.

We are deeply skeptical that the regime will comply. But we supported this resolution because we must demand nothing less. We owe this to the innocent people of Syria begging for help.

In the days to come, our resolve to stand by our demands in this resolution will be tested. All of us must rise to the challenge of maintaining this ceasefire, just as we came together today.

All of us must do everything we can to make the demands of this resolution a reality. It's the only way to restore the credibility of this Council. The Syrian people have been waiting long enough.

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On June 14, 2018, the State Department issued a press statement on preserving the Southwest De-escalation Zone in Syria. The statement is available at <https://www.state.gov/preserving-the-southwest-de-escalation-zone-in-syria/> and excerpted below.

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The United States remains concerned by reports of impending Syrian government operations in southwest Syria within the boundaries of the de-escalation zone negotiated between the United States, Jordan, and the Russian Federation last year and reaffirmed between Presidents Trump and Putin in Da Nang, Vietnam in November. The United States remains committed to maintaining the stability of the southwest de-escalation zone and to the ceasefire underpinning it.

We reiterate that any Syrian government military actions against the southwest de-escalation zone risk broadening the conflict. We affirm again that the United States will take firm and appropriate measures in response to Syrian government violations in this area.

The ceasefire arrangement and southwest de-escalation zone were initiatives by Presidents Trump and Putin to de-escalate the Syrian conflict, save lives, and create conditions for the displaced to safely and voluntarily return to their homes. A military offensive by the Syrian regime into this ceasefire zone would defy these initiatives, which have been a success to date. It is vitally important that the three nations supporting the southwest de-escalation zone do

everything they can to enforce and implement the understandings reached last year. Existing diplomatic channels have successfully monitored and de-escalated the situation in the southwest, avoiding any resumption of fighting for nearly a year. The ceasefire must continue to be enforced and respected.

Russia is duly responsible as a permanent member of the UN Security Council to use its diplomatic and military influence over the Syrian government to stop attacks and compel the government to cease further military offensives. We request that Russia fulfill its commitments in accordance with UNSCR 2254 and the southwest ceasefire arrangement.

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On June 21, 2018, the State Department issued a further press statement regarding ceasefire violations reported in Syria. The statement is excerpted below and available at <https://www.state.gov/reported-violations-of-the-southwest-ceasefire/>.

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The United States remains deeply troubled by reports of increasing Syrian regime operations in southwest Syria within the boundaries of the de-escalation zone ... Syrian regime military and militia units, according to our reports, have violated the southwest de-escalation zone and initiated airstrikes, artillery, and rocket attacks.

The United States continues to warn both the Russian government and the Assad regime of the serious repercussions of these violations and demands that Russia restrain pro-regime forces from further actions within the southwest de-escalation zone. During their call this weekend, Secretary Pompeo stressed to Russian Foreign Minister Sergey Lavrov the critical nature of mutual adherence to this arrangement and the unacceptable nature of any unilateral activity by the Assad regime or Russia. The United States expects all parties to respect the ceasefire, protect civilian populations, and avoid broadening of the conflict. We remain committed to maintaining the stability of the southwest de-escalation zone and to the ceasefire underpinning it.

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On October 18, 2018, the State Department issued a press statement on the decision by Special Envoy for Syria Steffan de Mistura to finish his tenure. The statement is excerpted below and available at <https://www.state.gov/decision-by-staffan-de-mistura-to-finish-his-tenure-as-un-special-envoy-for-syria/>.

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In his four years and four months as UN Special Envoy for Syria, Staffan de Mistura has worked tirelessly to find a solution to the Syrian crisis, saved lives by working to deescalate the violence that has engulfed the country, and eased suffering by constantly pressing for unhindered delivery of vital medical and humanitarian aid to Syrians in need.

Special Envoy De Mistura has also eloquently stated that there is no military solution in Syria, and that the only way forward is a political process under the auspices of UN Security Council Resolution 2254. He has offered a vision of a Syria that is free from violence and oppression and a Syrian government that represents the will of the Syrian people. His leadership in pursuit of these goals has been instrumental in building international consensus for a political pathway out of this terrible conflict.

Now, as Special Envoy De Mistura enters the final weeks of his tenure, he and UN Secretary General Guterres have pledged that he will use all his influence and energy to finally convene the Syrian constitutional committee—an important step forward in the political process and a symbol that a solution is possible.

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On November 29, 2018, the State Department issued a statement on the lack of any breakthrough at the latest meeting of the Astana group on Syria. The statement is excerpted below and available at <https://www.state.gov/no-breakthrough-at-astana-meeting/>.

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The latest “Astana group” meeting on Syria did not yield an agreed list of members for the Syrian Constitutional Committee and thus failed to produce progress toward advancing the political process in this tragic conflict. For 10 months, the so-called Astana/Sochi initiative on the Syrian Constitutional Committee, created to advance the goals laid out within UN Security Council Resolution (UNSCR) 2254, has produced a stalemate. The establishment and convening, by the end of the year, of the Constitutional Committee in Geneva is vital to a lasting de-escalation and a political solution to the conflict. This goal has broad international support: at the Quadrilateral Summit in Istanbul, Russia joined the call to convene the committee by December.

Russia and Iran continue to use the process to mask the Assad regime’s refusal to engage in the political process as outlined under UNSCR 2254. We all should work to achieve the goals as laid out in UNSCR 2254 to include de-escalation and a reinvigorated political process, but strongly believe success is not possible without the international community holding Damascus fully accountable for the lack of progress in resolving the conflict.

The United States remains committed to the UNSCR 2254 to achieve peace in Syria and support the Syrian people. We will continue to strongly support the work of UN Special Envoy Staffan de Mistura and the United Nations to advance a Syrian-led and Syrian-owned political process that would create a permanent, peaceful and political end to the conflict. We will remain engaged with the UN and other parties to encourage all possible efforts to maintain the ceasefire in Idlib and reduce violence across Syria; unhindered humanitarian aid, and the advancement of the political track as called for in UNSCR 2254.

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### 3. Ukraine

On October 11, 2018, the State Department congratulated Ukraine's parliament and leaders on extending a law on special status for areas of Ukraine controlled by Russia, acting to implement the Minsk agreements. The U.S. statement is excerpted below and available at <https://www.state.gov/ukraine-passes-key-hurdle-in-implementation-of-minsk-peace-agreements/>.

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The United States congratulates Ukraine's [p]arliament and Ukrainian leadership on extending the law on special status for Russia-controlled areas of eastern Ukraine. Extending this law, which would have expired yesterday, demonstrates Ukraine's continued commitment to a peaceful resolution of the conflict and implementation of the Minsk agreements. Ukraine's brave step towards peace stands in sharp comparison to Russia's continued failure to fulfill its Minsk commitments.

We call on Russia to join Ukraine in pursuing peace. Russia and the forces it arms, trains, leads, and fights alongside have yet to follow through on repeated commitments to cease hostilities, withdraw foreign fighters, exchange detainees, or disband the illegal armed formations. Moscow should institute a full and comprehensive ceasefire and cancel the illegal sham elections it is organizing in the Russia-controlled parts of eastern Ukraine.

The United States continues to support the efforts of France and Germany in the Normandy Format to advance implementation of the Minsk agreements and we remain open to dialogue with Moscow on avenues for restoring Ukraine's territorial integrity within its internationally recognized borders.

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### 4. India and Pakistan

On May 31, 2018, the State Department issued a press statement welcoming the commitment recently reaffirmed by India and Pakistan to fully implement the 2003 ceasefire along the Line of Control. The statement is available at <https://www.state.gov/india-and-pakistan-agree-to-uphold-ceasefire/>.

### 5. Ethiopia and Eritrea

The United States welcomed the July 9, 2018 peace agreement between Eritrea and Ethiopia in a July 10, 2018 press statement available at <https://www.state.gov/eritrea-and-ethiopia-end-war-and-adopt-joint-declaration-of-peace-and-friendship/>, which follows.

The United States welcomes the July 9 commitment to peace and security between the State of Eritrea and the Federal Democratic Republic of Ethiopia, effectively ending 20 years of conflict. We commend Prime Minister Abiy of Ethiopia and President Isaias of Eritrea for courageously leading their citizens towards peace, prosperity, and political reform. The normalization of relations and the adoption of the Joint Declaration of Peace and Friendship between Eritrea and Ethiopia will provide their peoples with the opportunity to focus on shared aspirations for closer political, economic, and social ties.

The United States stands ready to support this process, and encourages all parties to continue working with transparency and confidence in the coming days. Peace between Ethiopia and Eritrea will further the cause of stability, security, and development in the Horn of Africa and Red Sea.

## 6. Nicaragua

On June 18, 2018, the State Department issued a press statement on ongoing violence in Nicaragua. The statement is available at <https://www.state.gov/ongoing-violence-in-nicaragua/> and says:

The United States condemns the ongoing government-sponsored violence and intimidation campaign in Nicaragua, including the June 16 arson attack against the home and business of a family in Managua, killing six, and the further intimidation of the family during the wake. Attacks and threats against peaceful protestors and the general population are unacceptable, and must cease.

We urge immediate and full implementation of the June 15 National Dialogue agreement on human rights. The United States is aware the Nicaraguan government has accepted another visit by the Inter-American Commission on Human Rights, and recommends it begin immediately. We note the widespread call among Nicaraguans for early elections. The United States believes early elections represent a constructive way forward.

## 7. Sudan

The Troika (the United States, the United Kingdom, and Norway) issued a joint statement on June 19, 2018 condemning continued clashes in Jebel Marra, Darfur. The statement is excerpted below and available at <https://www.state.gov/sudan-the-troika-condemns-continued-clashes-in-jebel-marra-darfur/>.

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The Troika condemns the ongoing clashes between the Sudan Liberation Army-Abdul Wahid (SLA-AW) and Government of Sudan forces as well as inter-tribal violence in the Jebel Marra region of Darfur. The civilian population continues to bear the brunt of this unnecessary violence, which has led to the burning down of villages, causing high numbers of civilian injury and death, and the displacement of nearly 9,000 people.

It is unacceptable that the Government of Sudan has repeatedly prevented the African Union/United Nations Mission in Darfur (UNAMID) and humanitarian actors from accessing the areas of conflict and displaced populations. The Troika strongly urges the Government of Sudan to immediately provide unfettered access to both UNAMID and humanitarian actors. The SLA-AW leadership's refusal to engage with the peace process obstructs the achievement of sustainable peace in Darfur and unnecessarily prolongs civilian suffering. The Government's actions in military operations and its inaction in stopping the violence undermine efforts to achieve a peaceful solution to the conflict. There can be no military solution to the conflict in Darfur and the international community should consider imposing sanctions against those who continue to act as spoilers.

The Troika calls on all parties to the conflict to immediately cease all military engagement and hostilities, allow unfettered humanitarian access, and to meaningfully engage with the African Union High Level Implementation Panel (AUHIP) led peace process in order to reach a permanent ceasefire.

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## 8. South Sudan

On January 12, 2018, the joint statement of the Troika (the United States, the United Kingdom, and Norway) on South Sudan was issued as a State Department media note, available at <https://www.state.gov/the-troika-on-cessation-of-hostilities-violations-in-south-sudan/>. This joint statement, regarding violations of the December 21, 2017 Cessation of Hostilities agreement, follows.

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The members of the Troika (Norway, the United Kingdom, and the United States) strongly condemn the continuing pattern of violations of the December 21, 2017 Cessation of Hostilities (CoH) agreement by parties to the South Sudan High Level Revitalization Forum (the Forum), and call on all parties to immediately and fully implement the CoH in letter and spirit and ensure humanitarian access throughout the country.

The Troika has seen strong evidence of violations of the CoH by Government of South Sudan forces in Unity State and by forces associated with opposition groups, including Sudan People's Liberation Movement-In Opposition (SPLM-IO), in Unity State and the Greater Upper Nile region, as witnessed by ceasefire monitors. We are seriously concerned by continuing reports of the movement of forces by all sides in violation of the CoH, including the movement this week of hundreds of Government troops into Jonglei state. The Troika also notes with grave

concern the strong evidence from multiple sources linking the attacks in Gudele, Jubek State, on January 4 to former SPLA Chief of Defense Paul Malong and forces under Lt. Colonel Cham Garang, an SPLA-IO commander. We remain committed to holding to account all those who obstruct the realization of lasting peace for the people of South Sudan, whether or not they are participating directly in the Forum.

The HLRF process must be conducted in the spirit of compromise by those South Sudanese leaders who are committed to working for peace. Parties must not be able to increase their influence through force of arms in advance of the second round of talks.

The Troika reaffirms its full support for the Intergovernmental Authority on Development's (IGAD) efforts to build peace in South Sudan and will continue to follow developments on the ground. We call on our IGAD partners to rapidly investigate all violations and to immediately hold those responsible to account. We will continue to work closely with international and regional partners to ensure full accountability with respect to the CoH and stand ready to impose consequences on those who violate the agreement, also in line with the African Union Peace and Security Council Communiqué of September 20, 2017.

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On February 16, 2018, the State Department issued as a media note a joint statement of the Troika concerning Phase 2 of the High Level Revitalization Forum. The statement follows and is available at <https://www.state.gov/troika-statement-on-phase-2-of-the-high-level-revitalization-forum-for-south-sudan/>.

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The members of the Troika ... welcome the parties' constructive efforts toward compromise for the benefit of the people of South Sudan at the High Level Revitalization Forum (HLRF) over the last two weeks in Addis Ababa. The Troika expresses its appreciation for and fully supports the continuing effort by the Intergovernmental Authority on Development (IGAD) to restore peace through the HLRF, and commends the tireless efforts of the IGAD Special Envoy Ambassador Ismail Wais and the mediation team.

The Troika underscores the critical importance of the parties creating a conducive environment for peacemaking: fighting while talking is unacceptable and cannot be tolerated. The parties must make good on their promises to implement the Agreement on a Cessation of Hostilities (ACOH) signed in December 2017. We take note and support the intention by IGAD and the African Union to identify and impose consequences on those undermining peace as soon as possible and we stand ready to support them in their efforts. Implementation of the ACOH must also include the release of political prisoners and prisoners of war, the end to the use of child soldiers and sexual and gender-based violence as a weapon. The parties must also allow unfettered access for Ceasefire and Transitional Security Arrangements Monitoring Mechanism (CTSAMM) monitors and for humanitarian assistance and aid workers responding to Africa's worst humanitarian crisis.

While useful dialogue has taken place over the past two weeks, there is much more for the parties to do if the HLRF is to make meaningful and sustainable progress towards peace. The Troika calls on all parties to reconvene as soon as possible, without preconditions, to address the important security and governance arrangements that are essential for peace. We urge all parties to take steps to maintain the momentum of the process and refrain from comments or actions that could make returning to dialogue more difficult. We urge the parties to agree that a negotiated arrangement for an inclusive transitional government that reflects South Sudan's diversity is needed. We encourage the parties to set as priorities the separation of powers, dispute resolution and reconciliation mechanisms, service delivery, and accountability. Arrangements must not advantage any political, armed, or ethnic group. We call on the parties to develop practical security arrangements that end violence and build confidence, and set out a realistic path to broader security sector reform. We urge the parties to support financial reforms that address corruption and build confidence in public institutions.

The Troika renews its firm view that elections in 2018 are not viable given the continuing conflict, lack of security, displacement of one third of the population, and severe food insecurity affecting half the population. It calls on all parties to reject any unilateral effort to extend power through the ballot box, the legislature, or military means. A negotiated path to elections also means the protection of fundamental political freedoms, and significant improvements in security and humanitarian conditions. The Troika continues to stand with the people of South Sudan and urges their leaders to move expeditiously to achieve the peace their people deserve.

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On August 10, 2018, the Troika issued a further statement on South Sudan peace talks. The statement is available as a State Department media note at <https://www.state.gov/troika-statement-on-south-sudan-peace-talks/> and follows.

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The members of the Troika (the United States, the United Kingdom, and Norway) support the engagement of the region in the recent Khartoum-based negotiations on outstanding governance and security issues. We acknowledge the role of Sudan in hosting these negotiations. Considerable challenges lie ahead, and we are concerned that the arrangements agreed to date are not realistic or sustainable. Given their past leadership failures, South Sudanese leaders will need to behave differently and demonstrate commitment to peace and good governance.

Above all, we support the people of South Sudan's aspirations to lead lives unburdened by fear, and to experience peace, pluralism, and prosperity. We remain steadfast that the best hope for sustainable peace is a process inclusive of ordinary men and women, civil society, religious leaders, ethnic minorities, and other excluded groups. We urge mediators to ensure the open and free participation of these groups and other participants in the negotiations, to ensure their interests are fully protected. Moreover, the process should culminate in free, fair, and credible elections, and allow for a peaceful transition in leadership in the most expeditious and responsible manner.

During the next stage of the talks, parties must bring in a wider range of stakeholders, and develop clear plans for the transition period, including how resources will be used in a transparent and accountable way for the benefit of all South Sudanese. Critical questions remain, such as how security will be provided in Juba during the transition period and how meaningful checks will be placed on executive power.

We call on the parties to develop clear and realistic governance and security timelines and plans for the transition period, and on the Intergovernmental Authority on Development member states and the AU to continue and intensify their involvement in the implementation phase of any agreement.

We note that there has been some reduction in fighting, the most serious confidence-building measure of all. Sustained peace is a necessary condition for the legitimacy of a transitional arrangement. In furtherance of this, we call on our regional partners to uphold the United Nations Security Council arms embargo and on their financial institutions to ensure that the proceeds from corrupt and war-making activities do not flow through their jurisdictions. We now expect to see a change in the situation on the ground, beginning with a further significant reduction in violence, and all parties taking measures to allow full humanitarian access.

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The Troika issued a further statement on September 12, 2018. The statement was delivered by UK Special Representative for Sudan and South Sudan Ambassador Chris Trott and is excerpted below and available at <https://ss.usembassy.gov/troika-statement-on-the-south-sudan-peace-talks/>.

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The members of the Troika (the United Kingdom, United States, and Norway) welcome the commitment of the region to come together to address common peace and security priorities for the benefit of its citizens. We must seize this broader regional momentum to secure peace for the people of South Sudan.

The Troika acknowledges the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan and recognises the role IGAD played in this process. We hope discussions will remain open to those who are not yet convinced of the sustainability of this agreement.

We remain concerned about the parties' level of commitment to this agreement, and to the Cessation of Hostilities Agreement signed in Addis Ababa in December. In Wau, for example, military offensives have been undertaken since the signing of the most recent ceasefire. The ceasefire monitoring teams were denied timely access to assess the impact of this most recent violence, but it is certain that it has resulted in civilian deaths. Humanitarian access continues to be blocked both physically and bureaucratically, with humanitarian workers expelled, detained and physically harmed. This year, as the talks have been progressing in Addis Ababa and Khartoum, 13 humanitarian workers have been killed in South Sudan.

The Troika is committed to peace in South Sudan. But in order to be convinced of the parties' commitment, we will need to see a significant change in their approach. This must include, but not be limited to: an end to violence and full humanitarian access; the release of political prisoners; and a real commitment to effective and accountable implementation, demonstrated by supporting robust security and enforcement mechanisms, checks on executive and majority power, and the transparent use of resources for the benefit of all South Sudanese. Without progress in these critical areas, we remain concerned the agreement will not deliver the peace that the people of South Sudan deserve.

To ensure success, regional partners will need to maintain their engagement and play a positive role in the agreement's implementation. Their involvement in monitoring progress and holding the parties to account is crucial. This means publicly highlighting any violations by the parties, and ensuring those responsible face consequences. We call on regional partners to support the rigorous implementation of the United Nations Security Council sanctions and arms embargo. Specifically, any movement of military forces, weapons, or related material into South Sudan must not violate that embargo.

I would like to close with a message for the people of South Sudan. The Troika's priority has always been to work for peace. We remain committed to accompany South Sudan on its path toward justice, liberty, and prosperity.

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On September 26, 2018, Under Secretary of State Hale convened a meeting on the South Sudan peace process on the margins of the 73rd UN General Assembly. See State Department media note, available at <https://www.state.gov/under-secretary-hales-meeting-on-next-steps-on-the-south-sudan-peace-process/>. As explained in the media note, Under Secretary Hale and African regional leaders and other international partners "discussed ongoing efforts to address the political, security, and humanitarian crises in South Sudan, including key actions needed to ensure successful implementation of the September 12 peace agreement."

The Troika delivered a joint statement at the IGAD Council of Ministers' meeting on South Sudan on November 16, 2018. The statement is excerpted below and available at <https://www.usau.usmission.gov/troika-intervention-at-the-igad-council-of-ministers-meeting-on-south-sudan/>.

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The members of the Troika (the United States, Norway, and the United Kingdom) welcome the progress that has been made in regard to parts of the revitalized peace agreement signed on September 12. We have seen positive steps. Some key transitional governance bodies have been formed, senior members of opposition parties have returned to Juba, and both government and opposition representatives are participating in the work of the National Pre-Transitional Committee and the National Constitutional Amendment Committee. Members of government and opposition forces have jointly visited previously contested territories. Overall, violence has decreased, and some prisoners of war and political detainees have been released.

This initial progress needs to be built on and consolidated, to increase trust and confidence among South Sudanese and with the international community. Inclusiveness in implementation of the agreement, specifically participation by civil society, women, and displaced populations, will help build peace. The critical pre-transitional bodies, especially the NPTC, need to be empowered to function effectively and drive forward implementation of the peace deal, with South Sudan's resources clearly used to fund the agreement.

We are deeply concerned that progress is being undermined, however, by continued fighting, which we are seeing in some areas. In Wau and Yei, recent violence has targeted civilians. Humanitarian workers and ceasefire monitors continue to be denied access in parts of the country. The ongoing violence prolongs the suffering of the South Sudanese people, and increases the risk that the current momentum will be lost, key deadlines missed, and implementation falls behind. We urge all parties to uphold their commitments and cooperate on addressing and preventing violations of the Cessation of Hostilities Agreement and the new peace agreement.

IGAD and its member states have been crucial to the progress made so far. The region's continued engagement is essential to help this latest agreement deliver a lasting peace. The region must take the lead in encouraging the Government of South Sudan to demilitarize Juba and allow UNMISS complete freedom of movement to execute its mandate in the city. Proposals to augment security in South Sudan should be discussed with the wider international community, be part of an internationally authorized process, and be consistent with the UN arms embargo. We urge IGAD member states to support peace by rigorously implementing the UN Security Council arms embargo and South Sudan sanctions regime, and halting the export and transshipment of prohibited items. Finally, the region must hold the parties to account for ceasefire violations like the ones in Wau. Without this engagement from IGAD, the peace agreement will not hold.

JMEC and CTSAMVM also have a central role to play, and their reconstitution should be completed without delay with leadership that is independent of national interests and empowered to hold the parties to account. It is imperative that their reports, particularly CTSAMVM's violation reporting, are promptly made available and published in full.

South Sudan's people have suffered years of appalling violence, particularly women and children. They deserve a chance to live in peace, stability, and prosperity. The Troika are committed to a peaceful South Sudan, and will continue to encourage all South Sudanese and their partners in the region to take the steps needed to achieve this.

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## 9. Libya

On September 4, 2018, the governments of the United States, France, Italy, and the United Kingdom released a joint statement welcoming the ceasefire in Tripoli, Libya. The statement is available as a State Department media note at <https://www.state.gov/joint-statement-welcoming-the-ceasefire-in-tripoli-libya/>. The text appears below.

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The Governments of France, Italy, the United Kingdom, and the United States welcome the result of the mediation reached today by the United Nations Support Mission that aims to deescalate violence in and around Tripoli and ensure the protection of civilians. We reiterate our strong support for Special Representative of the Secretary-General Ghassan Salame as he works to realize an immediate and durable cessation of hostilities in the Libyan capital, which is a critical step to advancing the political process in accordance with the United Nations Action Plan.

As the Secretary-General noted on September 2, all parties should immediately cease hostilities and abide by the ceasefire agreement brokered by the United Nations. We call on all Libyan parties to refrain from any actions that could undermine today's ceasefire announcement, jeopardize the security of civilians, or set back Libyan efforts to advance the political process and move forward in the spirit of compromise.

We also reiterate support for the President of the Presidency Council, Fayeze al-Sarraj, and the Government of National Accord as they work in partnership with the United Nations to promote reconciliation and support a Libyan-led political process.

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On November 13, 2018, the United States welcomed the conclusions announced at the Palermo conference on Libya. The State Department press statement on the Palermo conference is excerpted below and available at <https://www.state.gov/palermo-conference-on-libya/>.

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The United States welcomes the conclusions announced by the Government of Italy following the November 12-13 conference on Libya in Palermo, which brought Libyan and international leaders together to advance our shared goal of helping Libya's institutions break their political deadlock and ensure a secure and prosperous future for all Libyans. We strongly support UN Special Representative of the Secretary-General (SRSG) Ghassan Salamé and the recalibrated UN Action Plan he presented to the Security Council on November 8, which calls for a Libyan-led National Conference to be held in the first weeks of 2019 and the subsequent electoral process to begin in the spring of 2019. We urge all Libyans to work constructively with SRSG Salamé toward the goals of an inclusive constitutional process and credible, peaceful, and well-prepared elections. The United States is committed to ensuring that all those who undermine Libya's peace, security, and stability will be held accountable.

The Palermo conference underscored that achieving such progress will require sustained attention to the economic and security aspects of the conflict. We are encouraged by the commitment of the Government of National Accord to accelerate implementation of comprehensive monetary and subsidy reforms, which Libya urgently needs to stabilize its economy. Equally critical is promoting greater transparency of Libya's economic institutions,

including the Central Bank of Libya. These reforms will support much-needed conversation among Libyans about enhancing fiscal transparency and promoting a more equitable distribution of the country's oil resources. The United States stands ready to support this economic dialogue, at Libya's request and in close coordination with the UN Support Mission for Libya (UNSMIL), the World Bank, and the International Monetary Fund. We also commend SRSG Salamé's leadership in de-escalating violence in Tripoli and UNSMIL's ongoing partnership with the Government of National Accord to put in place more durable security arrangements for the Libyan capital. We welcome the important steps taken by Prime Minister Fayez al-Sarraj to begin establishing capable, national security forces under civilian control.

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## 10. Yemen

On September 2, 2018, the State Department issued a statement on the Saudi-led coalition's announcement that it would review the rules of engagement in Yemen. The statement, which is available at <https://www.state.gov/saudi-led-coalitions-announcement-on-reviewing-rules-of-engagement-in-yemen/>, follows:

The United States regards the Saudi-led Coalition's announcement that it will review their rules of engagement, hold those at fault accountable, and compensate victims following the Joint Incident Assessment Team's finding that last month's Sa'ada air strikes lacked justification as an important first step toward full transparency and accountability. We continue to call on all sides to abide by the Law of Armed Conflict, to mitigate harm to civilians and civilian infrastructure, and thoroughly investigate and ensure accountability for any violations. It is imperative that all parties work toward a comprehensive political solution to avoid further harm to the Yemeni people. We fully support UN Special Envoy for Yemen Martin Griffiths as he prepares to convene parties in Geneva. All sides must engage constructively and in good faith in order to work toward a secure, stable, and peaceful Yemen.

On October 30, 2018, the State Department issued a statement by Secretary Pompeo calling on all parties to work with UN Special Envoy Martin Griffiths to end the conflict in Yemen. The statement is available at <https://www.state.gov/ending-the-conflict-in-yemen/>.

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The United States calls on all parties to support UN Special Envoy Martin Griffiths in finding a peaceful solution to the conflict in Yemen based on the agreed references.

The time is now for the cessation of hostilities, including missile and UAV strikes from Houthi-controlled areas into the Kingdom of Saudi Arabia and the United Arab Emirates. Subsequently, Coalition air strikes must cease in all populated areas in Yemen.

Substantive consultations under the UN Special Envoy must commence this November in a third country to implement confidence-building measures to address the underlying issues of the conflict, the demilitarization of borders, and the concentration of all large weapons under international observation.

A cessation of hostilities and vigorous resumption of a political track will help ease the humanitarian crisis as well.

It is time to end this conflict, replace conflict with compromise, and allow the Yemeni people to heal through peace and reconstruction.

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The United States offered further support for UN Special Envoy Griffiths and efforts to end the conflict in Yemen in a November 21, 2018 State Department press release, available at <https://www.state.gov/moving-forward-in-yemen/>.

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The United States reiterates its call for all parties to support UN Special Envoy for Yemen Martin Griffiths by immediately ceasing hostilities and engaging in direct talks aimed at ending the conflict.

We welcome the UN Special Envoy's statement that the Houthis and the Republic of Yemen Government are committed to attending the consultations in Sweden, and we call on the parties to follow through on that commitment. All parties must not delay talks any longer, or insist on travel or transport conditions that call into question good faith intentions to look for a solution or to make necessary concessions. The time for direct talks and building mutual confidence is now.

We encourage all combatants to abide by their statements declaring a commitment to cease hostilities and call on those parties to not use any period of truce to reinforce military positions, implant mines, or in any way escalate the conflict.

The United States welcomes the Saudi-led Coalition's November 20 announcement of a \$500 million contribution to address the food security crisis. In addition to this, Hudaydah port must be turned over to a neutral party to accelerate the distribution of aid to address the acute humanitarian crisis, and to prevent the port from being used to smuggle weapons and contraband into the country or to finance the Houthi militia.

It is time to end this conflict, replace conflict with compromise, and allow the Yemeni people to heal through peace and reconstruction.

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On December 4, 2018, as consultations on the conflict in Yemen were about to commence in Sweden, the State Department issued a further statement on Yemen, which follows and is available at <https://www.state.gov/yemen-consultations-in-sweden/>.

As consultations are set to commence between the Republic of Yemen Government and the Houthis in Sweden, the United States calls on parties to engage fully and genuinely, and cease any ongoing hostilities. The people of Yemen have suffered far too long. The parties owe it to their fellow Yemenis to seize this opportunity. We strongly support UN Special Envoy Martin Griffiths, who has undertaken tremendous effort to bring these consultations to fruition, and thank the Government of Sweden for hosting. We have no illusions that this process will be easy, but we welcome this necessary and vital first step. Now is the time for Yemenis to replace conflict with reconciliation and work together to realize a brighter future for Yemen. Peace, prosperity, and security can be on the horizon and those participating in the consultations have the chance to be part of a new chapter in Yemen's history.

On December 13, 2018, the State Department issued a statement by Secretary Pompeo on the conclusion of the consultations on Yemen in Sweden. His statement follows and is available at <https://www.state.gov/conclusion-of-yemen-consultations-in-sweden/>.

The United States commends participants from the Yemen consultations in Sweden for making progress on key initiatives, including a cease-fire and withdrawal of forces in Hudaydah, prisoner exchanges, and opening humanitarian corridors to the city of Taiz. Although many details remain subject to further discussion, these consultations between the Republic of Yemen Government and the Houthis marked a pivotal first step. All parties have an opportunity to build upon this momentum and improve the lives of all Yemenis. Moving forward, all must continue to engage, de-escalate tensions, and cease ongoing hostilities. This is the best way to give these and future consultations a chance to succeed. The United States thanks UN Special Envoy Martin Griffiths for his leadership on these efforts, continued optimism, and ability to inspire reconciliation. We also thank the Government of Sweden for hosting, as well as the governments of Kuwait, Oman, Saudi Arabia, the United Arab Emirates, and the many others that helped facilitate and support the consultations. The work ahead will not be easy, but we have seen what many considered improbable begin to take shape. Peace is possible. The end of these consultations can be the beginning of a new chapter for Yemen.

## C. CONFLICT AVOIDANCE AND ATROCITIES PREVENTION

### 1. Burma

On September 24, 2018, the State Department released a report “Documentation of Atrocities in Northern Rakhine State.” The report is available at <https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/documentation-of-atrocities-in-northern-rakhine-state/>. The Executive Summary of the report follows.

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The Bureau of Intelligence and Research (INR), with funding support from the Bureau of Democracy, Human Rights, and Labor (DRL), conducted a survey in spring 2018 of the firsthand experiences of 1,024 Rohingya refugees in Cox’s Bazar District, Bangladesh. The goal of the survey was to document atrocities committed against residents in Burma’s northern Rakhine State during the course of violence in the previous two years.

The survey used a representative sample of refugee camp populations to provide insights into the violence they witnessed. Any hearsay testimony was not recorded. Survey results reveal the pattern of events refugees experienced. There may be cases when multiple refugees reported witnessing the same event, so the percentages from this survey should not be extrapolated to come up with a definitive overall number of events. The National Geospatial-Intelligence Agency (NGA) worked with INR to map and analyze the resulting data (see Map 1).

The results of the survey show that the vast majority of Rohingya refugees experienced or directly witnessed extreme violence and the destruction of their homes. They identified the Burmese military as a perpetrator in most cases.

- Most witnessed a killing, two-thirds witnessed an injury, and half witnessed sexual violence (see Figure 1).
- Rohingya identified the Burmese military as a perpetrator in 84% of the killings or injuries they witnessed.
- Three-quarters say they saw members of the army kill someone; the same proportion say they witnessed the army destroying huts or whole villages. Police, unidentified security forces, and armed civilians carried out the rest of the observed killings.
- One-fifth of all respondents witnessed a mass-casualty event of killings or injuries (either in their villages or as they fled) with more than 100 victims.

The two main phases of violence—the first in October 2016 and the second beginning in August 2017—followed attacks against Burmese security forces by the Rohingya insurgent group Arakan Rohingya Salvation Army (ARSA). The vast majority of reported incidents against Rohingya took place from August to October 2017. The survey shows that the military, which used the ARSA attacks to justify its so-called counterinsurgency operations in northern Rakhine State, targeted civilians indiscriminately and often with extreme brutality.

- Forty-five percent of refugees witnessed a rape, and the majority of rapes witnessed were committed, in whole or in part, by the army. Overall, nearly 40% of refugees saw a rape committed by members of the Burmese security services—either police or military—including 18% who saw them commit a gang rape.

- Members of the security services, as well as non-Rohingya civilians in some cases, targeted children and pregnant women.
- Those who were left behind because they were elderly, sick, or otherwise infirm were frequently found dead when their relatives returned to check on them.

The survey reveals that the recent violence in northern Rakhine State was extreme, large-scale, widespread, and seemingly geared toward both terrorizing the population and driving out the Rohingya residents. The scope and scale of the military's operations indicate they were well-planned and coordinated. In some areas, perpetrators used tactics that resulted in mass casualties, for example, locking people in houses to burn them, fencing off entire villages before shooting into the crowd, or sinking boats full of hundreds of fleeing Rohingya.

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## 2. HRC on Prevention of Genocide and Other Atrocities

At the 37th session of the Human Rights Council, the United States participated in an interactive dialogue on the joint study of the special adviser on the prevention of genocide and the special rapporteur on truth, justice, reparation, and guarantees of non-recurrence. The statement by the U.S. delegation was delivered by David G. Mandel-Anthony on March 2, 2018 and is excerpted below and available at <https://geneva.usmission.gov/2018/03/02/u-s-strongly-supports-efforts-to-hold-accountable-those-responsible-for-atrocities/>.

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... The United States strongly supports credible transitional justice initiatives and has long supported efforts to hold accountable those responsible for atrocities, including genocide, war crimes, crimes against humanity, and other serious human rights violations and abuses. We believe that transitional justice can play a critical role in preventing the recurrence of violence and abuse. We are among the largest donors and supporters of post-conflict truth and justice initiatives in the world; we will continue our leading role.

In November, Secretary Tillerson concluded that the situation in Myanmar's northern Rakhine state constitutes ethnic cleansing against the Rohingya. The United States recognizes the importance of accountability in this context both to address past wrongs and prevent their recurrence. As such, we have repeatedly called for holding those responsible for atrocities to account. The government has denied atrocities occurred, despite credible information demonstrating the occurrence of massacres, sexual violence, and the existence of mass graves. The United States continues to call on the Government of Myanmar to cooperate with the UN Fact-Finding Mission and the Special Rapporteur. We have supported action on this at the UN Security Council and the General Assembly and will do so again at the HRC. We welcome the Government's stated commitment to implementing the recommendations of the Annan Commission, and we call upon the government to act to protect all its people.

We are also strongly committed to justice in the Central African Republic and South Sudan, as we believe that accountability and transitional justice contribute to atrocity prevention. In view of the findings contained in the latest report of the Commission on Human Rights in

South Sudan, we strongly urge the Government of South Sudan to sign the MOU on the establishment of the Hybrid Court immediately. In Latin America, the United States has consistently voiced support for Colombia's efforts to secure a just and lasting peace, including implementing a transitional justice strategy.

As our National Security Strategy affirms, we will not remain silent in the face of evil. We will work to hold accountable those responsible for genocide and other mass atrocities.

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On March 23, 2018, at the 37<sup>th</sup> session of the HRC, Jason Mack provided the U.S. explanation of vote in favor of a resolution on genocide. U.N. Doc. A/HRC/37/L.44. That statement is excerpted below and available at <https://geneva.usmission.gov/2018/03/23/eov-on-genocide/>.

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The United States would like to express our appreciation to Armenia for its efforts to reach consensus on this resolution, and support the text as drafted.

We wish to explain why the 2 paragraphs—PP 22 and OP 16—should be retained in the text before us.

We commend the sponsor for conducting a comprehensive bilateral negotiation process, including with the state that called this vote. We view these actions as hostile to the spirit of the resolution and contradictory to the important work of genocide prevention.

During the negotiation process, many countries emphasized the need to increase our capacity as a global community to prevent genocide — the reference to the joint analysis framework highlights the options available to the international community on early warning and prevention. The work of genocide prevention is too important for this reference to be politicized. We all need to be aware of the tools in our toolbox on such an important issue.

PP22 and OP16 take note of the new joint analysis framework and highlight its importance as one of the tools to assess the risk of genocide. The resolution also recommends greater collaboration among member states, regional organizations, and sub-regional organizations to increase their collaboration on prevention. The framework of analysis is a guideline, one that all states can use as appropriate; it is not imposed upon states. We should all welcome the addition of new options to increase our prevention efforts.

We stress that the motivation of this vote is simply to delete factual, correct references to a UN framework and a UN office. Such action diminishes the importance of this resolution.

Therefore, we strongly urge all members to vote in favor of retaining these 2 paragraphs and we will vote yes to retain them.

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### 3. Responsibility to Protect

On June 25, 2018, U.S. Representative to the UN for Economic and Social Affairs Kelley Currie delivered remarks at a UN General Assembly plenary session on the responsibility to protect. Ambassador Currie's remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-general-assembly-plenary-session-on-the-responsibility-to-protect/>.

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Thank you, Mr. President. Today, we are witnessing the record-breaking levels of human displacement, with unprecedented numbers of refugees and internally displaced persons forced to flee their homes. The fully manmade humanitarian and human rights crises, such as those, in Syria, Burma, and South Sudan, that are driving this mass displacement, highlight the urgent need for all Member States to adhere to international humanitarian law and international human rights law, and the need for coordinated and early international response to mass atrocities. The United States remains deeply committed to preventing, mitigating, and responding to atrocity crimes, and we urge the international community to do more to act in concert and respond before atrocities occur. We are pleased to be here today to reaffirm our support for the responsibility to protect civilians from genocide, war crimes, ethnic cleansing, and crimes against humanity, and to make a particular plea for more timely and decisive action at the Security Council on current and future humanitarian crises.

We are currently observing the tremendous human toll resulting from unchecked atrocities across the globe. On South Sudan, the Council has been paralyzed since it passed resolution 2206 in 2015. Meanwhile more than two million refugees have fled the fighting in the last two years. The UN has observed and reported on the widespread commission of mass atrocities and gross human rights violations. We have recently renew[ed] the sanctions established under Security Council resolution 2206, but we must do more. The United States has repeatedly called on the Council and the United Nations to support sanctions on those accountable for these atrocities and for a comprehensive arms embargo. Our commitment to the Responsibility to Protect should result in real action to address modern-day atrocities, such as in South Sudan, yet we have too often fallen short or failed to act when we can could and should.

We welcome the Secretary-General's report on early warning and early action, including the assertion that effective atrocity prevention means assisting countries to avert the outbreak of atrocity crimes. The United States believes that more should be done to improve our responses to early warning signals, including overcoming the uncertainties, hesitancies, and lack of political will which impede early action. It is worth the investment to prevent the high human cost of these crimes. In fact, we all know that the costs of prevention—in the form of improving human rights institutions, the fair administration of justice, and equitable, accountable governance—pale[] in comparison to the political, financial, and military costs typically required to respond to a crisis. We applaud the Secretary-General's efforts to empower and coordinate a broader set of actors, including civil society, parliaments, national human rights institutions, regional organizations and the UN system.

Further strengthening the principle of the responsibility to protect, and building knowledge of the range of preventative actions, can also help turn early warning into early action. To these ends, the United States supports scheduling regular, open debates in the Security Council, including on emerging threats and human rights issues that threaten to escalate into atrocities, and we support including the “Responsibility to Protect” as a standing item on the General Assembly agenda. We also commend the Secretary-General’s initiative to gather and share lessons learned on effective early warning and early action. We strongly encourage the Secretary General to appoint the next Special Advisor on the Responsibility to Protect as soon as possible to advance international commitments and tools for effective atrocity prevention within the UN framework.

The United States encourages member states to follow the Secretary’s call to create a national focal point for the responsibility to protect, conduct assessments consistent with the UN Framework of Analysis for Atrocity Crimes, and take early action on the findings. It is vital that these focal points do more than simply carry a title. The U.S. continues to strengthen its preventative capacities through the Atrocity Prevention Board, which coordinates a “whole of government” approach to bolster our ability to forecast, prevent, and respond to mass atrocities. This board oversees global risk analysis, followed by deeper analysis of prioritized countries, identifying potential pathways to atrocities, and opportunities to prevent or mitigate them, including by expanding existing resiliencies. The board has coordinated a range of actions such as targeted sanctions, preventive diplomacy and programming, mediation, improving adherence to the rule of law, documenting atrocities, supporting peacekeepers, and evacuating populations under attack.

While the United States recognizes the sovereignty of all member states, we remind member states of the commitments they voluntarily entered into to protect their populations from genocide, crimes against humanity, war crimes and ethnic cleansing. We continue to work with partner countries to strengthen coordination and share best practices, including through the United Nations General Assembly, the Security Council, the Peacebuilding Commission, and the Group of Friends of the Responsibility to Protect. We also recognize the critical role of nongovernmental organizations, the media, business and religious leaders, and local populations, including women, in efforts to prevent and respond to mass atrocities. The United States actively engages with these civic actors and organizations to enhance early warning and early action efforts, and reflect on lessons learned.

When prevention fails, promoting accountability for mass atrocity crimes is a priority for the United States. Bringing perpetrators to justice can deter those who otherwise might be emboldened to follow in their footsteps, and can help advance post-conflict reconciliation. The U.S. government is committed to holding those responsible for atrocities accountable by appropriately bringing them to justice in independent and impartial processes in accordance with fair trial guarantees. We also recognize the importance of programs to support survivors and promote reconciliation in the aftermath of atrocities, as a history of atrocities is one of the strongest predictors of future atrocities.

The U.S. government supports the Secretary-General’s effort to better coordinate the UN system to prevent atrocities. In particular, we strongly support the Secretary General’s recommendation that the Special Representative on Sexual Violence in Conflict work more closely with the Joint Office of the Special Advisors on the Prevention of Genocide and Responsibility to Protect, and we commend the excellent work of the SRSG, particularly in the Burma context. Women are often uniquely positioned within their communities to identify social

behaviors and patterns that are warning signs of violence against civilians. The United States strongly supports efforts to promote the meaningful participation of women in the prediction and prevention of outbreaks of mass atrocities. To this end, President Trump signed the Women, Peace, and Security Act in 2017, making the U.S. the first country to enact legislation incorporating UN Security Council Resolution 1325 into national law.

States that disregard or violate their primary responsibility to protect their own citizens represent one of the greatest threats to international peace and security we face today. Those who attempt to shield their crimes behind a veil of national sovereignty should find no comfort in this hall. As the preamble of the universal declaration—written in the aftermath of war and horrors—says, “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind”—a statement that is sadly no less true today than when it was 70 years ago when that foundational document was created. We have yet to achieve the “highest aspirations” laid out in the universal declaration, but in fully implementing the Responsibility to Protect, we can remain true to those aspirations and our national and collective commitments to them.

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**Cross References**

*Rohingya refugees*, **Ch. 1.C.3**

*International tribunals and other accountability mechanisms*, **Ch. 3.C**

*ICC and Libya*, **Ch. 3.C.1.c.**

*ICC and Sudan*, **Ch. 3.C.1.d.**

*Hybrid court for South Sudan*, **Ch.3.C.3.b.**

*International, Impartial and Independent Mechanism (“IIIM”) for Syria*, **Ch. 3.C.3.d**

*Efforts of the Palestinian Authority to Accede to Treaties*, **Ch. 4.B.4**

*Sokolow v. PLO*, **Ch. 5.A.4**

*Al-Tamimi v. Adelson*, **Ch. 5.B.2.a & 5.C.2**

*HRC Special Session on Gaza*, **Ch. 6.A.2.c**

*U.S. statement at HRC on Agenda Item 7 (Israel)*, **Ch. 6.A.2.d**

*Relocation of the U.S. Embassy to Jerusalem (Palestine v. United States)*, **Ch. 7.B.3**

*Venezuela*, **Ch. 7.D.1.a**

*Libya*, **Ch. 9.A.6**

*Jerusalem*, **Ch. 9.B.5**

*Libya cultural property*, **Ch. 14.A.1**

*Burma sanctions*, **Ch. 16.A.11.b**

*Libya sanctions*, **Ch. 16.A.11.e**

*Sanctions relating to the Middle East Peace Process*, **Ch. 16.A.11.f**

*Export controls on South Sudan*, **Ch. 16.B.3**

*Civilians in armed conflict*, **Ch. 18.A.4.a**

*Criminal accountability of UN officials and experts on missions*, **Chapter 7.A.2.**

*UN-African Union cooperation*, **Chapter 7.A.8.**

*Suspension of bilateral channel with Russia for Syria cessation of hostilities*, **Chapter 9.A.4.**

*Protecting Syrian cultural property*, **Chapter 14.B.**

*Syria-related sanctions*, **Chapter 16.A.2.**

*Sanctions*, **Chapter 16.A.**

*Civilians in armed conflict*, **Chapter 18.A.3.a.**

*Syria chemical weapons*, **Chapter 19.D.2**

## CHAPTER 18

### Use of Force

#### A. GENERAL

##### 1. Frameworks Guiding U.S. Use of Force

On March 12, 2018 the President provided a report to Congress on the “legal and policy frameworks guiding the United States’ use of military force and related national security operations.” See the President’s transmittal letter, available at <https://www.whitehouse.gov/briefings-statements/text-letter-president-united-states-officials/>. The report was provided consistent with Section 1264 of the National Defense Authorization Act for Fiscal Year 2018. The report also provides an update to the legal, factual, and policy bases for the “Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations,” originally published on December 5, 2016 (the “original report”), which is discussed in *Digest 2016* at 795-801. Excerpts follow from the report, which is available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

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#### *The Domestic Law Bases for the Ongoing Use of U.S. Military Force*

- *Statutory Authorization: The 2001 AUMF*
  - o The Scope of the 2001 AUMF: The classified annex contains more information on the application of the Authorization for Use of Military Force (2001 AUMF) ...
- *Statutory Authorization: The 2002 AUMF*: Although the ... 2002 AUMF was mentioned in the original report with respect to its authorization to use force against ISIS in Iraq and in certain circumstances in Syria, the original report did not provide a full explanation of the scope of the 2002 AUMF.

Under the relevant portions of the 2002 AUMF, “[t]he President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to ... defend the national security of the United States against the continuing threat posed by Iraq.” Although the threat posed by Saddam Hussein’s regime in Iraq was the primary focus of the 2002 AUMF, the statute, in accordance with its express goals, has always been understood to authorize the use of force for the related dual purposes of helping to establish a stable, democratic Iraq and for the purpose of addressing terrorist threats emanating from Iraq. After Saddam Hussein’s regime fell in 2003, the United States continued to take military action in Iraq under the 2002 AUMF to further these purposes, including action against al-Qaida in Iraq (now known as ISIS). Then, as now, that organization posed a terrorist threat to the United States and its partners and undermined stability and democracy in Iraq. Congress ratified this understanding of the 2002 AUMF by appropriating funds over several years. Furthermore, although the Iraq AUMF limits the use of force to address threats to, or stemming from, Iraq, it (like the 2001 AUMF) contains no geographic limitation on where authorized force may be employed. Accordingly, the 2002 AUMF reinforces the authority for military operations against ISIS in Iraq and, to the extent necessary to achieve the purposes described above, in Syria or elsewhere.

- *The President’s Constitutional Authority to Take Military Action in Certain Circumstances Without Specific Prior Authorization of Congress:* In addition to these statutes, Article II of the Constitution provides authority for the use of military force in certain circumstances even without specific prior authorization of Congress. For example, on April 6, 2017, the President directed a military strike against the Shayrat military airfield in Syria pursuant to his authority under Article II of the Constitution to conduct foreign relations and as Commander in Chief and Chief Executive. United States intelligence indicated that Syrian military forces operating from that airfield were responsible for the chemical weapons attack on Syrian civilians in southern Idlib Province, Syria. The President directed this strike in order to degrade the Syrian military’s ability to conduct further chemical weapons attacks and to dissuade the Syrian government from using or proliferating chemical weapons, thereby promoting regional stability and averting a worsening of the region’s current humanitarian catastrophe. In directing this strike, the President acted in the vital national security and foreign policy interests of the United States. Congress was notified of this particular strike on April 8, 2017, in a Presidential report, consistent with the War Powers Resolution.

#### ***Working With Others in an Armed Conflict***

The 2017 National Security Strategy and the 2018 National Defense Strategy continue to prioritize working by, with, and through allies and partners to achieve our national security objectives. This calls for partnerships with states, multinational forces, and in some cases, non-state actors that share U.S. interests. For example, 70 state partners (and 4 international organizations) are part of the Defeat-ISIS Coalition. United States-supported non-state actors in Syria were also critical in dismantling ISIS’s self-proclaimed physical “caliphate.”

- *Domestic Authorities and Limitations:*

Section 1232 of the NDAA for FY 2017, as amended by Section 1231 of the NDAA for FY 2018, purports to limit “bilateral military-to-military cooperation” between the United States and Russia. The United States does not support Russia’s military strategy in Syria, and U.S. military forces do not cooperate with Russian military forces. However, Section 1232

does not purport to limit military-to-military discussions with Russia to de-conflict military operations in Syria to reduce the risk of interference, miscalculation, or unintended escalation of military operations.

As described in the original report, the United States often supports its partners and allies by providing intelligence in furtherance of shared objectives. As appropriate, the United States takes a variety of measures, including diplomatic assurances, vetting, training, and monitoring, to promote respect for human rights and compliance with the law of armed conflict by the recipient of U.S. intelligence and to mitigate the risk that the intelligence will be used in violation of the law. Sharing must always be consistent with U.S. domestic law.

***Application of Key Domestic and International Legal Principles to Key Theaters***

- *Afghanistan:* Since October 7, 2001, the United States has conducted counterterrorism combat operations in Afghanistan. Pursuant to the strategy that the President announced publicly on August 21, 2017, U.S. forces remain in Afghanistan for the purposes of stopping the reemergence of safe havens that enable terrorists to threaten the United States, supporting the Afghan government and the Afghan military as they confront the Taliban in the field, and for the purpose of creating conditions to support a political process to achieve a lasting peace. United States forces in Afghanistan are training, advising, and assisting Afghan forces; conducting and supporting counterterrorism operations against al-Qa'ida and against ISIS; and taking appropriate measures against those who provide direct support to al-Qa'ida, threaten U.S. or coalition forces, or threaten the viability of the Afghan government or the ability of the Afghan National Defense and Security Forces to achieve campaign success. The United States remains in an armed conflict, including in Afghanistan and against al-Qa'ida, ISIS, the Taliban, and the Taliban Haqqani Network, and active hostilities are ongoing. The domestic and international legal bases for U.S. military operations and activities in Afghanistan remain unchanged from the original report.
- *Iraq:* Due to accelerated progress in the fight to defeat ISIS, the United States and the Defeat-ISIS Coalition are shifting focus in Iraq from combat operations to sustaining military gains. United States forces, however, continue to conduct airstrikes, and Iraqi security forces are still engaged in combat operations against remaining cells of ISIS. ISIS retains the ability to carry out lethal attacks, and it still poses a significant threat to civilians and the stability of the region. At the continued request and with the consent of the Government of Iraq, and with the continued authority provided by statute and the Constitution, U.S. forces are advising and coordinating with Iraqi forces and are training, equipping, and building the capacity of select elements of the Iraqi security forces, including Iraqi Kurdish Peshmerga forces, to prevent the re-emergence of ISIS. The domestic and international legal bases for U.S. military operations and activities in Iraq remain unchanged from the original report.
- *Syria:* The United States and the Defeat-ISIS Coalition liberated 4.5 million people from ISIS oppression in 2017, and ISIS has lost 98 percent of the territory it once claimed in Iraq and Syria. The United States and U.S.-supported Syrian Democratic Forces (SDF) are engaged in liberating the middle Euphrates River valley in Syria. U.S. operations include continued airstrikes; advice and coordination to indigenous ground forces; and training, equipment, and other assistance in support of those indigenous forces. Despite this, ISIS continues to be able to carry out lethal attacks. Therefore, the United States continues to use force against ISIS and al-Qa'ida in other parts of Syria as well. After the

middle Euphrates River valley is liberated, the United States will continue to conduct airstrikes against these terrorist groups in Syria and will continue to train, equip, and build the capacity of appropriately vetted Syrian groups pursuant to the authority provided by statute and the Constitution.

The fight against ISIS continues, and it remains a regional and global threat through its ability to organize and inspire acts of violence throughout the world. Similarly, al-Qa'ida continues to pose a threat to the United States and to the security of our partners and allies. The domestic and international legal bases for U.S. military operations and activities against ISIS and al-Qa'ida in Syria remain unchanged from the original report.

In May and June 2017, as well as February 2018, the United States took strikes against the Syrian Government and pro-Syrian Government forces. These strikes were limited and lawful measures taken to counter immediate threats to U.S. or partner forces while engaged in the campaign against ISIS. As a matter of domestic law, the 2001 AUMF provides authority to use force to defend U.S., Coalition, and partner forces engaged in the campaign to defeat ISIS to the extent such use of force is a necessary and appropriate measure in support of counter-ISIS operations. As a matter of international law, necessary and proportionate use of force in national and collective self-defense against ISIS in Syria includes measures to defend U.S., Coalition, and U.S.-supported partner forces while engaged in the campaign to defeat ISIS.

- *Yemen:* In addition to conducting direct action against AQAP in Yemen as described in the original report, the United States has also conducted a limited number of airstrikes against ISIS in Yemen. The 2001 AUMF confers authority to use force against ISIS. As a matter of international law, we note that the airstrikes against ISIS have been conducted with the consent of the Government of Yemen in the context of its armed conflict against ISIS and also in furtherance of U.S. national self-defense.

As described in the original report, since 2015, the United States has provided limited support to the Kingdom of Saudi Arabia (KSA)-led coalition military operations against Houthi and Saleh-aligned forces in Yemen. Authorized types of support continue to include intelligence sharing, best practices, and other advisory support when requested and appropriate. Additionally, the Arms Export Control Act (AECA) and associated delegations of authority provide the Secretary of State, primarily through the Foreign Military Sales program and through the Department of State's licensing of Direct Commercial Sales, the authority to provide or license defense articles and defense services to KSA, the United Arab Emirates (UAE), and other members of the KSA-led coalition. Many of these defense articles and defense services have been used in the conflict in Yemen. The domestic and international legal bases for limited U.S. military support to KSA-led coalition operations in Yemen remain unchanged from the original report.

- *Somalia:* In addition to conducting direct action against al-Qa'ida and al-Shabaab in Somalia as described in the original report, the United States has also conducted airstrikes against a limited number of ISIS terrorist targets in Somalia. The 2001 AUMF confers authority to use force against ISIS. As a matter of international law, we note that the airstrikes against ISIS have been conducted with the consent of the Government of Somalia in the context of its armed conflict against ISIS and also in furtherance of U.S. national self-defense.

- *Libya:* The United States has continued to conduct airstrikes against ISIS terrorist targets in Libya, including its desert camps and networks, to promote regional stability and contribute to the defeat of ISIS in Libya. The domestic and international legal bases for military direct action in Libya remain unchanged from the original report,
- *Niger:* At the request of the Government of Niger, the previous Administration approved, and the current Administration continued, the deployment of U.S. forces to Niger under the President's constitutional authority as Commander-in-Chief and Chief Executive and under certain statutory authorities of the Secretary of Defense to train, advise, and assist Nigerien partner forces. On October 4, 2017 and December 6, 2017, those U.S. forces and their Nigerien partner forces were attacked by forces assessed to be elements of ISIS, a group within the scope of the 2001 AUMF, and responded with force in self-defense. The Administration has concluded that this use of force was also conducted pursuant to the 2001 AUMF.

### ***Targeting***

*United States Policies Regarding Targeting and Incidental Civilian Casualties:* The United States remains committed to complying with its obligations under the law of armed conflict, including those that address the protection of civilians, such as the fundamental principles of necessity, humanity, distinction, and proportionality. In addition to American values and legal imperatives that guide U.S. forces in the protection of civilians, protecting civilians is fundamentally consistent with mission accomplishment and the legitimacy of operations. The United States continues, as a matter of policy, to apply heightened targeting standards that are more protective of civilians than are required under the law of armed conflict. These heightened policy standards are reflected in Presidential and other Executive Branch policies, military orders and rules of engagement, and the training of U.S. personnel. ...

### ***Capture and Detention of Individuals in Armed Conflict***

The capture of terrorist suspects remains an essential part of U.S. counterterrorism strategy. The United States uses all available tools at its disposal, including law of armed conflict detention, the criminal justice system, and transfers to third countries. Maximizing intelligence collection and seeking the most appropriate long-term disposition are key factors in choosing the right tool or combination of tools, while always adhering to U.S. legal obligations, policies, and values. The classified annex contains additional information on this topic.

The President issued Executive Order (E.O.) 13823 on January 30, 2018, directing the Secretary of Defense, in consultation with the Secretary of State, the Attorney General, the Secretary of Homeland Security, the Director of National Intelligence, and the heads of any other appropriate executive departments and agencies, to recommend policies to the President regarding the disposition of individuals captured in connection with an armed conflict. The Executive Branch will inform Congress of any new policies approved by the President.

- *Scope of Military Detention Under Article II of the US Constitution:* As discussed in the original report, the President as Chief Executive and Commander-in-Chief has constitutional authority to direct the use of military force in certain circumstances, without prior statutory authorization. Over two centuries of Executive Branch practice support this authority... This authority has been the basis for using force in a number of instances discussed throughout the original report and in this update. If the President were to order operations in reliance on his constitutional authority to use military force abroad, that authority would include the power to detain individuals with whom the United States

is engaged in hostilities so that they could not return to the battlefield for the duration of those hostilities.

- *Review of Continued Detention of Detainees at Guantanamo Bay:* The President issued E.O. 13823 on January 30, 2018, revoking Section 3 of E.O. 13492 of January 22, 2009, which was never acted upon fully but which ordered the closure of detention facilities at U.S. Naval Station Guantanamo Bay. Detention operations at Guantanamo Bay are necessary because a number of the remaining detainees are being prosecuted by military commission, and the detention of others is necessary to protect against continuing, significant threats to the security of the United States, as determined by periodic reviews. Further, detention operations at Guantanamo Bay are legal, safe, humane, and conducted consistent with U.S. and international law. The E.O. provides that all detention operations at U.S. Naval Station Guantanamo Bay will continue to be conducted consistent with all applicable United States and international law. The E.O. also permits the transport and detention of new detainees to Guantanamo Bay when lawful and necessary to protect the United States and directs the Secretary of Defense, in consultation with the Secretary of State and the Attorney General, to recommend policies to the President governing the transfer of individuals to Guantanamo Bay.

For those detainees at Guantanamo Bay not charged in or subject to a judgment of conviction by a military commission, E.O. 13823 retains the procedures for periodic review established in E.O. 13567 of March 7, 2011, which are described in the original report. The purpose of the periodic review is to determine whether continued law of war detention is necessary to protect against a significant threat to the security of the United States.

### ***Prosecution of Individuals Through the Criminal Justice System and Military Commissions***

Since the publication of the original report, the Department of Justice has successfully prosecuted a number of individuals for terrorism and terrorism-related offenses. Among others, Ibrahim Adam Huran, also known as Spin Ghul, was sentenced to life imprisonment for his role in attempting to murder American military personnel in Afghanistan and conspiring to bomb the U.S. Embassy in Nigeria, and Ahmed Abu Khattala was convicted of federal terrorism charges stemming from his role in the 2012 attacks on U.S. facilities in Benghazi.

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## **2. Use of Force Issues Related to Counterterrorism Efforts**

### ***Congressional communications regarding legal basis for counterterrorism operations***

On February 12, 2018, Assistant Secretary of State for Legislative Affairs Mary K. Waters wrote to Senator Tim Kaine in response to his letter of December 19, 2017 about the U.S. military counter ISIS campaign in Iraq and Syria. The State Department response was coordinated with the Department of Defense (“DoD”), which also responded to Senator Kaine on January 29, 2018. Excerpts follow from the State Department letter to Senator Kaine.

\* \* \* \*

Our purpose and reasons for being in Iraq and Syria are unchanged: defeating ISIS and degrading al-Qa'ida. The Iraqi Security Forces, including the Kurdish Peshmerga, and local partner forces in Syria, with the support of the 74-member Global Coalition to Defeat ISIS, have made great progress in destroying ISIS's so-called "caliphate." With Coalition support, our partners on the ground have liberated nearly all of the territory and millions of civilians once under ISIS's despotic control. However, the threat posed by ISIS and al-Qa'ida is not solely dependent upon the physical control of territory by these groups. Ensuring that ISIS cannot regenerate its forces or reclaim lost ground is essential to the protection of our homeland. Realizing that military operations are necessary, but insufficient by themselves, to achieve ISIS's enduring defeat, the U.S.-led Global Coalition to Defeat ISIS is committed to helping stabilize liberated communities through activities including restoring basic essential services, de-mining, and facilitating our partners' transition to sustainable, self-sufficient security forces and credible, inclusive governance. Through this approach, we are laying the groundwork to prevent ISIS's reemergence and setting the conditions that are ultimately conducive to allowing displaced Syrians and refugees to safely and voluntarily return to their homes.

The United States also continues to believe that the Syrian civil conflict must be resolved through a political solution, and a political solution can only be reached through the full implementation of United Nations Security Council Resolution 2254.

The domestic and international legal bases for use of military force by the United States in Iraq and Syria are unchanged, and outlined below.

As a matter of domestic law, legal authority for the use of military force against ISIS and al-Qa'ida includes the ... AUMF of 2001 and 2002. The 2001 AUMF also provides authority to use force to defend U.S., Coalition, and partner forces engaged in the campaign to defeat ISIS to the extent such use of force is a necessary and appropriate measure in support of counter-ISIS operations. The strikes taken by the United States in May and June 2017 against the Syrian Government and pro-Syrian-Government forces were limited and lawful measures taken under that authority to counter immediate threats to U.S. or partner forces engaged in that campaign. The United States does not seek to fight the Government of Syria or Iran or Iranian-supported groups in Iraq or Syria. However, the United States will not hesitate to use necessary and proportionate force to defend U.S., Coalition, or partner forces engaged in operations to defeat ISIS and degrade al-Qa'ida. There has been no assessment that either the Syrian Government or pro-Syrian-Government forces are "associated forces" of ISIS under the 2001 AUMF.

The 2002 AUMF provides authority "to defend the national security of the United States against the continuing threat posed by Iraq." The 2002 AUMF is an important source of authority for the use of military force to assist the Government of Iraq in military operations against ISIS and in continuing counterterrorism operations to address threats to U.S. national security emanating from Iraq following the destruction of ISIS's so-called physical "caliphate."

As a matter of international law, the United States is using force in Iraq with the consent of the Iraqi government. In Syria, the United States is using force against ISIS and al-Qa'ida, and is providing support to Syrian partner forces fighting ISIS such as the Syrian Democratic Forces, in the collective self-defense of Iraq (and other States) and in U.S. national self-defense. Consistent with the inherent right of self-defense, the United States initiated necessary and proportionate actions in Syria against ISIS and al-Qa'ida in 2014, and those actions continue to the present day. Such necessary and proportionate measures include the use of force to defend U.S., Coalition, and U.S.-supported partner forces from any threats from the Syrian Government and pro-Syrian Government forces.

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The January 29, 2018 Defense Department response to Senator Kaine is excerpted below.

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The 2001 ... AUMF authorizes the United States to use force against al-Qa'ida, the Taliban, and associated forces and against ISIS. DoD remains particularly focused on targeting ISIS and al-Qa'ida in Iraq and Syria. U.S. and partner forces in both countries continue to fight ISIS and al-Qa'ida and disrupt terrorist attack plotting. The Department of Defense is not targeting other militias or organizations, including Shia militia groups or Iranian proxies.

In support of the President's Iran Strategy, DoD is reviewing the breadth of our security cooperation activities, force posture, and plans. The Department of Defense is identifying new areas where we will work with allies and partners to pressure the Iranian regime, neutralize its destabilizing influences, and constrain its aggressive power projection, particularly its support for terrorist groups and militants. DoD supports State Department-led efforts to collaborate with allies and partners and, through sanctions and multilateral organizations like the United Nations, to pressure Iran to halt its destabilizing activities.

Although U.S. and Coalition-backed forces have liberated the vast majority of the territory ISIS once held in Iraq and Syria, more tough fighting remains ahead to defeat ISIS's physical "caliphate" and achieve the group's permanent defeat. ISIS is transitioning to an insurgency in Iraq and Syria, while continuing to support the global terrorist operations of its branches, networks, and individual supporters worldwide. Just as when we previously removed U.S. forces prematurely, the group will look to exploit any abatement in pressure to regenerate capabilities and reestablish local control of territory. As ISIS evolves, so too, is the campaign to defeat ISIS transitioning to a new phase in Iraq and Syria. DoD is optimizing and adapting our military presence to maintain counterterrorism pressure on the enemy, while facilitating stabilization and political reconciliation efforts needed to ensure the enduring defeat of ISIS. We, along with the Coalition and our partners, remain committed to ISIS's permanent defeat. ISIS will be defeated when local security forces are capable of effectively responding to and containing the group, and when ISIS is unable to function as a global organization.

With the approval of the Government of Iraq, DoD and other foreign partners are working with the Iraqi Security Forces to improve their capabilities and secure areas liberated from ISIS. In Syria, operating under current authorities, the U.S. military will continue to support local partner forces in Syria to complete the military defeat of ISIS and prevent its resurgence. The United States continues to support the Geneva-based political process pursuant to United Nations Security Council Resolution 2254....

As part of our effort to accelerate the campaign against ISIS, DoD revised how it publicly reports force levels in Iraq and Syria. As a result, DoD now publicly reports that it has approximately 2,000 forces in Syria. These numbers do not reflect an increase in the number of personnel on the ground; rather, they represent a change in how these numbers are publicly reported. Under previous reporting practices, certain forces in Syria on a temporary duty status were not publicly reported, but they are now included in the 2,000 force total. For operational

security reasons, U.S. forces conducting sensitive missions are not included in the publicly reported numbers. As you know, DoD provides these classified details to its congressional oversight committees in closed sessions. We anticipate these numbers will decrease as the nature of our operations change in Iraq and Syria, but we do not have a timeline-based approach to our presence in either Iraq or Syria.

In addition to providing authority to conduct offensive counterterrorism operations against al-Qa'ida and ISIS in Iraq and Syria, the 2001 AUMF also provides authority to use force to defend U.S., Coalition, and partner forces engaged in the campaign to defeat ISIS to the extent such force is a necessary and appropriate measure in support of the D-ISIS campaign. The small number of strikes taken by U.S. forces since May 2017 against the Syrian Government and pro-Syrian Government forces, referenced in the June and December 2017 periodic reports to Congress consistent with the War Powers Resolution, were limited and lawful measures taken under this authority to counter immediate threats to U.S. or partner forces engaged in the D-ISIS campaign. There has been no assessment that either the Syrian Government or pro-Syrian Government forces are “associated forces” of ISIS under the 2001 AUMF.

The April 6, 2017, U.S. missile strike on Shayrat airfield in Syria was not based on the authority of either the 2001 or 2002 AUMFs. Rather, as was notified to the Congress on April 8, the President authorized that strike pursuant to his power under Article II of the Constitution as Commander in Chief and Chief Executive to use this sort of military force overseas to defend important U.S. national interests. The U.S. military action was directed against Syrian military targets directly connected to the April 4 chemical weapons attack in Idlib and was justified, legitimate, and proportionate as a measure to deter and prevent Syria’s illegal and provocative use of chemical weapons.

Finally, the 2002 Authorization for Use of Military Force Against Iraq Resolution (2002 AUMF) continues to provide authority for military operations against ISIS in Iraq. It also provides authority to respond to threats to U.S. national security emanating from Iraq that may re-emerge and that may not be covered by the 2001 AUMF. The 2002 AUMF thus remains necessary to support the use of military force to assist the Government of Iraq both in the fight against ISIS, and in stabilizing Iraq following the destruction of ISIS’s so-called caliphate.

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### **3. Bilateral and Multilateral Agreements and Arrangements**

#### ***a. Defense Cooperation with Cote D’Ivoire***

The United States and Cote D’Ivoire effected an agreement on defense cooperation by exchange of notes at Abidjan on June 7, 2017 and February 23, 2018. The agreement entered into force February 23, 2018. The text of the agreement is available at <https://www.state.gov/18-223-2/>.

#### ***b. Defense Cooperation with Ghana***

The United States and Ghana signed a defense cooperation agreement at Accra on May 9, 2018. The agreement entered into force on May 31, 2018. The text of the agreement, with annex and appendix, is available at <https://www.state.gov/18-531/>.

**c. *Defense Cooperation with Honduras***

The United States and Honduras effected an agreement amending the annex of the agreement of May 6 and May 7, 1982 regarding defense cooperation. The agreement making the amendment was done by exchange of notes at Tegucigalpa on September 13, 2017 and May 16, 2018 and entered into force May 16, 2018. The text, with attachment, is available at <https://www.state.gov/18-516/>.

**d. *Defense Cooperation with Japan***

The United States and Japan effected an agreement regarding defense cooperation by exchange of notes at Tokyo on November 20, 2018. The agreement entered into force November 20, 2018 and is available at <https://www.state.gov/18-1120>.

**e. *Defense Cooperation with Poland***

In 2018, the United States and Poland effected an agreement amending their defense cooperation agreement of July 15, 2015. The agreement making the amendment was effected by exchange of notes at Warsaw on November 28 and December 21, 2018 and entered into force December 21, 2018. The agreement is available at <https://www.state.gov/18-1221>.

**4. International Humanitarian Law**

**a. *Civilians in Armed Conflict***

On May 22, 2018, U.S. Representative to the UN for Economic and Social Affairs Kelley Currie delivered remarks at a UN Security Council open debate on the protection of civilians in armed conflict. Ambassador Currie's remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-security-council-open-debate-on-the-protection-of-civilians-in-armed-conflict/>.

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The 2018 Secretary-General's report paints a dismal picture of the protection of civilians in the field and describes a "state of unrelenting horror and suffering affecting millions of women children and men across all conflicts."

The state of affairs for the protection of civilians is desolate. Millions of people are bearing the consequences. Tens of thousands innocently dying from unlawful attacks involving explosive weapons and chemical weapons, deliberate attacks on schools and medical facilities, extra judicial killings, starvation, sexual violence, and blatant disregard for international

humanitarian law. Many more civilians are either missing or have been forced from their homes; and medical and humanitarian personnel are being targeted at an alarming number. Sexual violence increasingly is being used as a tactic of war, and victims continue to be targeted based on their ethnic and religious backgrounds. Member States seemingly feel no qualms about routinely denying humanitarian access to civilians in dire need, from Burma to Yemen.

We all have an obligation and moral duty to demand and uphold the international community's resounding rejection of the use of chemical weapons in war 100 years ago after the world first witnessed the horrors of chemical warfare during World War I. We all have an obligation to uphold UN Security Council resolutions that call for the protection of schools, medical facilities, and even journalists from being targets in war. We have an obligation to insist on unhindered humanitarian access for all those in need and safe, voluntary evacuations of civilians compelled destruction to flee their homes, consistent with our obligations under international humanitarian and human rights law.

It is critical that all UN Member States do their part to protect civilians. The United States welcomes the Secretary-General's steps to improve peacekeeping and revive a sense of collective responsibility for the success of UN peacekeeping operations. But we need to be honest and clear when Member States are not living up to their commitments, and we—especially we in this Council—should be willing to apply meaningful pressure when parties to a conflict do not change course.

In missions across the globe, peacekeepers today serve at great personal risk and act heroically in many cases to protect civilians. However, we also still have far too many examples of peacekeepers failing to take necessary action to protect civilians. We continue to see units retreat from towns they are supposed to protect, rather than standing their ground as armed attackers approach. We continue to see those who are responsible for protecting civilians abuse their positions of trust.

Improving the protections of civilians in peacekeeping requires increased accountability and the United States welcomes the Secretary-General's steps to institutionalize a culture of accountability for performance in UN peacekeeping, starting with the development and implementation of a comprehensive performance policy that identifies transparent standards for performance and details measures to hold underperformers accountable.

The United States stands firmly behind the commitment to enhance performance for the protection of civilians and encourages all Member States to do the same by supporting the Kigali Principles, which were designed to help peacekeepers effectively implement their protection of civilians mandates. For example, the Principles call for troop-contributing countries to empower military commanders of peacekeeping contingents to use force to protect civilians—knowing that if a commander has to wait hours and hours for guidance from capital, it may be too late to prevent a fast-approaching attack on a nearby village. If properly implemented, there is little doubt that the Kigali Principles would make peacekeeping missions more effective, improve civilian security, and save lives.

We also join our UK colleagues in support of the human rights elements of peacekeeping missions. Their work fulfills crucial protection and prevention aspects to Council mandates, to which all Council members—but especially the P5—have agreed.

But what else can we as the Security Council or as Member States do to promote respect for international humanitarian law?

For one, we as the Security Council should stand in solidarity against genocide, crimes against humanity, war crimes, and ethnic cleansing, and work together to adopt urgently needed resolutions in all such cases.

Secondly, we as the Council should use the entire range of tools at our disposal that can and should be employed to compel parties to comply with applicable IHL and international human rights law and to promote accountability for breaches or violations. This includes sanctions, arms embargoes, fact-finding missions, independent mechanisms to gather, collect, and store evidence, and justice mechanisms to bring those responsible for these violations to justice.

Thirdly, each state should ensure that they have appropriate legislative and institutional arrangements to address current—and prevent future—violations of international humanitarian law and violations and abuses of fundamental human rights. Accountability is essential to provide both justice for victims of such violations and to end the culture of impunity that leads to them in the first place. Individual states should also investigate and, where appropriate, prosecute crimes committed within their jurisdiction. Credible national accountability efforts should be encouraged and supported along with other mechanisms, including fact-finding missions, commissions of inquiry, and international and hybrid tribunals. These mechanisms are critical when national options are unavailable or futile.

Fourth, we should use all the prevention tools we have at our disposal to stop cycles of conflict, build social cohesion, and promote and protect human rights. We note the Secretary-General's important leadership on the prevention and peacebuilding agendas.

And finally, the international community must give this issue the attention it deserves. Today is an important step in this regard.

We all know it's not enough just to be outraged by the accounts we've heard here today—and pretty much every other week that we sit in this Council. It's not enough to say the right things in this room, and then walk out of here and do nothing. We must remain committed to promoting the protection of civilians by doing our own part, as well. We have to use the tools that we have to ensure that we are doing our part to protect civilian lives and fulfill our own conventional and customary obligations under international humanitarian law and international human rights law. This not something any of us can do alone, but that should not stop all of us from taking the robust national and regional steps we can. We will need solid commitments and urgent action by all of us to truly and effectively protect innocent human lives.

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Attorney-Adviser Thomas Weatherall provided the U.S. explanation of vote on a Third Committee resolution on missing persons on November 16, 2018. Mr.

Weatherall's statement follows and is also available at

<https://usun.usmission.gov/explanation-of-vote-on-a-third-committee-resolution-on-missing-persons/>.

The United States agrees that avoiding harm to civilians, including through minimizing military use of civilian infrastructure, is important for preventing missing persons in armed conflict. The United States notes, however, that there is no obligation under international law for states to minimize the military use of civilian infrastructure. Accordingly, we read the language in operative paragraph

4 as referring only to states' general obligation to act in accordance with applicable international law and not as stating that international law requires states to minimize military use of civilian infrastructure.

**b. Report on Civilian Casualties**

On June 1, 2018, the Department of Defense submitted the annual report on civilian casualties in connection with U.S. military operations required by Section 1057 of the National Defense Authorization Act ("NDAA") for Fiscal Year 2018. Excerpts follow from the report.

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As noted in Executive Order 13732, *United States Policy on Pre- and Post-Strike Measures To Address Civilian Casualties in U.S. Operations Involving the Use of Force*, of July 1, 2016, the protection of civilians is fundamentally consistent with the effective, efficient, and decisive use of force in pursuit of U.S. national interests. Minimizing civilian casualties can further mission objectives; help maintain the support of partner governments and vulnerable populations, especially in the conduct of counterterrorism and counterinsurgency operations; and enhance the legitimacy and sustainability of U.S. operations critical to U.S. national security. As a matter of policy, U.S. forces therefore routinely conduct operations under policy standards that are more protective than the requirements of the law of war that relate to the protection of civilians.

U.S. forces also protect civilians because it is the moral and ethical thing to do. Although civilian casualties are a tragic and unavoidable part of war, no force in history has been more committed to limiting harm to civilians than the U.S. military. This commitment is reflected in DoD's consistent efforts to maintain and promote best practices that reduce the likelihood of civilian casualties, take appropriate steps when such casualties occur, and draw lessons from DoD operations to further enhance the protection of civilians. Executive Order 13732 catalogues the best practices DoD has implemented to protect civilians during armed conflict, and it directs that those measures be sustained in present and future operations.

**I. MILITARY OPERATIONS DURING 2017 THAT WERE CONFIRMED, OR REASONABLY SUSPECTED, TO HAVE RESULTED IN CIVILIAN CASUALTIES**

During 2017, U.S. forces engaged in a number of military operations, some of which were assessed to have resulted in civilian casualties. This section provides information regarding: a) Operation INHERENT RESOLVE and other military actions related to Iraq and Syria; b) Operation FREEDOM'S SENTINEL, including support to the North Atlantic Treaty Organization (NATO)-led RESOLUTE SUPPORT Mission; c) U.S. military actions in Yemen against al-Qa'ida in the Arabian Peninsula (AQAP) and the Islamic State of Iraq and Syria (ISIS); d) U.S. military actions in Somalia against ISIS and al-Shabaab; and e) U.S. military actions in Libya against ISIS.

DoD's practice for many years has been not to tally systematically the number of enemy combatants killed or wounded during operations. Although the number of enemy combatants killed in action is often assessed after combat, a running "body count" would not necessarily provide a meaningful measure of the military success of an operation and could even be

misleading. For example, the use of such metrics in the Vietnam War has been heavily criticized. We have therefore provided other information that is intended to help give context, such as information regarding the objectives, scale, and effects of these operation.

It is longstanding DoD policy to comply with the law of war in all military operations, however characterized. All DoD operations in 2017 were conducted in accordance with law of war requirements, including law of war protections for civilians, such as the fundamental principles of distinction and proportionality and the requirement to take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack.

DoD assesses that there are credible reports of approximately 499 civilians killed and approximately 169 civilians injured during 2017 as a result of Operation INHERENT RESOLVE in Iraq and Syria, Operation FREEDOM'S SENTINEL in Afghanistan, and U.S. military actions in Yemen against AQAP and ISIS. For the purposes of this report, these are incidents in which U.S. aircraft conducted the strike or strikes or where U.S. personnel engaged in ground combat. DoD has no credible reports of civilian casualties from U.S. military operations in Somalia or Libya in 2017. Sub-sections A through E below ... provide additional information about these operations.

The assessments of civilian casualties are based on reports that DoD has been able to assess as "credible"; *i.e.*, based on the available information, it is assessed that it is more likely than not that the report regarding civilian casualties is correct. Section II of this report describes in more detail the processes for conducting these assessments.

#### **A. Operation INHERENT RESOLVE and other military actions related to Iraq and Syria**

*Operation INHERENT RESOLVE.* During 2017, as part of the United States' comprehensive strategy to defeat ISIS, U.S. forces conducted a systematic campaign of airstrikes and other vital actions against ISIS forces in Iraq and Syria and carried out airstrikes and other necessary actions against al-Qa'ida in Syria in the context of the ongoing armed conflict against those groups.

U.S. forces were also deployed to Syria to conduct actions against ISIS with indigenous ground forces. In Iraq, U.S. forces advised and coordinated with Iraqi forces and provided training, equipment, communications support, intelligence support, and other support to select elements of the Iraqi security forces, including Iraqi Kurdish Peshmerga forces.

During 2017, the U.S.-led Coalition to defeat ISIS conducted more than 10,000 strikes, which killed hundreds of ISIS leadership figures and facilitators in Iraq and Syria; disrupted ISIS's command control network; degraded its use of unmanned aerial systems; reduced its ability to conduct research and development, procurement, and administration; and denied sources of funding for terrorist activities. These losses have undermined ISIS's ability to conduct attacks throughout the region and the world. With the loss of terrain and the liberation of the local population, ISIS can no longer generate funding through extortion and taxation. Additionally, airstrikes and ground operations crippled ISIS's use of hydrocarbon generating facilities and facilitation routes that moved and supplied ISIS fighters and supported illicit oil sales. U.S. forces have also degraded ISIS media operations.

These actions helped support partners, in particular the Iraqi Security Forces (ISF) and Syrian Democratic Forces (SDF), to make extraordinary progress over the past year, liberating Mosul and Raqqah – the former capitals of ISIS's self-proclaimed "caliphate" – during 2017. The liberation of Mosul provided the ISF with the momentum that led to the quick liberation of

Tal Afar and Hawijah. During 2017, more than 61,500 square kilometers were liberated from ISIS control across Iraq and Syria, equating to the liberation of more than 98 percent of the land once claimed by ISIS and of more than 4.5 million people from ISIS oppression. Actions in Iraq were undertaken in coordination with the Government of Iraq, and in conjunction with Coalition partners.

In 2017, U.S. forces participating in the Defeat-ISIS campaign in Syria also took a limited number of strikes against Syrian government and pro-Syrian government forces in order to counter immediate threats to U.S. and partner forces while engaged in that campaign.

DoD assesses that there were credible reports of civilian casualties caused by Operation INHERENT RESOLVE in Iraq and Syria during 2017, as indicated earlier in the report.

For Operation INHERENT RESOLVE, U.S. Central Command (USCENTCOM) publishes a monthly report that: (1) catalogues reports of civilian casualties that have been received, including the date and location in which the civilian casualties reportedly occurred and the source of the report (*e.g.*, a military unit's own after-action reporting, media report, non-governmental organization report, posting on social media); and (2) whether reports of civilian casualties have been assessed to be credible or not, and if not, the general reasons why such reports were assessed not to be credible. The monthly report also identifies the reports of civilian casualties that still remain to be assessed.

It should be noted that the U.S.-led Coalition to defeat ISIS, as a matter of strategy and policy, considers all civilian casualties to be the combined result of "Coalition" action and jointly attributed to Coalition members. It is rarely the case that a single civilian casualty occurs solely from the actions of one nation's military activities. Coalition personnel from multiple countries take part in every strike in some manner, from the initial collection and analysis of intelligence, to the Coalition's deliberate targeting process, and finally, in conducting the strikes themselves. In our view, this is the most appropriate way to view civilian casualty incidents related to Coalition action in Iraq and Syria. Public reports released by USCENTCOM about civilian casualties reflect this approach.

Due to the number of reports of civilian casualties in Iraq and Syria received during 2017 and the resources required to review each report, as of February 26, 2018, more than 450 reports of civilian casualties from 2017 remained to be assessed. As described below, DoD continues to assess reports and updates assessments if DoD receives additional information on any report of civilian casualties.

*Additional Military Action in Syria.* Additionally, on April 6, 2017, U.S. forces in the Mediterranean Sea operating beyond the territorial sea of any State struck the Shayrat military airfield in Syria in response to the chemical weapons attack on Syrian civilians in southern Idlib Province, Syria, on April 4, 2017. The strike, which involved 59 Tomahawk Land Attack missiles, was assessed to have resulted in the damage or destruction of fuel and ammunition sites, air defense capabilities, and 20 percent of Syria's operational aircraft. DoD has no credible reports of civilian casualties resulting from this strike.

#### **B. Operation FREEDOM'S SENTINEL, including support to the North Atlantic Treaty Organization (NATO)-led RESOLUTE SUPPORT Mission**

During 2017, U.S. forces operated in Afghanistan to eliminate the reemergence of safe-havens that enable terrorists to threaten the United States or its interests, support the Afghan government and the Afghan military as they confront terrorist organizations in the field, and help create conditions to support a political process to achieve a lasting peace. In the context of the ongoing armed conflict in Afghanistan, U.S. forces in Afghanistan trained, advised, and assisted

Afghan forces; conducted and supported counterterrorism actions against al-Qa'ida and against ISIS; and took appropriate measures against those who provide direct support to al-Qa'ida, threaten U.S. and Coalition forces, or threaten the viability of the Afghan government or the ability of the Afghan National Defense and Security Forces to achieve campaign success.

These actions included strikes, such as (1) the strike on February 26, 2017, that killed Taliban commander Mullah Abdul Salam, along with four other enemy combatants in Kunduz; (2) the strike on an ISIS tunnel complex in Achin district, Nangarhar Province, on April 13, 2017, that was designed to minimize the risk to Afghan and U.S. forces conducting clearing operations in the area while maximizing the destruction of ISIS fighters and facilities; (3) the strike on April 19, 2017, that killed Quari Tayib, once known as the Taliban shadow governor of Takhar Province, along with eight additional Taliban fighters in Kunduz Province; (4) the strike on an ISIS headquarters in Kunar Province on July 11, 2017, that killed an emir of ISIS, Abu Sayed; and (5) the strike on December 1, 2017, that killed the Taliban's "Red Unit" commander Mullah Shah Wali, along with one of Wali's deputy commanders and three other insurgents in Helmand Province. These actions also included strikes on seven Taliban drug labs and one Taliban command-and-control node in northern Helmand Province during November 2017.

DoD assesses that there were credible reports of civilian casualties caused by U.S. military actions in Afghanistan during 2017, as indicated earlier in the report.

### **C. U.S. military actions in Yemen against al-Qa'ida in the Arabian Peninsula (AQAP) and ISIS**

During 2017, a small number of U.S. military personnel were deployed to Yemen to conduct actions in the context of the armed conflict against AQAP and ISIS. U.S. forces continued to work closely with the Government of Yemen and regional partner forces to dismantle and ultimately eliminate the terrorist threat posed by these groups. U.S. forces conducted a number of airstrikes against AQAP operatives and facilities in Yemen, and supported United Arab Emirates- and Yemen-led efforts to clear AQAP from Shabwah Governorate.

For example, on January 20, 21, and 22, 2017, the U.S. military conducted strikes in al-Baydah Governorate, which killed five AQAP operatives. On January 28, 2017, U.S. forces conducted a raid on an AQAP compound in al-Bayda, Yemen, to gather information to help prevent future terrorist attacks, killing 14 AQAP operatives. U.S. forces also conducted a counter-terrorism operation against a compound associated with AQAP in Ma'rib Governorate, Yemen, on May 23, 2017, which killed seven AQAP militants through a combination of small arms fires and airstrikes. On November 20, 2017, U.S. airstrikes in al-Bayda Governorate, Yemen, killed five AQAP militants, including an AQAP leader responsible for planning and conducting terrorist attacks against Yemeni and Coalition forces and an al-Bayda-based facilitator. U.S. forces also conducted eight airstrikes in Yemen in December 2017 that targeted both AQAP and ISIS, resulting in the death of an AQAP external operations facilitator and the AQAP deputy arms facilitator with ties to senior AQAP leadership and who was responsible for facilitating the movement of weapons, explosives, and finances in Yemen.

DoD assesses that there were credible reports of civilian casualties caused by U.S. military actions in Yemen against AQAP and ISIS during 2017, as indicated earlier in the report.

### **D. U.S. military actions in Somalia against ISIS and al-Shabaab**

During 2017, U.S. forces in Somalia were countering the terrorist threat posed by ISIS and al-Shabaab, an associated force of al-Qa'ida. In the context of the armed conflict against those groups, U.S. forces conducted a number of airstrikes against ISIS and al-Shabaab. For

example, on January 7, 2017, Somali partner forces, African Union Mission in Somalia (AMISOM) forces, and U.S. advisors conducted a self-defense strike against al-Shabaab in Gaduud, Somalia. On June 11, 2017, U.S. forces also conducted an airstrike in southern Somalia on an al-Shabaab command and logistics node, killing a number of militants. Periodic strikes continued throughout the summer and fall of 2017, killing numerous al-Shabaab militants. On November 21, 2017, U.S. forces conducted an airstrike against an al-Shabaab camp 125 miles northwest of Mogadishu, killing more than 100 militants. Strikes continued into December 2017, with U.S. forces conducting more airstrikes against al-Shabaab vehicle-borne improvised explosive devices and al-Shabaab militants. U.S. forces also advised, assisted, and accompanied regional forces, including Somali and African Union Mission in Somalia (AMISOM) forces, during counterterrorism actions in Somalia in 2017.

As indicated earlier in the report, DoD has no credible reports of civilian casualties resulting from U.S. strikes in Somalia in 2017. One 2017 report of civilian casualties in Somalia remains under investigation.

#### **E. U.S. military actions in Libya against ISIS**

During 2017, U.S. forces conducted a number of airstrikes in Libya as part of the ongoing armed conflict against ISIS. For example, on January 19, 2017, U.S. forces conducted airstrikes destroying two ISIS camps 45 kilometers southwest of Sirte. On September 26, 2017, U.S. forces also conducted two airstrikes in Libya, killing several ISIS militants. These airstrikes were conducted in coordination with Libya's Government of National Accord.

As indicated earlier in the report, DoD has no credible reports of civilian casualties resulting from U.S. strikes in Libya in 2017.

### **II. DOD PROCESSES FOR ASSESSING REPORTS OF CIVILIAN CASUALTIES FROM U.S. MILITARY OPERATIONS**

As reflected in Executive Order 13732, *United States Policy on Pre- and Post-Strike Measures To Address Civilian Casualties in U.S. Operations Involving the Use of Force*, of July 1, 2016, the U.S. military, as appropriate and consistent with mission objectives and applicable law, including the law of war, has a practice of reviewing or investigating incidents involving civilian casualties, including by considering relevant information from all available sources, such as other agencies, partner governments, and nongovernmental organizations and taking measures to mitigate the likelihood of future incidents of civilian casualties.

Specific processes for reviewing or investigating incidents have varied over the years and have varied by geographic combatant command and by operation. Department of Defense has different processes due to host nation requests, different mission objectives, different operational designs, different available resources, and different organizational designs and command relationships within the Area of Responsibilities. As but one example, some commands do not have access on the ground to areas where civilian casualties are suspected to have occurred. Commands also work to improve their processes over time and adapt to the ever-changing fog and friction of war. The following is a general description of processes U.S. military units used during 2017.

After a report of civilian casualties resulting from a command's operations becomes known, the command or another entity (such as a specialized board or team) will seek to assess the credibility of the report. The command or entity would consider reports from any source, including its own after-action reporting or reports from external sources, such as a nongovernmental organization, the news media, or social media. In assessing the report, the command or entity would seek to review all readily available information from a variety of

sources. This may include, but is not limited to, operational planning data, video surveillance and other data from Intelligence, Surveillance, and Reconnaissance (ISR) assets, witness observations (including those of partnered forces) where available, news reports, and information provided by nongovernmental organizations and other sources such as local officials or social media.

After reviewing the available information, a competent official determines whether it is more likely than not that civilians were injured or killed. If warranted, a more extensive administrative investigation would be conducted to find facts about the incident, and to make relevant recommendations, such as identifying process improvements to reduce the risk of further civilian casualty incidents.

DoD acknowledges that there are differences between DoD assessments and reports from other organizations. These differences result from a variety of factors. For example, nongovernmental organizations and media outlets often use different types of information and different methodologies to assess whether civilian casualties have occurred. Some organizations conduct on-the-ground assessments and interviews, while others rely heavily on media reporting. DoD assessments seek to incorporate all available information, including tools and information that are not available to other organizations—such as operational planning data and intelligence sources. As the RESOLUTE SUPPORT (RS) Mission explained in an April 2018 report that sought to explain discrepancies between its assessments and those of the United Nations Assistance Mission in Afghanistan (UNAMA):

The RS investigation team assess that in several of the cases where casualties were alleged to be from air strikes, no aerial platforms were nearby at the time, and reported explosions may have resulted from concealed IEDs or insurgents firing rockets and mortars. In other cases, RS investigators have access to surveillance information that gives them confidence that civilians were not present at the scene of a strike.

For example, on November 19, 2017, in the air campaign under new US authorities striking Taliban revenue streams, a suspected drug lab was struck in northern Helmand. UNAMA relayed information to RS alleging that nine civilians from the same family were killed in the strike. They shared detailed information about three women, two boys and four girls—including a one-year-old. This claim of nine dead was included in the UNAMA report, but not counted by RS. RS investigations disproved the allegation as surveillance of the house over a significant period of time showed no sign of the presence of a family. Local government officials said that no civilians were killed.

It also bears noting that DoD's assessments reflect DoD's efforts to review reports of civilian casualties. In some cases, DoD has not been able to assess a report as credible because insufficient information has been provided or because investigators have not yet been able to review the report due to a large volume of reports. However, DoD assessments continue to be conducted, and existing assessments are updated if new information becomes available.

### **III. STEPS DOD TAKES TO MITIGATE HARM TO CIVILIANS**

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During 2017, all operations previously listed were conducted consistent with the best practices identified in Executive Order 13732. For example, pre-deployment training for U.S. military units during 2017 included instruction on the law of war, rules of engagement, and other policies related to protecting civilian populations. Also, during U.S. military operations in 2017,

practices related to protecting civilians during operations included: (1) characterizing the operating environment in an effort to identify the locations of civilians in advance of operations; (2) carefully crafting the operational design to avoid civilians during planned ground maneuver; (3) conducting shaping actions to reduce the need later to conduct fires in self-defense; (4) optimizing targeting processes; and (5) taking active measures to mitigate weapons' effects in order to protect civilians and structures.

*Characterizing the operating environment*—Available sensors (e.g., visual sensors, human intelligence, signals intelligence) were used to characterize the battlespace to determine where the enemy was located, where civilians were located, and where the enemy kept equipment, arms, and other objects required to fight. For large operations, this process can start a year or more in advance. For smaller operations, the process can start weeks ahead of ground force maneuver. Characterizing the battlespace is a continual process used during target selection, target engagement, and post-strike assessments.

*Crafting the operational design*—U.S. military planners also worked with partner forces during 2017 to design battle plans so ground forces were able to maneuver around areas of the enemy and civilians in such a way as to reduce harm to civilians.

*Conducting shaping actions*—U.S. forces also relied heavily on precision-guided munitions (PGMs) during 2017 to conduct shaping actions designed to degrade enemy capabilities and defenses well ahead of the arrival of ground forces. Although the law of war does not require the use of PGMs when non-precision-guided weapons may be used in compliance with the law of war, commanders understood that shaping actions could use a relatively few, well-placed PGMs to concentrate force for greater effects in degrading enemy defensive capabilities. This helped speed up the successful liberation of enemy-held areas and maximized the protection of civilians and structures. When supporting partner forces, most munitions were employed dynamically as the partner force maneuvered and was in contact with the enemy. By using shaping actions to shorten the period when ground forces would be in contact with enemy forces, the number of munitions employed by liberating forces in the conflict can often be decreased, resulting in more protection of civilians from the dangers of combat.

*Optimizing targeting processes*—During U.S. military operations in 2017, measures were also taken during targeting processes to protect civilians more fully. For example, strike processes worked with commanders to define the required effects of different strikes, intelligence sources and analysis were used to identify enemy forces as accurately as possible, and determinations were made whether the required effects could be achieved through non-kinetic options. For example, in some instances, simply bringing aircraft overhead was enough to get the enemy to react and to slow or stop a counterattack and thus enable friendly forces to regain the initiative. Additionally, some lawful targets were not attacked due to concerns about collateral effects on objects and/or certain persons, even though such collateral harm would not have been excessive. Before strikes, U.S. forces often leveraged multiple ISR assets to do collateral scans to help protect transient civilians. This included employment of multiple strike aircraft and ISR platforms to clear for and to protect transient civilians during attacks. In situations where commanders determined a strike was required, they were often able to choose weapons that would achieve the desired effects but that would also cause the least amount of collateral damage.

*Mitigating weapons' effects*—During U.S. military operations in 2017, techniques were used to mitigate weapons' effects on civilians and structures. One example was to delay the fuse on air-to-ground munitions. Delaying the fuse buries the munition, allowing the ground to absorb

fragmentation from the munition and to channel the blast, which can more effectively protect nearby civilians and structures. Low-yield and direct fire munitions were also used to reduce the likelihood of causing collateral damage. Another technique used during U.S. military operations in 2017 was to use specific angles of entry for munitions sent into target areas, which allowed for the munitions to strike more precisely (*e.g.*, a particular floor of a building or other specific location of hostile forces), thereby further minimizing civilian casualties and effects on structures.

As mentioned earlier, we believe that the U.S. military operations listed above were conducted consistent with the best practices identified in Executive Order 13732. Unfortunately, despite the best efforts of U.S. forces, civilian casualties are a tragic but at times unavoidable consequence of combat operations. This is especially true when fighting in urban areas and against adversaries like ISIS and al-Qa’ida who use civilians as shields and whose tactics include intentionally endangering the lives of innocents.

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**c. *Protocols to the Geneva Conventions***

On October 15, 2018, Julian Simcock, Deputy Legal Adviser for the U.S. Mission to the UN, delivered remarks at a meeting of the Sixth Committee on “Agenda Item 83: Status of the Protocols Additional to the Geneva Conventions of 1949.” Mr. Simcock’s remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-83-status-of-the-protocols-additional-to-the-geneva-conventions-of-1949/>.

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The United States has long been a strong proponent of the development and implementation of international humanitarian law, IHL, which we often also refer to as the law of war or the law of armed conflict. We recognize the vital importance of compliance with its requirements during armed conflict. Accordingly, the United States continues to ensure that all of our military operations comply with IHL, as well as all other applicable international and domestic law. We similarly call on all states and parties to armed conflicts to ensure that they comply fully with applicable IHL.

The United States is a party to the Third Additional Protocol to the 1949 Geneva Conventions relating to the adoption of an additional distinctive emblem, but it is not a party to the 1977 Additional Protocols to the 1949 Geneva Conventions.

The United States has, under successive Administrations, urged the Senate to give its advice and consent to ratification of Additional Protocol II to the Geneva Conventions, and this treaty is pending before the Senate for its advice and consent. Extensive interagency reviews, including one completed in 2011, have found U.S. military practice to be consistent with the Protocol’s provisions. It also found that any issues could be addressed with reservations, understandings, and declarations. We believe these conclusions remain valid today. Although the United States continues to have significant concerns with many aspects of Additional Protocol I,

Article 75 of that Protocol sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict. The U.S. Government has chosen out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and we expect all other nations to adhere to these principles as well.

Proper implementation of IHL obligations is critical to reducing the risk to civilians and civilian objects during armed conflict. As we have seen in recent conflicts, it is a tragic reality of war that egregious harm to civilians can occur even when parties comply with their obligations under IHL. Thus, it is all the more critical for parties to comply with IHL, including the principles of distinction and proportionality, as well as the obligations of both attacking and defending parties to take precautionary measures for the protection of the civilian population and other protected persons and objects. In taking precautions for the protection of civilians, the United States routinely imposes, as a matter of policy, certain heightened standards that are more protective of civilians than would otherwise be required under IHL. Moreover, the United States always seeks to adhere to applicable IHL requirements during armed conflicts and encourages all states and parties to armed conflicts to do the same. There are many practical measures that states can take to help effectively implement IHL. I would like to mention three examples.

The first is Weapons Reviews. The U.S. Department of Defense policy has for many years required the legal review of the intended acquisition or procurement of weapons or weapon systems. This review includes ensuring that such acquisition or procurement is consistent with the law of war. Although the United States is not bound by Article 36 of Additional Protocol I, and customary law does not require “weapons reviews,” as such, we view the review of the legality of weapons as a best practice for implementing customary law and treaty law relating to weapons. Such reviews may be especially important with respect to weapons that incorporate in novel ways emerging technologies, such as new developments in artificial intelligence. It is important to consider any risks that such novel applications entail as well as the potential to use emerging technologies in upholding compliance with IHL, such as by reducing the risk of civilian casualties. Under a U.S. Department of Defense policy that addresses the use of autonomy in weapons systems, the Department of Defense conducts two reviews that include both legal and policy considerations pertinent to certain types of autonomous and semi-autonomous weapon systems—once prior to making the decision to enter into formal development of the weapon, and another before the weapon is fielded. However, even weapons that are not subject to this special policy review process receive a legal review in accordance with DoD policy. Conducting legal reviews of weapons is a practical measure that all states can take to support their compliance with IHL.

The second example is Sharing State Practice. States can further improve their implementation of IHL through the voluntary and non-politicized sharing of state practice, including official publications, policies, and procedures. Through such exchanges, states can learn how other states have implemented their IHL obligations and can identify good practices that they may wish to incorporate into their own procedures. The state-driven intergovernmental process on strengthening respect for IHL, under Resolution 2 of the 32nd International Conference of the Red Cross and Red Crescent, provides a valuable opportunity to create a non-politicized space for this type of regular exchange and dialogue. The United States recently submitted an official proposal to create an online repository of official state documents regarding their practice and policies related to their implementation of IHL. This outcome could also be complemented by, and is without prejudice to, whatever other outcomes states may agree upon.

We look forward to further progress under this initiative in advance of and during the 33rd International Conference in December 2019.

The third example is ICRC Notification and Access. Providing the ICRC notification of and access to detainees in non-international armed conflicts, NIACs, can also improve the implementation of IHL. For many years, the U.S. military has adhered to the policy and practice of notifying the ICRC about detainees in U.S. custody and allowing the ICRC timely access to them, consistent with Department of Defense regulations and policies. This policy and practice is now codified as a requirement under U.S. domestic law. The U.S. military has found this practice beneficial, in part because of the ICRC's practical experience in understanding the challenges of detention and the "confidential" modalities under which access is granted. The "confidential" modalities help ensure a frank, constructive, and non-politicized dialogue with the ICRC that has proven very valuable. The United States believes that providing ICRC notification and access to detainees in military detention facilities is a good practice for parties to armed conflict, as it can help them identify better ways to implement IHL and further ensure the humane treatment of detainees.

In sum, conducting weapons reviews, sharing state practice under appropriate modalities, and providing the ICRC with notice of and access to detainees are three practical and non-politicized ways that states can enhance their implementation of IHL and help further ensure compliance. These three examples reflect broader categories of mechanisms that states can use to implement their commitment to the fundamental principles of IHL into their military operations so as to provide concrete humanitarian benefits. Although the fundamental principles of IHL are clear and universally recognized, how these principles apply in particular circumstances or how these principles might be most effectively implemented is not always as clear and universally recognized.

We therefore encourage all states to implement these measures and similar measures for the sound and efficacious implementation of IHL. We also look forward to continuing to work with other states including our allies and partners, as well as the ICRC, on further strengthening the implementation of and respect for IHL.

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**d. *Applicability of international law to conflicts in cyberspace***

On September 20, 2018, the White House released its 2018 National Cyber Strategy. The document outlines the steps the federal government is taking to "promote an open, secure, interoperable, and reliable cyberspace." The Strategy includes four pillars: I. Protect the American People, the Homeland, and the American Way of Life; II. Promote American Prosperity; III. Preserve Peace Through Strength; and IV. Advance American Influence. The State Department media note on the release of the 2018 National Cyber Strategy is available at <https://www.state.gov/release-of-the-2018-national-cyber-strategy/>. The Strategy is available at <https://www.whitehouse.gov/wp-content/uploads/2018/09/National-Cyber-Strategy.pdf> and excerpts follow from the section on "Pillar III: Preserve Peace Through Strength."

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**Enhance Cyber Stability through Norms of Responsible State Behavior**

The United States will promote a framework of responsible state behavior in cyberspace built upon international law, adherence to voluntary non-binding norms of responsible state behavior that apply during peacetime, and the consideration of practical confidence building measures to reduce the risk of conflict stemming from malicious cyber activity. These principles should form a basis for cooperative responses to counter irresponsible state actions inconsistent with this framework.

***Priority Action***

**ENCOURAGE UNIVERSAL ADHERENCE TO CYBER NORMS:** International law and voluntary non-binding norms of responsible state behavior in cyberspace provide stabilizing, security-enhancing standards that define acceptable behavior to all states and promote greater predictability and stability in cyberspace. The United States will encourage other nations to publicly affirm these principles and views through enhanced outreach and engagement in multilateral fora. Increased public affirmation by the United States and other governments will lead to accepted expectations of state behavior and thus contribute to greater predictability and stability in cyberspace.

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The Department of Defense (“DoD”) released its own Cyber Strategy on September 18, 2018, outlining its execution of the National Strategy. The DoD Summary of the DoD Strategy is available at

[https://media.defense.gov/2018/Sep/18/2002041658/-1/-1/1/CYBER\\_STRATEGY\\_SUMMARY\\_FINAL.PDF](https://media.defense.gov/2018/Sep/18/2002041658/-1/-1/1/CYBER_STRATEGY_SUMMARY_FINAL.PDF).

On September 28, 2018, Deputy Secretary of State John J. Sullivan spoke about a ministerial meeting he hosted that day on advancing responsible state behavior in cyberspace. Deputy Spokesperson Robert Palladino and Deputy Assistant Secretary for Cyber and International Communications and Information Policy Robert L. Strayer joined Deputy Secretary Sullivan in providing a briefing on U.S. efforts to advance responsible behavior in cyberspace. The briefing is available at <https://www.state.gov/on-the-ministerial-meeting-on-advancing-responsible-state-behavior-in-cyberspace/> and excerpted below.

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...This morning I hosted a meeting with like-minded countries on advancing responsible state behavior in cyberspace. Our goal is to deter malicious activity in cyberspace. The U.S.-led international effort seeks to promote and maintain an open, interoperable, reliable, and secure cyberspace.

During the meeting this morning we discussed strategies to confront cyber threats while maintaining the many benefits that free people and free nations have come to enjoy from the internet. The U.S.-promoted framework launched by President Trump last week for international

cyber stability has three components. First, responsible states must comply with their obligations under international law. Second, nonbinding norms of responsible behavior during peacetime provide important guidance to states, and we're looking to develop those. And third, implementation of political confidence-building measures can help bring stability to cyberspace.

Having said that, there must be consequences for states that act contrary to this framework. Today I called on like-minded partners to join the United States to work together to hold states accountable for their malicious cyber activity.

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**DEPUTY SECRETARY SULLIVAN:** ... What we're talking about is action by nation-states that are contrary to the norms that have developed over time on appropriate use of cyberspace, which we saw in interference in the U.S. election in 2016, in cyber attacks that have been attributed over the last year and a half or so—WannaCry and Petya.

One of the things we talked about today at the ministerial was the work we need to ... further define those norms and define those boundaries that states can't cross, and if they do cross, that there would be consequences and costly consequences for crossing those boundaries.

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**DEPUTY SECRETARY SULLIVAN:** ... what we focused on today was, for the most part, cyber activities short of what we would characterize as a use of force, as an act of war. There are potential cyber activities that would be catastrophic and cause enormous loss of life and property damage, which would be the equivalent of ... an act of war.

... And that's where we're focused on defining norms of behavior, and through the UN with the GGE, the Group of Government Experts, which we hope to reconvene, to define norms of behavior that states will abide by and, if they don't, to impose consequences.

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**DEPUTY SECRETARY SULLIVAN:** So we discussed today the concept of deterrence, which is embedded in our National Security Strategy and in particular our National Cyber Strategy, to impose costs and consequences on those state actors and non-state actors who seek to attack the United States, our allies and partners, our cyber infrastructure.

**QUESTION:** Now would that be sanctions?

**DEPUTY SECRETARY SULLIVAN:** It could be any number of tools that are available to the President, whether it's sanctions, diplomatic activity, offensive cyber activities by the United States. There's ... really a wide variety of tools that the President could employ depending on the nature of the attack that was made on the United States.

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**DEPUTY SECRETARY SULLIVAN:** ... [I]t's certainly mentioned in our National Security Strategy and National Cyber Strategy that there are state actors that have targeted the United States. And that's ... discussed in the strategy documents, and we are ... working hard to make our cyber domain more secure, more resilient, but also to deter that type of behavior by the

range of responses that I mentioned, which would also include offensive cyber operations by the United States.

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## **B. CONVENTIONAL WEAPONS**

### **1. U.S. Policy on Conventional Arms Transfer**

On April 19, 2018, the President issued a National Security Presidential Memorandum (NSPM-10), laying out U.S. policy on conventional arms transfers. In July, the Secretary of State submitted to the President the Implementation Plan requested as part of NSPM-10. The criteria used to review proposed transfers appear in a State Department fact sheet available at <https://www.state.gov/conventional-arms-transfer-cat-policy/>. A special briefing by Tina S. Kaidanow, Principal Deputy Assistant Secretary of State for Political-Military Affairs on April 19, 2018 explained the updated conventional arms transfer policy and unmanned aerial systems (UAS) export policy, and is available at <https://www.state.gov/briefing-on-updated-conventional-arms-transfer-policy-and-unmanned-aerial-systems-uas-export-policy/>. On August 8, 2018, Principal Deputy Assistant Secretary Kaidanow provided further remarks on the CAT policy, available at <https://www.state.gov/u-s-arms-transfer-policy/>.

### **2. Convention on Certain Conventional Weapons (“CCW”)**

The 2017 Meeting of High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or Have Indiscriminate Effects (“CCW”), decided that the “group of governmental experts” (“GGE”) on emerging technologies in the area of lethal autonomous weapons systems (“LAWS”) would meet for ten days in 2018. The United States government submitted two working papers to the LAWS GGE in 2018. The final report of the GGE for 2018 adopted ten “guiding principles,” for which the United States expressed strong support. U.N. Doc. No. CCW/GGE.1/2018/3. Excerpts follow (with footnotes omitted), first, from the March 28, 2018 U.S. paper regarding humanitarian benefits of emerging technologies in the area of lethal autonomous weapon systems. U.N. Doc. No. CCW/GGE.1/2018/WP.4.

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2. Civilian casualties are a tragic part of war. Although civilian casualties do not necessarily reflect a violation of international humanitarian law (IHL), protecting civilians from unnecessary suffering is one of the main purposes of IHL. Reducing civilian casualties promotes the objectives and purposes of the CCW, whose preamble recalls the “general principle of the protection of the civilian population against the effects of hostilities.”

3. Emerging autonomy-related technologies, such as artificial intelligence (AI) and machine learning, have remarkable potential to improve the quality of human life with applications such as driverless cars and artificial assistants. The use of autonomy-related technologies can even save lives, for example, by improving the accuracy of medical diagnoses and surgical procedures or by reducing the risk of car accidents. Similarly, the potential for these technologies to save lives in armed conflict warrants close consideration.

4. In particular, the United States believes that discussion of the possible options for addressing the humanitarian and international security challenges posed by emerging technologies in the area of lethal autonomous weapons systems in the context of the objectives and purpose of the Convention must involve consideration of how these technologies can be used to enhance the protection of the civilian population against the effects of hostilities.

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6. The fundamental IHL principles of distinction and proportionality are consistent with military doctrines that are the basis for effective combat operations. ...

7. Existing State practice provides many examples of ways in which emerging technologies in the area of lethal autonomous weapons systems could be used to reduce risks to civilians: (1) incorporating autonomous self-destruct, self-deactivation, or self-neutralization mechanisms; (2) increasing awareness of civilians and civilian objects on the battlefield; (3) improving assessments of the likely effects of military operations; (4) automating target identification, tracking, selection, and engagement; and (5) reducing the need for immediate fires in self-defense.

**Autonomous self-destruct, self-deactivation, or self- neutralization mechanisms**

8. Autonomous self-destruct, self-deactivation, or self-neutralization mechanisms can be used to reduce the risk of weapons causing unintended harm to civilians or civilian objects. These mechanisms are not necessarily new, but they have become more effective with advances in technology.

9. For example, the Amended Protocol II to the Convention recognizes that self-destruction or self-neutralization mechanisms can help ensure that a mine will no longer function as a mine when the mine no longer serves the military purpose for which it was emplaced.

10. Similarly, the Hague VIII Convention Relative to the Laying of Automatic Submarine Contact Mines, October 18, 1907, also recognizes that naval mines and torpedoes should be constructed so as to become harmless after they have fulfilled their military purpose.

11. Although the United States is not a party to Convention on Cluster Munitions and does not regard its prohibitions as reflecting customary international law, that instrument recognizes that electronic self-destruction mechanisms and electronic self-deactivating features in explosive submunitions that are designed to be dispersed or released from a conventional munition can help avoid indiscriminate area effects and the risks posed by unexploded submunitions.

12. Apart from mines and bombs employing submunitions, a number of weapons systems can use self-destructing ammunition, which automatically destroys the projectile after a period of time so that it poses less risk of inadvertently striking civilians and civilian objects. ...

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**Increasing military awareness of civilians and civilian objects**

14. Civilian casualties can result from a lack of awareness of the presence of civilians on the battlefield due to the “fog of war.” ...

15. AI could help commanders increase their awareness of the presence of civilians and civilian objects on the battlefield by automating the processing and analysis of data.

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**Improving assessments of the likely effects of military operations**

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23. U.S. planners regularly use software tools in planning military operations to assist in assessing the likely effects of weapons, such as estimating potential collateral damage. The use of software tools allows estimates that once took hours or days to be generated in minutes.

24. More sophisticated computer modelling software could help military planners more accurately assess the presence of civilians or predict the likely effects that the weapon would create when striking the military objective. Assessments could be generated more quickly and more often, further reducing the risk of civilian casualties.

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**Automating target identification, tracking, selection, and engagement**

26. Automated target identification, tracking, selection, and engagement functions can allow weapons to strike military objectives more accurately and with less risk of collateral damage.

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28. The use of munitions with guidance systems allows commanders to strike military objectives more accurately and with less risk of harm to civilians and civilian objects. Moreover, when the weapon is more accurate, fewer weapons need to be fired to create the same military advantage.

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**Reducing civilian casualties from the immediate use of force in self-defense**

32. Emerging technologies could reduce risk of civilian casualties from the immediate use of force in self-defense.

33. Civilians are at increased risk in situations in which military forces are in contact with the enemy and respond to enemy fires in self-defense. In those operational situations, the imperative to take immediate action to counter a threat from the enemy reduces the time available to take precautions to reduce the risk of civilian casualties.

34. Existing practice, however, suggests that emerging technologies may offer a number of ways to reduce civilian casualties as a result of such engagements.

35. First, the use of robotic and autonomous systems can reduce the need for immediate self-defense fires by reducing the exposure of human beings to hostile fire. For example, remotely piloted aircraft or ground robots have been used to scout ahead of forces conducting

patrols in environments where they might be surprised by enemy ambushes or roadside bombs. Robotic and autonomous systems can provide a greater standoff distance from enemy formations, allowing forces to exercise tactical patience to reduce the risk of civilian casualties.

36. Second, technologies to identify automatically the direction and location of incoming fire can reduce the risk of misidentifying the location or source of enemy fire. ...

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Excerpts below (with most footnotes omitted) are from the second U.S. working paper, submitted to the LAWS GGE on August 28, 2018 regarding “Human-Machine Interaction in the Development, Deployment, and Use of Emerging Technologies in the Area of [LAWS].” U.N. Doc. No. CCW/GGE.2/2018/WP.4.

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1. In our view, the key issue for human-machine interaction in emerging technologies in the area of LAWS is ensuring that machines help effectuate the intention of commanders and the operators of weapons systems. This is done by, *inter alia*, taking practical steps to reduce the risk of unintended engagements and to enable personnel to exercise appropriate levels of human judgment over the use of force.

2. This approach supports compliance with the law of war. Weapons that do what commanders and operators intend can effectuate their intentions to conduct operations in compliance with the law of war and to minimize harm to civilians and civilian objects.

3. This paper discusses a number of measures the United States is taking to ensure that new weapons help effectuate the commander’s intent. These measures and policies are set forth in U.S. Department of Defense Directive 3000.09, *Autonomy in Weapon Systems* (DoD Directive 3000.09). DoD Directive 3000.09 was initially issued in 2012 after a DoD working group considered DoD’s past practice in using autonomy in weapon systems, including lessons learned, and potential future applications of autonomy in weapon systems.

#### **Minimizing unintended engagements**

4. DoD Directive 3000.09 states that one of its purposes is to establish “guidelines designed to minimize the probability and consequences of failures in autonomous and semi-autonomous weapon systems that could lead to unintended engagements.”

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#### **Ensuring appropriate levels of human judgment over the use of force**

8. DoD Directive 3000.09 requires that autonomous and semi-autonomous weapon systems “be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force.”

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**Practical measures to ensure the use of autonomy in weapon system effectuates human intentions**

16. DoD Directive 3000.09 establishes a number of requirements—at different stages of the weapon design, development, and deployment process—intended to ensure the use of autonomy in weapon systems effectuates human intentions.

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**Holistic, Proactive, Review Processes Guided by the Fundamental Principles of the Law of War**

27. Emerging technologies are difficult to regulate because technologies continue to change as scientists and engineers develop advancements. A best practice today might not be a best practice in the near future. Similarly, a weapon system that, if built today, would risk creating indiscriminate effects, might, if built with future technologies, prove more discriminating than existing alternatives by reducing the risk of civilian casualties.

28. Thus, rather than seeking to codify best practices or set new international standards, States should seek to exchange practice and implement holistic, proactive review processes that are guided by the fundamental principles of the law of war.

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**Proactive reviews during development and before fielding**

32. We also recommend a proactive approach in addressing issues in human-machine interaction. States seeking to develop new uses for autonomy in their weapons should be affirmatively seeking to identify and address these issues in their respective processes for managing the life cycle of such weapons. ...

33. This practice in conducting a special policy review is consistent with broader DoD practice in conducting legal reviews of the intended acquisition or procurement of any weapon by the Department of Defense, as reflected in U.S. Department of Defense Directive 5000.01, The Defense Acquisition System. Such reviews, among other things, help ensure consistency with the law of war.

**Guidance from the fundamental principles of the law of war**

34. In applying holistic approaches and proactive review processes, States should be guided by the fundamental principles of the law of war.

35. The U.S. military has long used the fundamental principles of law of war as a general guide for conduct during war, when no more specific rule applies. These principles are: military necessity, humanity, distinction, proportionality, and honor.

36. These principles have also been the basis for many codifications of the law of war, including the Geneva Conventions of 1949, which, as the International Court of Justice (ICJ) has observed, “are in some respects a development, and in other respects no more than the expression, of” fundamental general principles of international humanitarian law.<sup>14</sup>

37. The practice of resorting to the fundamental principles of the law of war even though specific rules might not apply, has itself been codified in the so-called “Martens Clause.” First included in the Preamble to the 1899 Hague Convention II with Respect to the Laws and

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<sup>14</sup> Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p.14, 113 (June 27, 1986, ¶1218).

Customs of War on Land, the clause also is included in a common article to the 1949 Geneva Conventions, which states that denunciation of the Convention “shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.”<sup>15</sup>

38. The ICJ has observed that, in relation to “the cardinal principles constituting the fabric of humanitarian law,” the Martens Clause “has proved to be an effective means of addressing the rapid evolution of military technology.”<sup>16</sup> The ICJ’s observation has been reflected in the practice of the United States. For example, careful consideration of the principles of military necessity and humanity has been critical to the U.S. Department of Defense’s review of the legality of new weapons.

39. In addition to helping to assess whether a new weapon falls under a legal prohibition, the fundamental principles of the law of war may also serve as a guide in answering novel ethical or policy questions in human-machine interaction presented by emerging technologies in the area of LAWS.

40. For example, if the use of a new technology advances the universal values inherent in the law of war, such as the protection of civilians, then the development or use of this technology is likely to be more ethical than refraining from such use.

41. The following questions might be useful to consider in assessing whether to develop or deploy an emerging technology in the area of lethal autonomous weapons systems:

- (a) Does military necessity justify developing or using this new technology?
- (b) Under the principle of humanity, does the use of this new technology reduce unnecessary suffering?
- (c) Are there ways this new technology can enhance the ability to distinguish between civilians and combatants?
- (d) Under the principle of proportionality, has sufficient care been taken to avoid creating unreasonable or excessive incidental effects?
- (e) Under the principle of the honor, does the use of this technology respect and avoid undermining the existing law of war rules?

**“Human Control”**

42. The key issue for human-machine interaction in the development, deployment, and use of emerging technologies in the area of lethal autonomous weapons systems is ensuring that when it is necessary to use force, such force is used to effectuate the intentions of commanders and operators. In particular, practical measures should be taken to reduce the risk of unintended engagements (e.g., those resulting from accidents or sabotage) and to ensure that personnel exercise appropriate levels of human judgment over any use of force.

43. We view this as distinct from the concept of “human control,” a term that risks obscuring the genuine challenges in human-machine interaction.

<sup>15</sup> Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, art. 63, 1950 UNTS 32, 68; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949, art. 62, 1950 UNTS 86, 120; Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, art. 142, 1950 UNTS 136, 242; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, art. 158, 1950 UNTS 288, 392.

<sup>16</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, 257 (July 8, 1996, 78).

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**Terminologies and Conceptualizations: The Misplaced Focus of “Human Control”**

46. During the April 2018 session of the GGE, delegations presented a range of different terminologies and conceptualizations regarding human-machine interaction, including human control, supervision, oversight, and judgment. Some have advocated that CCW GGE discussions focus in particular on the issue of “human control” of weapons systems and have advocated for the promulgation of new standards to ensure minimum levels of control or “meaningful human control.” The concept of “human control” is subject to divergent interpretations that can hinder meaningful discussion.

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49. ...[P]ast regulation of weapons systems under international humanitarian law has not included broadly applicable standards for weapon control systems. Moreover, existing international humanitarian law instruments, such as the CCW and its Protocols, do not seek to enhance “human control” as such. Rather, these instruments seek, *inter alia*, to ensure the use of weapons consistent with the fundamental principles of distinction and proportionality, and the obligation to take feasible precaution for the protection of the civilian population. Although control over weapon systems can be a useful means in implementing these principles, “control” is not, and should not be, an end in itself.

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**Manual control of a weapons system is not a prerequisite for holding humans accountable**

54. Some may argue that it is important to emphasize control because of concerns that the use of autonomous weapons systems somehow removes individuals from responsibility. However, personnel are responsible for their decisions to use force regardless of the nature of the weapon system they utilize. The lack of a manual control over a weapon system does not remove this responsibility or result in an accountability gap.

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56. When using weapons systems with autonomous functions, the commander must make the legal judgments required by IHL, including by the principles of distinction and proportionality. The human operators of the system and their superior commanders are responsible and accountable for their use of the system, even if that system has sophisticated autonomous functions.

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On October 26, 2018, U.S. Permanent Representative to the Conference on Disarmament and U.S. Special Representative for Biological and Toxin Weapons Convention (BWC) Issues Robert Wood delivered remarks at UN General Assembly First Committee discussion on conventional weapons. Ambassador Wood’s remarks are

excerpted below and available at <https://www.state.gov/remarks-at-un-general-assembly-first-committee-discussion-on-conventional-weapons/>.

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...[T]he United States supported the outcome of the CCW Group of Governmental Experts (GGE) on Lethal Autonomous Weapons Systems in 2018. This GGE was successful and productive.... States ... adopted a substantive report that included ten possible guiding principles for future work on emerging technologies in the area of LAWS. We think it is important to continue to engage in these reality-based discussions.

...[T]he United States continues to urge all Member States to implement fully the UN Programme of Action [“PoA”] to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons and the International Tracing Instrument. The third Review Conference of the PoA provided an opportunity to renew our shared commitments to ending the human suffering caused by the illicit trade in small arms and light weapons. ... The United States remains committed to seeing the full implementation of the PoA, and will continue providing both financial and technical conventional weapons destruction assistance ...

[A]lthough it has been some time since the world has seen Man-Portable Air Defense Systems (MANPADS) used to bring down a civilian airliner, this significant threat remains. In furtherance of our efforts in seeing the full implementation of the PoA, the United States continues to work with partners to deter their illicit trafficking and use, including through training programs for border security forces, destruction of excess state-held stocks, and assisting with the mitigation of MANPADS threats near critical aviation sites such as international airports. Since 2003, the United States has cooperated with countries around the globe to destroy more than 38,000 excess, loosely secured, illicitly held, or otherwise at-risk MANPADS missiles, and thousands more launchers, in more than 40 countries.

...[T]he United States strongly supports the UN Register of Conventional Arms. The Register pioneered international discussion of international transfers of conventional arms, and it remains the cornerstone of international efforts to address the problems arising from irresponsible transfers of such arms. The United States urges all States to report data on their international transfers of conventional arms, and to include data on transfers of small arms and light weapons alongside the traditional categories of heavy weapons.

[T]he United States is committed to ensuring that conventional arms are transferred in a responsible manner. To this end, the United States attended the meetings of the Working Groups and the fourth Conference of State Parties of the Arms Trade Treaty in Tokyo. Further, we have continued to satisfy our financial and reporting obligations and we encourage States Parties to do the same.

[T]he United States remains the world’s single largest financial supporter of conventional weapons destruction programs. We remain committed to providing assistance that reduces excess arms and ammunition from State-held stockpiles, improves stockpile security, and remediates landmines and explosive remnants of war in order to facilitate stability, security, and prosperity in countries recovering from conflict, and to prevent illicit small arms and light weapons proliferation. Since 1993 we have provided more than \$3.2 billion in assistance to more than 100 countries through our conventional weapons destruction program, which covers both weapons

and ammunition destruction and stockpile security, as well as humanitarian mine action. We remain committed to these programs, particularly as humanitarian mine action plays an increasing role in our effort to deliver rapid stabilization assistance in both post conflict and conflict zones.

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## C. DETAINEES

### 1. Law and Policy regarding Detainees: E.O. 13823

On January 30, 2018, the President issued Executive Order 13823 “Protecting America Through Lawful Detention of Terrorists.” 83 Fed. Reg. 4831 (Feb. 2, 2018). Excerpts follow from the order.

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#### Section 1. Findings.

(a) Consistent with long-standing law of war principles and applicable law, the United States may detain certain persons captured in connection with an armed conflict for the duration of the conflict.

(b) Following the terrorist attacks of September 11, 2001, the 2001 Authorization for Use of Military Force (AUMF) and other authorities authorized the United States to detain certain persons who were a part of or substantially supported al-Qa’ida, the Taliban, or associated forces engaged in hostilities against the United States or its coalition partners. Today, the United States remains engaged in an armed conflict with al-Qa’ida, the Taliban, and associated forces, including with the Islamic State of Iraq and Syria.

(c) The detention operations at the U.S. Naval Station Guantanamo Bay are legal, safe, humane, and conducted consistent with United States and international law.

(d) Those operations are continuing given that a number of the remaining individuals at the detention facility are being prosecuted in military commissions, while others must be detained to protect against continuing, significant threats to the security of the United States, as determined by periodic reviews.

(e) Given that some of the current detainee population represent the most difficult and dangerous cases from among those historically detained at the facility, there is significant reason for concern regarding their reengagement in hostilities should they have the opportunity.

#### Sec. 2. Status of Detention Facilities at U.S. Naval Station Guantanamo Bay.

(a) Section 3 of Executive Order 13492 of January 22, 2009 (Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities), ordering the closure of detention facilities at U.S. Naval Station Guantanamo Bay, is hereby revoked.

(b) Detention operations at U.S. Naval Station Guantanamo Bay shall continue to be conducted consistent with all applicable United States and international law, including the Detainee Treatment Act of 2005.

(c) In addition, the United States may transport additional detainees to U.S. Naval Station Guantanamo Bay when lawful and necessary to protect the Nation.

(d) Within 90 days of the date of this order, the Secretary of Defense shall, in consultation with the Secretary of State, the Attorney General, the Secretary of Homeland Security, the Director of National Intelligence, and the heads of any other appropriate executive departments and agencies as determined by the Secretary of Defense, recommend policies to the President regarding the disposition of individuals captured in connection with an armed conflict, including policies governing transfer of individuals to U.S. Naval Station Guantanamo Bay.

(e) Unless charged in or subject to a judgment of conviction by a military commission, any detainees transferred to U.S. Naval Station Guantanamo Bay after the date of this order shall be subject to the procedures for periodic review established in Executive Order 13567 of March 7, 2011 (Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force), to determine whether continued law of war detention is necessary to protect against a significant threat to the security of the United States.

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## 2. Criminal Prosecutions: *Hamidullin*

As discussed in *Digest 2016* at 856-65, and *Digest 2017* at 750-63, the U.S. Court of Appeals in *Hamidullin*, No. 15-4788, considered the question of whether Hamidullin qualified as a prisoner of war under the Third Geneva Convention and was entitled to combatant immunity. On April 18, 2018, the Fourth Circuit issued its opinion, affirming the district court's denial of Hamidullin's claim of combatant immunity. Excerpts follow from the majority opinion, with footnotes omitted.

\* \* \* \*

Appellant Irek Hamidullin appeals his conviction for, among other things, providing and conspiring to provide material support to terrorists, in violation of 18 U.S.C. § 2339A, and conspiring and attempting to destroy an aircraft of the United States Armed Forces, in violation of 18 U.S.C. § 32. Hamidullin contends that the district court erred in concluding that he was not entitled to combatant immunity under the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (“Third Geneva Convention” or “Convention”), and that he did not qualify for the common law combatant immunity defense of public authority. Hamidullin also challenges his conviction for violating 18 U.S.C. § 32, arguing that § 32 does not apply to otherwise lawful military actions committed during armed conflicts.

We affirm, concluding that Hamidullin is not entitled to combatant immunity. We also conclude that § 32 clearly applies.

I. Irek Hamidullin is a former Russian Army officer affiliated with the Taliban and Haqqani Network. He was captured by the Afghan Border Police and American soldiers in the Khost province of Afghanistan in 2009 after he planned and participated in an attack on an Afghan Border Police post at Camp Leyza. He was taken into U.S. custody and held in U.S.

facilities in Afghanistan. He was later indicted in the Eastern District of Virginia for acts associated with the attack....

Prior to trial, Hamidullin moved for dismissal of the second superseding indictment on the grounds that he qualified for combatant immunity pursuant to the Third Geneva Convention and common law. Hamidullin also moved to dismiss his 18 U.S.C. § 32 charge, arguing that the statute was not intended to apply to lawful military actions.

The district court held an evidentiary hearing on Hamidullin's motions at which experts testified as to the applicability of the Third Geneva Convention and laws of war in Hamidullin's circumstance and as to the structure and practices of the Taliban and the Haqqani Network. Thereafter, the court denied Hamidullin's motion to dismiss. The district court assumed without deciding that in 2009, when the alleged acts took place, the conflict in Afghanistan was an international armed conflict and determined that Hamidullin was not a lawful combatant because neither the Taliban nor the Haqqani Network fell within any of the categories of lawful combatants listed in Article 4 of the Third Geneva Convention. Thus, the district court concluded that, as a matter of law, Hamidullin was not entitled to combatant immunity under the Third Geneva Convention or common law and precluded him from presenting this defense at trial. The district court also determined that the plain language of 18 U.S.C. § 32 embraced unlawful acts in a combat zone.

In August 2015, Hamidullin was convicted by a jury on all charges and sentenced to multiple life sentences. On appeal, Hamidullin argues that the district court erred in (1) holding that his prosecution was not barred by the doctrine of combatant immunity, as articulated by the Third Geneva Convention and common law, and (2) determining that 18 U.S.C. § 32 applied to his actions. On June 23, 2017, this Court ordered supplemental briefing to address whether the district court possessed jurisdiction to decide, in the first instance, whether Hamidullin qualifies for combatant immunity under the Third Geneva Convention. In particular, we requested briefing on whether the district court's jurisdiction was affected by Army Regulation 190-8—which implements international law relating to detention during armed conflicts. In response, Hamidullin argues that Army Regulation 190-8 requires that this Court vacate his conviction and remand with instructions that he be transferred to the U.S. military for treatment in accordance with Army Regulation 190-8.

II. <sup>1</sup><sub>SEP</sub> Hamidullin argues he is entitled to combatant immunity under various theories. Accordingly, we begin with a brief discussion of the doctrine of combatant immunity. Combatant immunity is rooted in the customary international law of war and “forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets.” *United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002). ... In order to invoke combatant immunity, a combatant must also be lawful, as described below. *Ex parte Quirin*, 317 U.S. 1, 31 (1942) (“Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”).

The current doctrine of combatant immunity is codified in the Third Geneva Convention. The Third Geneva Convention is one of four international agreements drafted in the wake of World War II to govern the status and treatment of wounded and captured military personnel and civilians in wartime. See Adriana Sinclair, *Geneva Conventions*, in 1 *The Oxford Encyclopedia of American Military and Diplomatic History* 414 (Timothy J. Lynch ed., 2013). The Geneva Conventions have been signed and ratified by every country in the world, including the United

States. *Id.* The Conventions therefore have the force of law in the United States. U.S. Const. art. VI, cl. 2.

Article 2 of each of the Geneva Conventions renders the full protections of the Conventions, including combatant immunity, applicable only in international armed conflicts between signatories of the Conventions. Third Geneva Convention, art. 2. (“[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties”). If Article 2 is applicable, then the Third Geneva Convention provides that lawful combatants who are captured in such a conflict are considered prisoners of war (POWs). The categories of combatants qualifying as lawful are listed in Article 4 of the Convention. Two of these categories are relevant in this case:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) . . . .
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

*Id.* art. 4(A)(2)–(3). Under the Convention, POWs are granted combatant immunity. *See id.* art. 87 (stating that POWs “may not be sentenced . . . to any penalties except those provided for in respect of members of the armed forces of the [detaining] Power who have committed the same acts”); *id.* art. 102 (“A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.”). If there is doubt as to whether a captured combatant is a lawful combatant and thus entitled to POW status, Article 5 of the Convention requires that the captured person be treated as a POW until their status is determined by a “competent tribunal.” *Id.* art. 5 (“Should any doubt arise . . . such persons shall enjoy the protection of the [Third Geneva] Convention until such time as their status has been determined by a competent tribunal.”). The text of the Convention is silent as to what qualifies as a competent tribunal.

When a conflict is not an international conflict between Geneva Convention signatories, at least one article of the Geneva Conventions still applies. Article 3 of each Convention provides that in an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum,” certain provisions, including protecting “[p]ersons taking no active part in the hostilities,” and refraining from “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” *Id.* art 3; *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 629–30 (2006). Thus, Article 3 allows for combatants

captured during non-international conflicts to face trial and judgment for their actions as long as they are tried in the opposing force's country's "regularly constituted court." *Id.*; see also 1 Int'l Comm. of Red Cross (ICRC), *Customary International Humanitarian Law* 354–55 (2005) (stating that pursuant to Article 3 of the Third Geneva Convention, captured combatants can be sentenced in a "regularly constituted court" that is "established and organised in accordance with the laws and procedures already in force in a country.").

The Supreme Court has determined that Article 2 of the Third Geneva Convention applies when a conflict "involve[s] a clash between nations," whereas Article 3 "affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory 'Power' who are involved in a conflict." See *Hamdan*, 548 U.S. at 628–29 (discussing the conflict in Afghanistan between the U.S. and al-Qaeda and applying Article 3). See also ICRC, *Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949* 1350–51 (1987) (discussing the Conventions' distinction between international and non-international conflicts and explaining that "in a non-international armed conflict the legal status of the parties involved in the struggle is fundamentally unequal. Insurgents (usually part of the population), fight against the government in power").

Here, Hamidullin claims that he cannot be tried in a United States criminal court because he is a POW entitled to combatant immunity under the Third Geneva Convention. We now turn to that inquiry.

III. As a threshold matter, we must consider whether the district court had jurisdiction to decide in the first instance whether Hamidullin qualified as a POW under the Third Geneva Convention, or whether Army Regulation 190-8 requires that his status first be determined by a military tribunal.

Army Regulation 190-8 controls the Army, Navy, Air Force, and Marine Corps approach to the treatment and care of enemy prisoners of war and other detainees. Army Reg. 190-8, i. The regulation articulates a general policy that "[a]ll persons taken into custody by U.S. forces will be provided with the protections of the [Third Geneva Convention]," *id.* 1–5(a)(2), and that "[i]n accordance with Article 5 [of the Convention], if any doubt arises as to whether a person ... belongs to any of the categories enumerated in Article 4, ... such persons shall enjoy the protection of the [Third Geneva] Convention until such time as their status has been determined by a competent tribunal," *id.* 1–6(a). Army Regulation 190-8 further states:

A competent tribunal shall determine the status of *any* person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

*Id.* 1–6(b) (emphasis added). Army Regulation 190-8 defines a competent tribunal as a tribunal "composed of three commissioned officers." *Id.* 1–6(c).

Hamidullin argues that Army Regulation 190-8 limits the ability of Article III courts to hear criminal claims against him. He contends that, like in the context of the federal prosecution of juveniles and hate crimes, when the Attorney General must make a certification to the district court demonstrating the unavailability or inappropriateness of state court prosecution prior to federal prosecution, the government must comply with Army Regulation 190-8 prior to proceeding with the criminal prosecution of captured combatants. See 18 U.S.C. § 5032; 18

U.S.C. § 249(b). He asserts that Army Regulation 190-8 requires that any doubt about the applicability of combatant immunity to captured combatants be resolved in the first instance by a competent tribunal composed of three military officers. Because no such tribunal determined his status, Hamidullin contends that he is immune from criminal prosecution in civilian court and should be remanded to the custody of the U.S. military. This argument is unpersuasive.

A. Army Regulation 190-8's general implementation of the Third Geneva Convention does not impact the district court's jurisdiction in this case. Army Regulation 190-8 confirms that persons taken into custody by U.S. forces will be provided Geneva Convention protections. The regulation implements Article 5 of the Convention and provides that if there is doubt as to whether a detained person is a POW, as defined by the Third Geneva Convention, the detainee "shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." Army Reg. 190-8, 1-6(a). Critically, however, Army Regulation 190-8, in implementing Article 5, is also restricted by Article 5's applicability. Article 2 of the Convention provides that the Article 5 determination of POW status by a competent tribunal is only applicable in cases of international armed conflict between Convention signatories. Consequently, Army Regulation 190-8, by its own terms, only provides that POW status is determined by a competent tribunal in cases of international armed conflict. We conclude, however, that at the time of Hamidullin's offense, the conflict in Afghanistan was not an international armed conflict, and therefore that the Army Regulation 190-8 and the Article 5 requirement that POW status be determined by a competent tribunal does not apply.

The conflict in Afghanistan began in 2001 as an international armed conflict arising between two or more Third Geneva Convention signatories—it was a conflict between the United States and its coalition partners on one side, and the Taliban-controlled Afghan government on the other. *See* J.A. 265–66. Shortly thereafter, in 2002, the Taliban lost control of the government and was replaced by a government led by Hamid Karzai. *See* J.A. 270. The United States and its coalition partners remained in Afghanistan at the request of this new government, assisting it in combating the continued Taliban insurgency. J.A. 311–12. Thus, by 2009, the conflict in Afghanistan had shifted from an international armed conflict between the United States and the Taliban-run Afghan government to a non-international armed conflict against unlawful Taliban insurgents.

The Pictet Commentary, which the Supreme Court has found instructive in interpreting the Third Geneva Convention in *Hamdan*, 548 U.S. at 619–20, supports the conclusion that in 2009, the conflict in Afghanistan was non-international. The Pictet Commentary explains that Article 4(A)(3) of the Convention, which defines POWs to include "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power," Third Geneva Convention, art. 4(A)(3), was a response to the refusal of certain states to recognize the combatant immunity of French followers of General Charles de Gaulle fighting during World War II, ICRC, *Commentary to Geneva Convention III Relative to the Treatment of Prisoners of War* 62 (J. Pictet ed., 1960) ("[Article 4] must be interpreted, in the first place, in the light of the actual case which motivated its drafting—that of the forces of General de Gaulle which were under the authority of the French National Liberation Committee."). Article 4(A)(3) was drafted to afford POW protections to combatants who, like the Free French led by General de Gaulle, continued to engage in armed conflict even after a new government had been installed in their country and reached an armistice with a once-adversary. *Id.* at 61–63. However, Article 4(A)(3) is not without limit; indeed, the drafters of the Third Geneva Convention feared that an overly broad interpretation of Article 4(A)(3) would be "open to abusive interpretation" and lead

“to the formation of armed bands.” *Id.* at 62, 63. The Pictet Commentary, therefore, makes clear that the installation of a new government by an invading power is not enough to convert a conflict from international to non-international. Rather, some level of international recognition is required for the conflict to remain an “international armed conflict.” *Id.* at 63 (“It is not expressly stated that this Government or authority must, as a minimum requirement, be recognized by third States, but *this condition is consistent with the spirit of the provision*, which was founded on the specific case of the forces of General de Gaulle.” (emphasis added)). In the case of the Free French, the ousted government led by General de Gaulle was recognized by the Allied forces. Conversely, by the time Hamidullin was captured, the Taliban had been removed from power for eight years and *no* country recognized the Taliban as the legitimate government of Afghanistan. J.A. 275–76 (explaining that the last country recognizing the Taliban government withdrew its recognition within months of 9/11). Thus, the Pictet Commentary suggests that in 2009, the conflict in Afghanistan was a non-international armed conflict for the purposes of the Convention.

The International Committee of the Red Cross and the executive branch of the United States government have reached this same conclusion. See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* 10 (2011) (“As the armed conflict does not oppose two or more states, i.e. as all the state actors are on the same side, the conflict must be classified as non-international, regardless of the international component, which can at times be significant. A current example is the situation in Afghanistan (even though that armed conflict was initially international in nature).”); ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* 7 (2007) (“This conflict [against the Taliban and Al-Qaeda] is non-international ... because it is being waged with the consent and support of the respective domestic authorities and does not involve two opposed States.”); see also The White House, *Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations* 19, 32 (2016) (stating that the United States is currently engaged only in non-international armed conflicts). Common sense agrees. If the conflict in Afghanistan was originally an international armed conflict occurring between two “High Contracting Parties”—the United States and the Afghan government—the conflict cannot remain international when the conflict between the recognized Afghan government and the United States has ceased. Accordingly, the provision in Army Regulation 190-8 directing that POW status be determined in accordance with Article 5 is inapplicable, and Hamidullin’s argument that these provisions require a competent tribunal to determine his POW status must fail.

Instead, because we conclude that the conflict in Afghanistan was non-international at the time of Hamidullin’s offense, the protections of Article 3 of the Convention apply. Under Article 3, however, there is no provision entitling combatants captured during non-international conflicts to POW status or the resulting combatant immunity. Therefore, there is no process by which Hamidullin is entitled to a determination of whether he is a POW, as no POW status exists under Article 3, and, consequently, combatant immunity cannot be granted. Pursuant to Article 3, Hamidullin can be sentenced in a “regularly constituted court” that is “established and organised in accordance with the laws and procedures already in force in a country.” 1 ICRC, *Customary Int’l Humanitarian Law* 355 (2005) (interpreting Third Geneva Convention, art. 3). A U.S. federal district court is one such court. See 18 U.S.C. § 3231 (“The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.”); *Hamdan*, 548 U.S. at 632, 635 (clarifying that “Article 3 [of the

Conventions] ... tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems"). Thus, the district court had jurisdiction to adjudicate Hamidullin's case irrespective of Army Regulation 190-8's invocation of Article 5 of the Convention.

B. Hamidullin also argues that Army Regulation 190-8's statement that "[a] competent tribunal shall determine the status of *any* person not appearing to be entitled to prisoner of war status ... who asserts that he or she is entitled to treatment as a prisoner of war" entitles him to a competent tribunal regardless of whether the 2009 conflict was international. *Id.* 1-6(b) (emphasis added). We disagree.

To be sure, military regulations have the force of law. *Standard Oil Co. of Cal. v. Johnson*, 316 U.S. 481, 484 (1942) ("War Department regulations have the force of law."); *United States v. Eliason*, 41 U.S. (16 Pet.) 291, 302(1842) ("[R]ules and orders publicly promulgated [sic] through [the secretary of war] must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority."). However, both the Supreme Court and this Court have made clear that military law does not govern our Article III jurisprudence. *See United States v. Rendon*, 607 F.3d 982, 990 (4th Cir. 2010) ("[M]ilitary law 'is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.'" (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953))). Consequently, a regulation such as Army Regulation 190-8, 1-6(b), cannot preclude district court jurisdiction when doing so contravenes Congress's grant of jurisdiction to the judiciary.

Hamidullin's interpretation of Army Regulation 190-8, 1-6(b), would allow an internal executive branch regulation to strip Article III courts of their statutorily granted jurisdiction. At the time of his trial, Hamidullin was in civilian custody and under indictment for civilian crimes over which Congress has granted exclusive jurisdiction to Article III district courts. *See* 18 U.S.C. § 3231. During his civilian criminal proceeding Hamidullin raised a defense—combatant immunity—that is inextricably tied up in questions of treaty interpretation. This defense does not deprive the district court of its authority to hear Hamidullin's case, as there can be no question that it is the role of the judiciary, not the executive, to interpret treaties. To quote the Supreme Court in *Sanchez-Llamas v. Oregon*:

Under our Constitution, "[t]he judicial Power of the United States" is "vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1. That "judicial Power ... extend[s] to ... Treaties." *Id.* § 2. And, as Chief Justice Marshall famously explained, that judicial power includes the duty "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law "is emphatically the province and duty of the judicial department," headed by the "one supreme Court" established by the Constitution. *Id.*; see also *Williams v. Taylor*, 529 U.S. 362, 378-379 (2000) (opinion of Stevens, J.) ("At the core of [the judicial] power is the federal courts' independent responsibility— independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law"). 548 U.S. 331, 353-54 (2006). Determining the meaning of the Third Geneva Convention as a matter of federal law "is emphatically the province and duty of the judicial department," *Marbury*, 5 U.S. (1 Cranch) at 177, and remanding this case to the executive branch to determine the Convention's meaning and applicability to Hamidullin in the first instance would be an abdication of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction

given them.” *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

Of course, the executive may engage in the interpretation of treaties in order to implement them into its own internal procedures and regulations. Such interpretations are “entitled to great weight” and can inform the judiciary’s own interpretations. *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (discussing the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 24, 1980, T.I.A.S. No. 11670); *see also Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982). Here, the Executive Branch has used Army Regulation 190-8 to implement the protections of the Third Geneva Convention. Additionally, the executive has explicitly expressed its interpretation of the Third Geneva Convention with regards to the Taliban. In 2002, when the conflict in Afghanistan was still considered an international armed conflict and, thus, Article 4 of the Convention applied to determine whether a combatant qualified as a POW, President George W. Bush determined that Taliban detainees did not qualify as POWs because they were unlawful combatants. Memorandum of President George W. Bush to the Vice President, et. al. (Feb. 7, 2002); *see also Hamdan v. Rumsfeld*, 415 F.3d 33, 43 (D.C. Cir. 2005), *rev’d on other grounds*, 548 U.S. 557 (2006) (“The President found that Hamdan was not a prisoner of war under the Convention. Nothing in [Army Regulation 190-8], and nothing [petitioner] argues, suggests that the President is not a ‘competent authority’ for these purposes.”).

Hamidullin asks us to provide a three-member military tribunal with the authority to displace the president’s interpretation of the Convention. In arguing that Army Regulation 190-8, 1–6(b) applies even if at the time of his offense the conflict in Afghanistan was non-international, Hamidullin requests that we remand him to military custody to allow a tribunal to determine whether the Third Geneva Convention provides him with combatant immunity. This will necessarily involve a reconsideration of President Bush’s interpretation of the Convention, as the Convention only extends combatant immunity to combatants involved in international armed conflicts. Accordingly, Hamidullin not only asks this Court to abdicate our duty to decide cases properly within our jurisdiction, but also asks us to ignore the legal determination already made by the President of the United States, and to instead authorize a panel of three mid-level, non-lawyer military officers to usurp our authority and responsibility. *See Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949*, 26 Op. O.L.C. 1, 9 (2002). (stating that Article 5 “[t]ribunals are ... designed to determine whether a particular set of facts falls within one of the Article 4 categories; they are not intended to be used to resolve the proper interpretation of those categories.”). Moreover, remanding this case to a military tribunal to make a legal determination that the Commander-in- Chief has already made could lead to an inconsistent application of the laws of war, would undermine the United States and its partners’ current application of the legal framework for non-international armed conflicts in Afghanistan, and, perhaps most troubling, would violate separation of powers principles by conferring our responsibility to hear cases properly within our jurisdiction upon a three-member military tribunal. We cannot allow Hamidullin’s interpretation of Army Regulation 190-8 to upend our system of governance. It is the responsibility of this Court—not of a three-member panel of military officers—to decide the lawfulness of the executive’s interpretation. *See Sanchez-Llamas*, 548 U.S. at 353–54.

Consequently, we conclude that the district court had jurisdiction to determine whether Hamidullin qualifies as a POW and was entitled to combatant immunity under the Convention, irrespective of Army Regulation 190-8. We therefore decline to remand Hamidullin to military custody, and turn to the merits of his combatant immunity defenses.

IV. Hamidullin argues he is entitled to combatant immunity pursuant to the Third Geneva Convention and common law. We review the district court's factual findings for clear error, and its legal determinations de novo. *United States v. Washington*, 398 F.3d 306, 310 (4th Cir. 2005).

A. To be entitled to combatant immunity, the Third Geneva Convention requires that a combatant (1) be captured during an international armed conflict, Third Geneva Convention, art. 2, and (2) be a lawful combatant—in other words, the combatant must belong to one of the Article 4 categories defining POW's, *id.* art. 4. Article 4 lists six categories of lawful combatants, but only two categories, Article 4(A)(2) and (A)(3), are relevant here. Article 4(A)(2) provides that members of militias belonging to a party to the conflict are lawful combatants entitled to POW status so long as they are commanded by a person responsible for subordinates, carry a "fixed distinctive sign," carry arms openly, and operate in accordance with the laws of war. *Id.* art. 4(A)(2). Article 4(A)(3) provides that "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power" are likewise POWs. *Id.* art. 4(A)(3).

Below, the district court assumed, without deciding, that the conflict in Afghanistan in 2009 was international and determined that neither the Taliban nor the Haqqani Network fit into an Article 4 category. It held that the Taliban and Haqqani Network most closely resembled a "militia" or "organized resistance movement" as described in Article 4(A)(2), but that neither organization fulfilled the criteria of Article (4)(2). Specifically, the district court found that neither organization has a fixed, distinctive sign recognizable at a distance, carries arms openly, or conducts operations in accordance with the laws and customs of war. *See id.* art. 4(A)(2).

Hamidullin does not identify a clear error in the district court's factual findings, and makes no claim that the Taliban satisfy the criteria set forth in Article 4(A)(2). Instead, he contends he is entitled to POW status under Article 4(A)(3), which covers "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." *Id.* art. 4(A)(3). Unlike the criteria for militia in Article 4(A)(2), Article 4(A)(3) contains no conditions that groups must fulfill in order to be entitled to POW status; membership in a regular armed force expressing allegiance to a government not recognized by the detaining power is the only enumerated requirement. Hamidullin contends that because the Third Geneva Convention does not expressly incorporate the Article 4(A)(2) criteria into Article 4(A)(3), he is entitled to POW status regardless of whether the Taliban satisfies the Article 4(A)(2) criteria.

The difficulty with Hamidullin's argument is that, as discussed above, we hold that the conflict in Afghanistan was not an international armed conflict. As a result, irrespective of whether Taliban fighters are entitled to POW status pursuant to Article 4(A)(3), Hamidullin is not entitled to combatant immunity because the protections of Article 3 (governing non-international conflicts), rather than Article 2 (governing international conflicts), apply. Article 3 only requires that Hamidullin be tried "by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Third Geneva Convention, art. 3. The U.S. federal district courts are "established and organised in accordance with the laws and procedures already in force" in the United States. *See* 1 ICRC, *Customary International Humanitarian Law* 355 (2005); 18 U.S.C. § 3231. Accordingly, the district court did not err in determining that Hamidullin was properly tried in a regularly constituted American court.

B. In the alternative, Hamidullin argues that even if he does not qualify for combatant immunity under the Third Geneva Convention, he is eligible for common law combatant immunity as an enemy soldier fighting for a rival sovereign. He frames this defense as a public authority defense, citing *Dow v. Johnson* and other post-Civil War jurisprudence. 100 U.S. 158, 165 (1879) (“[F]rom the very nature of war, the tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and soldiers of the invading army.”); see also *Coleman v. Tennessee*, 97 U.S. 509, 515 (1879) (“Officers and soldiers of the armies of the Union were not subject during the war to the laws of the enemy, or amenable to his tribunals for offences committed by them.”). Hamidullin argues that just as defendants who act in objectively reasonable reliance on the authority of a government official are immune from criminal liability, see *United States v. Fulcher*, 250 F.3d 244, 252–53 (4th Cir. 2001), soldiers in armed conflict are immune from criminal liability when they act by virtue of the direction of a belligerent party. Typically, however, the public authority defense looks to whether the defendant’s actions were sanctioned by a U.S. official, as foreign officials do not have authority to authorize violations of U.S. criminal law. See 1 Charles E. Torcia, *Wharton’s Criminal Law* § 41 (15th ed. 2015) (“The fact that a crime committed in time of peace was committed under the directions of the authority of a foreign government is no defense.”). Nonetheless, Hamidullin asserts that “immunity from ordinary criminal liability applies without distinction between soldiers who fight on behalf of a State and opposing forces who assert a rival claim to sovereign authority.” Appellant Br. 35. We disagree.

The Third Geneva Convention is the governing articulation of lawful combatant status. The principles reflected in the common law decisions cited by Hamidullin were refined and collected in 20th century efforts to codify the international law of war that resulted in the Third Geneva Convention. Just as a statute preempts common law when Congress speaks directly to the question, see e.g., *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 315 (1981), a self-executing treaty like the Third Geneva Convention would similarly preempt common law if the treaty speaks directly to the question. The Third Geneva Convention explicitly defines the category of individuals entitled to POW status, and concomitantly, combatant immunity. Third Geneva Convention, art. 4. As such, the Third Geneva Convention’s definition of lawful and unlawful combatants is conclusive.

Moreover, Hamidullin’s broad framing of common law combatant immunity would extend immunity far beyond the Third Geneva Convention, to every person acting on behalf of an organization that claims sovereignty. For example, it could supply a claim of immunity to terrorists operating on behalf of the Islamic State, which itself claims sovereignty. We decline to broaden the scope of combatant immunity beyond the carefully constructed framework of the Geneva Convention. The Convention represents an international consensus on the norms of treatment of prisoners, a consensus that would be eviscerated if common law principles were interpreted as superseding. Because Hamidullin does not qualify for combatant immunity pursuant to the Third Geneva Convention, he likewise does not qualify for the common law defense of public authority.

V. Last, Hamidullin challenges his conviction for conspiring and attempting to destroy a U.S. military aircraft in violation of 18 U.S.C. § 32(a). Section 32(a) states that “[w]hoever willfully—(1) sets fire to, damages, destroys, disables, or wrecks any aircraft in the special aircraft jurisdiction of the United States” shall be imprisoned not more than twenty years. 18 U.S.C. § 32(a). The special jurisdiction of the United States includes “an aircraft of the armed forces of the United States” in flight. 49 U.S.C. § 46501(2)(B). Section 32(b) criminalizes the

damage or destruction of “civil aircraft registered in a country other than the United States.” The district court held that the plain language of § 32(a) applies to unlawful acts even when committed in a combat zone.

Hamidullin argues that Congress did not intend to apply § 32 to military personnel whose attacks on aircraft are accepted under the laws of armed conflict. To support this contention, he relies on a memorandum from the Office of Legal Counsel which analyzed § 32(b) and reasoned that § 32(b) should not be construed to “have the surprising and almost certainly unintended effect of criminalizing actions by military personnel that are lawful under international law.” *United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148, 164 (1994).

We conclude that Hamidullin’s argument fails because even Hamidullin’s preferred construction of congressional intent does not preclude application of the statute in this case. He claims that Congress did not intend § 32 to apply to the actions of “military force” that are lawful under international law. However, as described above, Hamidullin was not a lawful combatant and his conduct was not lawful under the Third Geneva Convention. Hence, the district court did not err in determining that the plain language of § 32(a) applied to Hamidullin’s conduct. Here, Hamidullin was convicted of attempting to fire anti-aircraft weapons at U.S. military helicopters. Given Hamidullin’s status as an unlawful combatant, that attack falls under the plain language of 18 U.S.C. § 32(a).

We do not take our duty to respect and comply with the tenets of international law lightly. This is especially true when, as here, our interpretation of that responsibility has the potential to seriously impact the treatment of persons captured during armed conflicts. Nonetheless, for the foregoing reasons, it is clear to us that neither the Third Geneva Convention nor U.S. Army regulations grant Hamidullin immunity from criminal prosecution in an Article III court. Moreover, the text of § 32(a) clearly applies to these facts. Accordingly, the judgment of the district court is *AFFIRMED*.

\* \* \* \*

Hamidullin filed a motion in the Fourth Circuit seeking rehearing en banc. On June 12, 2018, the United States filed a brief opposing the motion, which is excerpted below and available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

\* \* \* \*

En banc review is warranted only when the panel decision conflicts with a decision of the Supreme Court or this Court or where “the proceeding involves a question of exceptional importance,” such as “an issue on which the panel decision conflicts with the authoritative decisions of other” courts of appeals. Fed. R. App. P. 35(a) and (b). Neither circumstance exists here.

Hamidullin contends that this Court should grant rehearing en banc to consider three claims. First, Hamidullin argues that Army Regulation 190-8 requires a remand for a military tribunal to determine in the first instance whether Hamidullin was entitled to POW status.

Second, Hamidullin claims he was entitled to combatant immunity under a broader, “common law” theory that, unlike the GPW, allows fighters belonging to non-State insurgent groups to assert combatant immunity even in non-international armed conflicts. Third, Hamidullin argues that 18 U.S.C. § 32(a) does not prohibit attacking aircraft during an armed conflict. The panel correctly rejected those claims, and its decision does not conflict with any decision of the Supreme Court, this Court, or any other court of appeals. Moreover, Hamidullin has not shown that his claims present issues of exceptional importance that are likely to recur. Finally, Hamidullin would not be entitled to relief in any event. As the district court found, even if the Taliban were treated as an armed group belonging to a State engaged in an international armed conflict, Hamidullin’s bid for combatant immunity would fail because the Taliban’s systematic violations of the law of war disqualify their members from combatant immunity.

1. Hamidullin contends (Pet. 6-13) that, under AR 190-8, a military tribunal must determine his entitlement to POW status before an Article III court may exercise criminal jurisdiction. The panel correctly rejected that novel claim.

a. Army Regulation 190-8 implements Article 5 of the GPW by providing that, where there is doubt as to whether a person detained by the U.S. armed forces qualifies as a POW, such persons should be provided POW protections until their status has been determined by a competent tribunal. *Hamidullin*, 888 F.3d at 69. “Critically, however, [AR 190-8], in implementing Article 5, is also restricted by Article 5’s applicability,” and Article 5 is “only applicable in cases of international armed conflict.” *Id.* That limitation makes sense. There is no need for a military tribunal to determine whether a prisoner detained by a State in a non-international armed conflict is entitled to POW protections under Article 4 because those protections, including combatant immunity, do not apply. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 631-32 (2006) (explaining that Article 3 of the Convention is the only article that applies in non-international armed conflicts). Under Article 3, States may prosecute captured fighters in a “regularly constituted court,” and Article III courts meet that standard. *Hamidullin*, 888 F.3d at 71, 75. Because the conflict in Afghanistan was non-international at the time of Hamidullin’s conduct, the panel correctly held that AR 190-8 has no application here.

b. The President’s determination that Taliban detainees are unlawful combatants who do not qualify as POWs under the GPW also forecloses Hamidullin’s entitlement to a tribunal under AR 190-8. Nothing in that regulation requires convening a panel of military officers to make a legal determination that their Commander-in-Chief has already made. *Hamidullin*, 888 F.3d at 72-73. Hamidullin’s construction of AR 190-8 would authorize a military tribunal “to displace the [P]resident’s interpretation of the Convention,” thereby undermining the Executive Branch’s ability to apply a consistent legal framework to the ongoing armed conflict in Afghanistan. *Id.*; *see also id.* at 78 (Wilkinson, J., concurring) (“Empowering different panels of military officers” to “override the determination of the President” would “fly in the face” of the President’s “control over the military,” result in “disparate treatment of similarly situated detainees,” “hamstring our country in its ability to approach armed conflicts in a unified fashion,” and “undermine the consistent practice of both the United States and its allies to uniformly treat Taliban fighters as insurgents who lack any claim to the Third Geneva Convention’s combatant immunity defense”).

c. Hamidullin argues (Pet. 7) that AR 190-8 goes beyond the GPW by affording a presumption of POW status even to members of non-State armed groups in non-international armed conflicts. That claim is inconsistent with the regulation’s stated purpose, which is to implement Geneva Convention protections, not to extend them to circumstances where they do

not apply. And even if AR 190-8 could plausibly be read to apply to the non-international armed conflict against the Taliban, that reading would be superseded by more recent Defense Department directives issued by higher-level authorities (*e.g.*, the Deputy Secretary of Defense) that govern the current armed conflict. *See, e.g.*, DoD Directive 2310.01E, *DoD Detainee Program*, August 19, 2014, Incorporating Change 1, May 24, 2017. That Directive makes clear that the requirement to provide POW protections in certain cases until a competent tribunal has determined a detainee's status applies only "[d]uring international armed conflict." *See id.* ¶ 3(h).

d. Hamidullin argues (Pet. 7-8) that applying AR 190-8 only to international armed conflicts cannot be squared with a Congressional statement of U.S. policy to provide Article 5 tribunals in any case where there is "doubt" regarding a detainee's POW status. But that statement merely repeats the language of Article 5 and AR 190-8 itself, which require a military tribunal only when there is "doubt" as to an individual's "legal status" under the GPW to receive POW privileges, and not as to each and every captured combatant. *See id.* ¶ 1- 5(a)(2) (requiring POW protections "until some other legal status is determined by competent authority.") (emphasis added). In Hamidullin's case, there is no such doubt. "Competent authorit[ies]" at the highest levels of the Executive Branch have conclusively determined that Taliban detainees do not "belong to any of the categories enumerated in Article 4" because (1) the conflict against the Taliban in 2009 was not an international armed conflict; and (2) the Taliban flagrantly and systematically violate the Article 4 criteria. *See Hamidullin*, 888 F.3d at 71-72; *Hamidullin*, 114 F. Supp. 3d at 386-87. Those determinations are sufficient to resolve any "doubt" as to Hamidullin's status, and nothing in AR 190-8 requires convening a tribunal to revisit those determinations in each individual case. *See Hamdan v. Rumsfeld*, 415 F.3d 33, 43 (D.C. Cir. 2005), *rev'd on other grounds*, 548 U.S. 557 (2006) (holding that the President's determination barred a military commission defendant's claim of entitlement to an AR 190-8 tribunal because "[n]othing in [AR 190-8]...suggests that the President is not a 'competent authority' for these purposes").

e. Hamidullin contends (Pet. 8-9) that denying POW status to Taliban fighters is inconsistent with U.S. practice in earlier conflicts. But the authorities he cites do not establish that the United States has historically afforded POW status in non-international armed conflicts to non-State insurgent groups like the Taliban that defy the laws of war. The prosecution of Taliban fighters as unlawful combatants in civilian courts is entirely consistent with the Geneva Convention framework and the uniform practice of the United States and its partners. *See Hamidullin*, 888 F.3d at 77-78 (Wilkinson, J., concurring).

f. Hamidullin's AR 190-8 argument does not warrant en banc review. There is no conflict with any decision of the Supreme Court, this Court, or any other court of appeals. And the argument arises only in the limited context of persons captured by the U.S. armed forces and later prosecuted in Article III court. Hamidullin does not claim that this is a frequently recurring pattern, nor has he cited any other case where a defendant in an Article III prosecution has invoked AR 190-8 to seek a remand to a military tribunal.

The remand Hamidullin seeks would serve no purpose except delay. Hamidullin provides no reason to believe that his claim for POW status before a military tribunal would fare any better than it did in district court. Even if the military panel accepted Hamidullin's unsupported contention that combatant immunity is available to fighters for non-State groups in non-international armed conflicts, he would still have to persuade the panel that the Taliban's flagrant violations of the law of war do not foreclose its members from claiming POW status. The district court rejected that contention, and federal courts in other cases have uniformly rejected bids for

combatant immunity on behalf of the Taliban and other groups that defy the laws of war. *See, e.g., United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) (rejecting combatant immunity defense because Taliban do not comply with the laws of war); *United States v. Hausa*, 2017 WL 2788574, at \*6 & n.6 (E.D.N.Y. Jun. 27, 2017) (same as to al Qaeda); *United States v. Arnaout*, 236 F. Supp. 2d 916, 917 (N.D. Ill. 2003) (same). There is no reason to doubt that a military tribunal would reach the same conclusion.

2. Hamidullin, relying on post-Civil War cases addressing in various contexts the legal consequences of belligerent acts by Confederate forces, contends (Pet. 13-16) he was entitled to combatant immunity under a broader, “common law” theory that, according to Hamidullin, allows fighters belonging to non-State insurgent groups to assert combatant immunity even in non-international armed conflicts. That contention has no merit and does not warrant en banc review.

The panel correctly held that the GPW, not the nineteenth-century common law jurisprudence Hamidullin relies on, provides the modern standard for combatant immunity in U.S. courts. *See Hamidullin*, 888 F.3d at 75-76. As the panel explained, “[t]he principles reflected in the [pre-Geneva Convention] common law decisions” were “refined” and codified in the GPW, which “represents an international consensus” on the scope of combatant immunity. *Id.* For that reason, the panel correctly held that the GPW’s “explicit[]” definition “of lawful and unlawful combatants is conclusive.” *Id.*

Extending combatant immunity to non-State insurgent groups would undermine the international consensus that the Geneva Conventions reflect. *See Hamidullin*, 888 F.3d at 76. Moreover, affording combatant immunity to armed groups beyond the Geneva Convention framework would inhibit the government’s ability to bring terrorists to justice. *See id.* (“Hamidullin’s broad framing of common law combatant immunity would extend immunity far beyond the [GPW] to every person acting on behalf of an organization that claims sovereignty,” including “terrorists operating on behalf of the Islamic State”); *see also id.* at 12 (Wilkinson, J., concurring) (Hamidullin’s theory “would threaten to elevate every band of terrorists...to near nation-state status and, in so doing, to extend the protections of the Geneva Convention to those who both regularly and flagrantly violate its dictates”). Hamidullin’s sweeping expansion of combatant immunity would require the United States to treat lawless insurgents, many of whom are responsible to no one but themselves, as if they were members of a State’s regular forces. The panel therefore correctly “decline[d] to broaden the scope of combatant immunity beyond the carefully constructed framework of the Geneva Convention.” *Id.* at 76.

Hamidullin does not contend that any federal court has applied any other standard for combatant immunity since the adoption of the GPW. As far as the government is aware, every federal court to have considered a combatant immunity defense since U.S. ratification of the 1949 Geneva Conventions has applied the GPW standards.

Hamidullin contends (Pet. 13-14) that the panel’s decision is in tension with decisions of this Court and other courts of appeals recognizing the existence of a “common law of war” based on domestic precedents. However, the fact that domestic precedents may shed light on law-of-war issues in some contexts not explicitly addressed in the Geneva Conventions, such as military commission jurisdiction, *see Bahlul v. United States*, 767 F.3d 1, 23 (D.C. Cir. 2014) (en banc), or civil liability for defense contractors, *see Al Shimari v. CACI International, Inc.*, 679 F.3d 205, 216 (4th Cir. 2012) (en banc), has no bearing on the issue here, where the GPW explicitly provides the governing standard for assessing Hamidullin’s combatant immunity claim.

In any event, the post-Civil War cases addressing the lawfulness of Confederate belligerency provide no support for Hamidullin’s claims. As those cases recognize, the United States in the Civil War determined as a matter of policy to treat Confederate forces as lawful belligerents, and the courts deferred to that determination. *See The Prize Cases*, 67 U.S. 635, 670 (1862). Here, the United States and its partners have made the opposite determination with respect to the Taliban. Nothing in the common law or the GPW requires extending the protections of combatant immunity to members of non-State insurgent groups such as the Taliban that regularly and flagrantly violate the laws of war.

3. Hamidullin argues (Pet. 16-17) that 18 U.S.C. § 32(a), which prohibits conspiring or attempting to destroy a U.S. military aircraft, does not apply to his conduct. The panel correctly rejected that argument. As the panel explained, even assuming the statute contains an implied exception for lawful combatants who shoot at U.S. military aircraft during an armed conflict, Hamidullin’s “status as an unlawful combatant” takes him outside any such exception. *Hamidullin*, 888 F.3d at 76. Accordingly, Hamidullin’s attempt to fire anti-aircraft weapons at U.S. military helicopters “falls under the plain language of 18 U.S.C. § 32(a).” *Id.*

Hamidullin does not contend that the panel’s construction of Section 32(a) conflicts with any other federal court decision. Instead, he relies on an Office of Legal Counsel memorandum that, in addressing a different subsection of Section 32, stated that Congress did not intend for that provision to criminalize “actions by military personnel that are lawful under international law.” However, as the panel held, Hamidullin’s conduct does not satisfy that criterion. Hamidullin and his insurgent group were not “military personnel” who belong to a State, and who, with State authorization, conduct operations in compliance with the laws of war. Hamidullin, as an unlawful combatant fighting on behalf of a non-State insurgent group that systematically violates the laws of war, is not immune from Section 32(a)’s prohibition on attacking U.S. military aircraft.

\* \* \* \*

### 3. U.S. Court Decisions and Proceedings

#### a. *Joint Habeas Petition: Al-Bihani et al.*

The United States responded on February 16, 2018 to a joint habeas petition filed in U.S. District Court for the District of Columbia on behalf of a group of Guantanamo detainees challenging their continued detention. Excerpts follow from the U.S. brief in *Al-Bihani et al. v. Trump, et al.*, No. 01994-UNA, (D.D.C. 2018), available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

\* \* \* \*

Petitioners erroneously contend that their detention violates the AUMF because they are subject to “perpetual” and “indefinite” detention. . . . But Petitioners’ continued detention is not indefinite, as it is bounded by the cessation of active hostilities, . . . . In *Hamdi*, the detainee argued that the AUMF did not authorize “indefinite or perpetual detention,” and the plurality replied that the AUMF grants the authority to detain for the duration of active hostilities. See 542

U.S. at 520-21. That rationale is appropriate here: Petitioners are detained because of their affiliation with al-Qaeda, Taliban, or associated forces, and they remain detained today because active hostilities against those groups remain ongoing. See *al-Wirghi v. Obama*, 54 F. Supp. 3d 44, 47 (D.D.C. 2014) (Lamberth, J.) (rejecting same argument raised by Petitioners and concluding that “detention is not unconstitutionally indefinite”).

Petitioners’ argument that they are subject to indefinite detention under the AUMF essentially boils down to the assertion that they should be released because hostilities have been ongoing for too long. But the notion that Petitioners must be released even though hostilities continue ignores binding precedent and turns the law respecting wartime detention on its head; Petitioners effectively ask this Court to reward enemy forces for extending the length of the conflict by persistently continuing their attacks. There is no support for that position, and the Court of Appeals has expressly rejected the argument that courts should alter the standard for law-of-war detention due to the length of detention. See *Ali*, 736 F.3d at 552. The AUMF “does not have a time limit” and “absent a statute that imposes a time limit or creates a sliding-scale standard that becomes more stringent over time, it is not the Judiciary’s proper role to devise a novel detention standard that varies with the length of detention.” *Id.* (and noting further that “Congress and the President may choose to make long-term military detention subject to different, higher standards,” while acknowledging the Executive’s conduct of periodic reviews regarding the need for ongoing detention).

...

Petitioners also erroneously contend that they should be released because the purpose underlying their law of war detention—*i.e.*, to prevent their return to the battlefield—“has evaporated” and no longer exists. ... [T]here is no merit to this claim because active hostilities against Al-Qaeda, Taliban, and associated forces remain ongoing. The law of war expressly ties the authority to detain enemy belligerents to the duration of active hostilities because the very purpose of law of war detention is “to prevent captured individuals from returning to the field of battle and taking up arms once again.” *Hamdi*, 542 U.S. at 518. Accordingly, longstanding law-of-war principles and “common sense” dictate that “release is only required when the fighting stops.” *Al-Bihani*, 590 F.3d at 874. Here, active hostilities against al-Qaeda, Taliban, and associated forces continue, and therefore, the AUMF, as informed by the laws of war, continues to authorize Petitioners’ detention to prevent Petitioners from returning to the fight.

Petitioners also argue that even if they were “once part of a targetable group, their past membership alone is no longer enough, if it ever was, to presume a threat of return to the battlefield.” ... Petitioners attempt to support this view by selectively and misleadingly quoting from an international law treatise to contend that detention is not authorized “where a detainee is no longer likely to take part in hostilities against the Detaining Power (in the case of combatants).” ... What the treatise actually says is that “the Third Geneva Convention requires the repatriation of seriously wounded and sick prisoners of war because they are no longer likely to take part in hostilities against the Detaining Power.” 1 Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law* 345 (2005) (emphasis added). None of the Petitioners here raise claims based on Articles 109 and 110 of the Third Geneva Convention, which addresses the repatriation of sick and wounded prisoners of war—privileged belligerents detained in international armed conflict. Further, Petitioners notably omit that their cited treatise recognizes “the long-standing custom that prisoners of war may be interned for the duration of active hostilities,” at least in international armed conflicts. *Id.* at 344, 451-56 (citing Article 118 of the Third Geneva Convention).

In the absence of any authority to support their position, the Court should reject Petitioners' invitation to re-write the laws of war to impose a new, unspecified detention standard or time limit that would conflict with longstanding authority that detention is authorized for the duration of active hostilities. See *Ali*, 736 F.3d at 552. Nor is there any basis for Petitioners' contention that their detention under the AUMF entitles them to an individualized judicial determination whether they are likely to return to the battlefield or continue to pose a threat to the national security. The Court of Appeals has expressly rejected that position. See *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010) ("the United States's authority to detain an enemy combatant is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities."); *id.* ("Whether a detainee would pose a threat to U.S. interests if released is not at issue in habeas corpus proceedings in federal courts concerning aliens detained under the authority conferred by the AUMF."). Rather, that assessment is to be made by the Executive Branch through its administrative processes, which continue.

...

The Court also should reject Petitioners' argument that the President's detention authority under the AUMF, as informed by the laws of war, should be construed narrowly to avoid raising constitutional issues with Petitioners' ongoing detention. Because Petitioners' continued detention neither implicates the Due Process clause nor violates it, ... there is no need to reinterpret the detention authority under the AUMF in a manner that would conflict with longstanding law-of-war principles to avoid alleged constitutional issues with that authority. See *Hamdi*, 542 U.S. at 520 (AUMF authorizes law-of-war detention while active hostilities continue for a U.S. citizen detainee with due process rights); *Ali*, 736 F.3d at 552 ("the Constitution allows detention of enemy combatants for the duration of hostilities").

...

There is also no basis for Petitioners' argument that the Government's detention authority under the AUMF has lapsed because of alleged changes in the nature of the ongoing armed conflict against al-Qaeda, Taliban, and associated forces. Petitioners point to language used by the *Hamdi* plurality in reaching its conclusion that law-of-war detention may last until the end of active hostilities: "If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel." *Hamdi*, 542 U.S. at 521. Petitioners contend that the AUMF's detention authority has now "unraveled" because the circumstances of the current conflict can no longer justify their detention. ... But just as *Hamdi* concluded, "that is not the situation we face as of this date." *Hamdi*, 542 U.S. at 521 (noting "active combat operations against Taliban fighters apparently are ongoing in Afghanistan.").

Consistent with the President's determination as Commander-in-Chief that active hostilities remain ongoing, approximately 14,000 military personnel are currently deployed to Afghanistan, and they engage, when and where appropriate, in uses of force against al-Qaeda, Taliban, and associated forces, consistent with the laws of war in a context similar to that presented to the Supreme Court in *Hamdi* and to that presented in other, traditional military operations. ... *Hamdi*, 542 U.S. at 521. Indeed, the United States is still actively fighting al-Qaeda, Taliban, and associated forces, in the same geographic locations, because these groups continue to attack United States forces and plot to inflict harm on the United States and its allies and partners. This case, thus, does not present a situation in which Petitioners' detention would be inconsistent with the "clearly established principle of the law of war that detention may last

no longer than active hostilities” or the rationales underlying that principle. *Hamdi*, 542 U.S. at 520. For these reasons, Judges Kollar-Kotelly and Leon previously rejected the same argument that Petitioners assert here. See *Al-Alwi*, 236 F. Supp. 3d at 423 (rejecting argument that “that the unusual nature and length of the conflict in Afghanistan have caused conventional understandings of the law of war to unravel completely”); *Al-Kandari*, Slip Op. at 18 (“while the plurality in *Hamdi* did caution that the facts of a particular conflict may unravel the Court’s understanding of the Government’s authority to detain enemy combatants, the Court does not agree with Petitioner that such a situation exists at this point in time”).

\* \* \* \*

## II. PETITIONERS’ CONTINUED DETENTION DOES NOT VIOLATE DUE PROCESS

In *Boumediene v. Bush*, the Supreme Court granted Guantanamo Bay detainees the privilege of habeas corpus. 553 U.S. at 797. In particular, the Court stated that the detainees were entitled to a “meaningful opportunity” to challenge the basis for their detention. *Id.* at 779. In doing so, however, the Court also directed that both “the procedural and substantive standards” used to adjudicate these cases must accord appropriate deference to the political branches. *Id.* at 796-797. Over the years, the judges of this District and the Court of Appeals have developed a well-settled body of law that implements that directive.

Petitioners now challenge several aspects of this well-settled precedent, asserting that the passage of time has rendered Petitioners’ continued detention in violation of substantive due process and the procedural regime established by the Court of Appeals in violation of procedural due process. For the reasons stated below, those challenges are not well-founded. Most fundamentally, Petitioner may not challenge here what has been foreclosed by the Court of Appeals and the Supreme Court. See *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997) (district courts are obligated to apply controlling Circuit precedent unless that precedent has been overruled by the Court of Appeals en banc or by the Supreme Court). Accordingly, Petitioner’s claims that their continued detention violates due process should be rejected.

### A. Petitioners May Not Invoke Due Process Clause Protections

The law of this Circuit is that the Due Process Clause does not apply to unprivileged alien enemy combatants detained at Guantanamo Bay. *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009), vacated and remanded, 559 U.S. 131, reinstated in relevant part, 605 F.3d 1046, 1047, 1048 (D.C. Cir. 2010), cert. denied, 563 U.S. 954 (2011). This holding has been reiterated subsequently by the Court of Appeals, including in *al Madhwani v. Obama*, 642 F.3d 1071, 1077 (D.C. Cir. 2011), and has been applied repeatedly by the judges of this District. Most importantly, that holding has never been overruled. *Salahi*, 2015 WL 9216557 at \*5. Consequently, Petitioners’ due-process arguments are foreclosed here. See *Torres*, 115 F.3d at 1036.

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### B. Petitioners’ Continued Detention Does Not Violate Substantive Due Process

Even were the Court to assume that the Due Process Clause extends in some manner to detainees such as Petitioners at Guantanamo Bay, binding Supreme Court and Circuit precedent also establishes that Petitioners’ continued detention is fully consistent with due process. As explained supra, five Justices in *Hamdi* determined that the AUMF authorized detention until the cessation of active hostilities. 542 U.S. at 518 (plurality op.) (detention “for the duration of the particular conflict in which... [detainees] were captured[] is so fundamental and accepted an

incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress [] authorized the President to use”); *id.* at 587-588 (Thomas, J., dissenting).

There can be no question but that the due-process question was squarely presented in *Hamdi*, for Hamdi himself was a U.S. citizen detained within the United States. *Id.* at 510. And the Court specifically considered the due-process issue, balancing Hamdi’s substantial liberty interest and the Government’s interest in ensuring that he did not return to the battlefield against the United States. *Id.* at 531.

Acknowledging *Hamdi*, the Court of Appeals has held that Guantanamo Bay detainees may be held under the AUMF until the end of hostilities. *Ali*, 736 F.3d at 544, 552; see also *Aamer*, 742 F.3d at 1041; *al-Bihani*, 590 F.3d at 875. Consequently, even were this Court to find, contrary to Circuit precedent, that Petitioners might have some due-process rights, binding Supreme Court and Circuit precedent establishes that those rights are not violated by Petitioners continuing detention. See *Torres*, 115 F.3d at 1036.

Petitioners’ arguments to the contrary—(1) that due process places time-specific limits on their detention and (2) that their continued detention is now unconstitutional based on an arbitrary Executive policy not to release any Guantanamo detainees—do not counsel a different result: the former is inapplicable in the context here, the second is factually wrong.

...First, due process does not place time-specific limits on wartime detention. *Hamdi* and the law of war make clear that enemy combatants such as Petitioners may be detained for the duration of the hostilities. 542 U.S. at 518; accord *Aamer*, 742 F.3d at 1041; *Ali*, 736 F.3d at 544, 552; *al-Bihani*, 590 F.3d at 875. Consequently, as long as the relevant conflict continues—and it does...—no constitutional issue arises as to Petitioners’ continued detention. That the duration of that detention may be currently indeterminate—because the end of hostilities cannot be predicted—does not render the detention “perpetual” or unconstitutionally “indefinite.” ... Rather, Petitioners’ detention remains, as it always was, bounded by the ultimate cessation of hostilities. See 542 U.S. at 518. That limit, even though currently not determinable, renders Petitioners’ detention sufficiently definite to satisfy due process. See, *e.g.*, *Ali*, 736 at 552 (acknowledging that the conflict with al-Qaeda, the Taliban, and associated forces “has no end in sight” but that, nevertheless, “the Constitution allows detention of enemy combatants for the duration of hostilities”).

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...Petitioners’ continued detention still serves the purpose justifying it: to prevent Petitioners’ return to the battlefield. Accordingly, Petitioners’ detention is not unconstitutionally arbitrary. See *al Wirghi*, 54 F. Supp. 3d at 47.

Petitioners’ argument otherwise is grounded on a false premise, specifically that their continued detention is based solely on a policy barring the release of any detainees from Guantanamo Bay. ... [T]he policy of the United States was and has remained that detainees will be provided periodic reviews to determine whether their continued, lawful law-of-war detention by the United States may be ended by transfer without endangering security interests of the United States. This policy was reiterated by the Deputy Secretary of Defense just last fall. See Policy Mem., Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay per Exec. Order 13567 Attach. 3 ¶ 2.a (Nov. 27, 2017) (available at [http://www.prs.mi/Portals/60/Documents/POLICY\\_MEMORANDUM\\_IMPLEMENTING\\_GUIDELINES.pdf](http://www.prs.mi/Portals/60/Documents/POLICY_MEMORANDUM_IMPLEMENTING_GUIDELINES.pdf)).

Moreover, the President confirmed the vitality of that policy by Executive Order just two weeks ago, when he instructed that the periodic-review process instituted by Executive Order 13,567 would continue and would apply to any detainees transferred to Guantanamo Bay in the future. Exec. Order 13,823 §2(e), 83 Fed. Reg. at 4831-32. At the same time, the President dispelled any doubt that detainees designated as eligible for transfer may be transferred, subject to appropriate security conditions, if deemed appropriate by the Secretary of Defense... Thus, the policy of the United States remains that Guantanamo Bay detainees may be transferred prior to the end of active hostilities when it is determined that their continued law of war detention is no longer necessary to protect against a continuing significant threat to the security of the United States. See *id.* § 2(e).

In furtherance of this policy, Guantanamo Bay detainees have continued to receive periodic reviews of their detention. ...

Furthermore, that two of the Petitioners were previously approved for transfer does not render their continued detention unnecessary or unconstitutionally arbitrary. ...

Indeed, more specifically as to these two petitioners, their designations as eligible for transfer explicitly disclaimed any concession that the detainees did not pose any threat to the security of the United States. ...

### **C. The Judicially Crafted Procedures Governing Petitioners' Habeas Cases Do Not Violate Due Process**

In *Boumediene*, the Supreme Court explicitly left to the “expertise and competence of the District Court[s]” the task of determining appropriate evidentiary and procedural rules for these Guantanamo habeas cases. 553 U.S. at 796. In doing so, the courts were instructed to balance the detainees’ need for meaningful access to the writ against the burden on the Executive and, in particular the military, in responding to these wartime petitions. See *id.* at 795-96. Specifically, the Court noted that these habeas proceedings “need not resemble a criminal trial.” *Id.* at 783.

In response, the judges of this District and the Court of Appeals have addressed numerous evidentiary and procedural issues in these cases as those issues have arisen. The result is a comprehensive body of case law including:

(1) that when deciding whether to admit government intelligence reports as evidence, a district court is to afford the Government the usual rebuttable presumption of regularity in the recording of the information in government documents, *Latif v. Obama*, 666 F.3d 746, 755 (D.C. Cir. 2011);

(2) that when deciding whether a detainee is legally detained, a district court must consider the evidence as a whole and not piecemeal, *al-Adahi v. Obama*, 613 F.3d 1102, 1105-06 (D.C. Cir. 2010);

(3) that when considering hearsay evidence, a district court must determine the weight to be accorded that evidence, *al-Bihani*, 590 F.3d at 879; and

(4) that when presented with evidence a detainee stayed at an al Qaeda guesthouse, a district court was entitled to draw an inference the detainee was a member of al Qaeda, for one does not generally end up staying at a terrorist guesthouse by mistake—either by the guest or the host, *Ali*, 736 F.3d at 546.

And, of primary concern to Petitioners, the governing case law provides

(5) that the Government must demonstrate by a preponderance of the evidence that a detainee was part of or substantially supported al Qaeda, Taliban, or associated forces. *al-Bihani*, 590 F.3d at 878.

Petitioners now call into question the constitutionality of these and other unnamed decisions, asserting that they collectively set the bar too low to justify Petitioners' continued detention.

As an initial matter, here again, this is the wrong forum for these arguments. Simply put, Petitioners again ask this Court to reverse or ignore binding Circuit precedent. To do so would be error. *Torres*, 115 F.3d at 1036. For this reason alone, this claim should be denied.

As to Petitioners' more fundamental challenges, the constitutionality of the preponderance-of-the-evidence standard in this wartime detention context has been thoroughly and explicitly discussed in multiple opinions by the Court of Appeals. Petitioners cite none of these opinions, and elide the fact that the Court has not questioned whether that standard required the Government to prove too little, but rather whether it required the Government to prove too much. "Our cases have stated that the preponderance of the evidence standard is constitutionally sufficient and have left open whether a lower standard might be adequate to satisfy the Constitution's requirement for wartime detention." *Uthman v. Obama*, 637 F.3d 400, 403 n.3 (D.C. Cir. 2011); see also *Hussain v. Obama*, 718 F.3d 964, 967 n.3 (D.C. Cir. 2013) ("[i]n *al-Adahi* we wrote that although the standard is 'constitutionally permissible ... we have yet to decide whether [it] is required.'" (quoting *al-Adahi*, 613 F.3d at 1103)). Petitioners' call for a clear-and-convincing evidence standard to justify their continued detention, therefore, has already been rejected.

Petitioners nevertheless suggest that, whatever the initial constitutionality of the collective decisions they challenge, the passage of time has rendered unconstitutional procedures previously determined to be appropriate. But this argument, too, has been rejected by the Court of Appeals. In *Ali*, the Court rejected the notion that the Government's evidentiary burden is somehow contingent on the duration of detention. Rather, that burden of proof remains temporally fixed, because it is grounded in (1) the purpose of military detention (to keep enemy combatants from returning to the battlefield) and (2) the fact that military detention ends with the end of hostilities. See *Ali*, 736 F.3d at 544; see *id.* at 552 (noting that the standards it applied in 2013 were the same it would have applied in 2002). This logic applies with full force to the remaining evidentiary decisions, either individually or collectively. Petitioners' complaint that the preponderance burden of proof either separately or in combination with the Court of Appeals' other evidentiary rulings has due to the passage of time become unconstitutional is simply unsupported.

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#### **b. Paracha v. Trump**

In June 2018, the United States filed its brief in the Supreme Court in opposition to a petition for certiorari in *Paracha v. Trump*, No. 17-6853. Paracha is a Pakistani national detained at Guantanamo since 2004. The Supreme Court denied the petition for certiorari. Excerpts follow from the U.S. brief opposing certiorari.

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The United States has repeatedly reviewed the propriety of petitioner's detention and determined that his continued detention remains necessary. In 2009, the Guantanamo Review Task Force reviewed petitioner's case, determined that he should not be transferred or released from military detention, and referred petitioner for potential prosecution. Notice 1-2 (July 8, 2013) (Doc. 389); *id.* Ex. 1, at 4; see Exec. Order No. 13,492, § 4(a), (c)(2) and (3), 3 C.F.R. 205-206 (2009 Comp.). In 2016, the Periodic Review Board reviewed petitioner's case and determined that petitioner should remain in military detention as "a continuing significant threat" in light of, *inter alia*, his "past involvement in terrorist activities, including contacts and activities with Usama Bin Laden, Kahlid Shaykh Muhammad and other senior al-Qaeda members, facilitating financial transactions and travel, and developing media for al-Qaeda." Periodic Review Board, Unclassified Summary of Final Determination (Apr. 7, 2016), <http://go.usa.gov/x9JKg>; see Exec. Order No. 13,567, §§ 2-3, 3 C.F.R. 227-229 (2011 Comp.). In 2017, the Board completed its second review of petitioner's case and determined that petitioner's continued detention "remains necessary" in light of, *inter alia*, his "continued refusal to take responsibility for his involvement with al-Qa'ida" and his "indifference to the impact of his prior actions." Periodic Review Board, Unclassified Summary of Final Determination (Apr. 20, 2017), <https://go.usa.gov/xNN2F>.

2. a. In April 2015, petitioner filed a motion for summary judgment in his habeas case. Mot. for Summ. J. (Apr. 30, 2015) (Doc. 401). Although petitioner had not filed a pleading raising any bill-of-attainder-based claims, see Am. Habeas Pet. (Doc. 11); Pet. App. 1 n.1, petitioner's summary-judgment motion, as supplemented, asked the district court to "declare[] invalid and void" 32 statutory provisions as unconstitutional bills of attainder. Mot. for Summ. J. 6; see Pet. App. 1 & n.1. Those provisions—many of which have expired, have been repealed, or are no longer effective—fall into four categories. See Gov't C.A. Br. 4-7 & Addendum (Add.) A1-A4.

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b. The district court denied petitioner's motion for summary judgment and dismissed his purported bill-of-attainder claims. ... The court then determined that it lacked jurisdiction over the bill-of-attainder claims on two grounds. ...

First, the district court concluded that petitioner lacked Article III standing to challenge the 32 provisions, because petitioner failed to show that any of those provisions had caused him an injury-in-fact that would likely be redressed by the requested relief. ....

Second, the district court concluded that it lacked statutory subject-matter jurisdiction over petitioner's bill-of-attainder claims. ... Section 2241(e)(1) of Title 28 provides that no court, justice, or judge shall have jurisdiction to hear "an application for a writ of habeas corpus" filed by an alien detainee who the United States has determined is an enemy combatant or who is awaiting such determination. 28 U.S.C. 2241(e)(1). Section 2241(e)(2)—the provision at issue in this case—further provides that, with an exception not relevant here, no court, justice, or judge shall have jurisdiction to hear or consider

any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. 2241(e)(2). The district court concluded that Section 2241(e)(2) deprived it of jurisdiction over petitioner’s bill-of-attainder claims, which “obviously ‘relate[]’ to his confinement.” Pet. App. 5-6 & n.3. The court added that the bill-of-attainder claims were non-habeas claims within the scope of Section 2241(e)(2), because they do “not actually challenge the legality of [petitioner’s] confinement” or “any aspect of the place or conditions of his confinement” and thus do “not sound in habeas.”

c. The district court subsequently entered a Rule 54(b) partial final judgment dismissing the bill-of-attainder claims. Pet. App. 10; see *id.* at 7-9.

3. The court of appeals affirmed in a short, unpublished per curiam judgment. Pet. App. 11-12. The court stated that Section 2241(e)(2) “withdraws jurisdiction over any action other than habeas raised by a detained alien who ‘has been determined by the United States to have been properly detained as an enemy combatant.’” ... The court also stated that it had “repeatedly upheld the constitutionality of this provision insofar as it withdraws jurisdiction over ‘any detention-related claims, whether statutory or constitutional,’ that do not sound in habeas.” ... The court concluded that Section 2241(e)(2) deprived the district court of jurisdiction to hear petitioner’s bill-of-attainder claims, because “the Government has determined that [petitioner] is an enemy combatant” and petitioner’s bill-of-attainder claims—which “would not alter the fact, duration, or conditions of his confinement” even if they were successful—“do not ‘sound in habeas.’” ....

#### ARGUMENT

The court of appeals correctly affirmed the dismissal of petitioner’s bill-of-attainder claims on the ground that Section 2241(e)(2) deprived the district court of subject-matter jurisdiction over those claims. ... Petitioner asks this Court to review that judgment by presenting two questions: whether certain federal statutory provisions are unconstitutional bills of attainder, ...; and whether petitioner has Article III standing to bring his bill-of-attainder claims in this habeas action, .... The court of appeals did not resolve either of those questions, and its jurisdictional judgment would be unaffected by this Court’s resolution of them. Certiorari is therefore unwarranted on the two questions that petitioner presents.

In the body of his petition, petitioner also argues that Congress could not have constitutionally prohibited federal courts from exercising jurisdiction over his bill-of-attainder claims, ..., and that Section 2241(e)(2)’s jurisdiction-stripping provision should not be construed to apply to such claims, .... Even if petitioner had properly presented those questions, petitioner’s contentions would lack merit and would not warrant certiorari.

\* \* \* \*

ii. Petitioner asserts ... that Section 2241(e)(2) should not apply to his bill-of-attainder claims because those claims are “unrelated to [his] confinement” and do not complain about “any ‘aspect of [his] detention, transfer, treatment, trial, or conditions of confinement,’” ... But beyond that bare assertion, petitioner does not explain why his bill-of-attainder claims fall outside Section 2241(e)(2)’s text, which extends to any non-habeas claim “relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement” of an alien enemy-combatant detainee, 28 U.S.C. 2241(e)(2) (emphasis added).

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#### 4. Transfer of a U.S. Citizen Detainee: *Doe v. Mattis*

In 2017, a dual citizen of the United States and Saudi Arabia (“Doe”) was detained by the United States after being captured on an active battlefield in Syria. Doe admitted to being recruited and trained to fight for ISIL. Doe’s counsel filed a petition for habeas corpus in the U.S. District Court for the District of Columbia. The United States simultaneously responded to the habeas petition and sought to transfer Doe to a third country. On January 23, 2018, the district court ordered the United States to provide 72 hours’ notice to the court prior to any transfer, providing Doe’s counsel the opportunity to contest any transfer to which Doe did not agree. *Doe v. Mattis*, No. 17-2069. The United States appealed that order to the D.C. Circuit, arguing that the United States had authority to transfer Doe to Iraq and Saudi Arabia without notice to the court. The identities of the countries were under seal during the litigation and therefore were redacted from the briefs. The redacted opening and reply briefs are available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

While the appeal from the order requiring notice of transfer was pending, the United States notified the district court on April 17, 2018 that Saudi Arabia had agreed to accept Doe’s transfer. Doe did not consent to the transfer. The district court granted Doe’s motion for a preliminary injunction blocking the transfer on April 19. The United States appealed and that appeal was consolidated with the original appeal of the order requiring notice of any transfer. The redacted version of the U.S. supplemental brief in the D.C. Circuit appealing the preliminary injunction is excerpted below and available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

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...[W]e have recognized that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments.”); *Kiyemba v. Obama*, 561 F.3d 509, 515 (D.C. Cir. 2009) (“Judicial inquiry into a recipient country’s basis or procedures for prosecuting or detaining a transferee from Guantanamo would implicate not only norms of international comity but also the same separation of powers principles that preclude the courts from second-guessing the Executive’s assessment of the likelihood a detainee will be tortured by a foreign sovereign.”). ...

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[The] basis for taking custody of Petitioner is closely analogous to Iraq’s basis for taking custody of the petitioners in *Munaf*. In *Munaf*, Iraq sought to detain and prosecute two U.S. citizens accused of committing crimes within its borders; ... Petitioner’s alleged activities with ISIL implicate [REDACTED] national security, law enforcement, international relations, and foreign policy interests. As with Iraq in *Munaf*, [REDACTED] has a direct stake in what happens to Petitioner.

And under international law, [REDACTED] jurisdiction over Petitioner is clear. Under customary international law, a sovereign has authority to exercise “prescriptive jurisdiction if

there is a genuine connection between the subject of the regulation and the state seeking to regulate.” Restatement (Fourth) of Foreign Relations Law of the United States—Jurisdiction § 211 (Am. Law Inst. Draft No. 2, 2016).

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**B.** Petitioner’s primary counter-argument is that the Supreme Court’s decision in *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8 (1936), and the rules governing domestic extraditions apply equally to military transfers in overseas theaters of combat. But the petitioners in *Munaf* made the exact same argument and the Supreme Court unanimously rejected it. That was because, the Court explained, an overseas military transfer does not present “an extradition case.” 553 U.S. at 704. There is a fundamental difference between a battlefield detainee captured abroad and “a ‘fugitive criminal’ ... found within the United States.” *Id.* (quotation marks omitted).

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Petitioner and the district court have cited two other decisions in support of the preliminary injunction against transfer, but both underscore the lack of legal basis for it. *First*, the district court found that *Wilson v. Girard*, 354 U.S. 524 (1957), involved “positive legal authority to transfer the detainee[],” ECF 87 at 3 n.2, but that is mistaken. The petitioner in *Girard* was a serviceman stationed in Japan who was accused of causing the death of a Japanese national. 354 U.S. at 525-26. The U.S. military “notified Japan that Girard would be delivered to the Japanese authorities for trial” and the petitioner filed a habeas petition in the United States seeking to block his transfer into Japanese custody. *Id.* at 526. While it is true that there was a treaty between Japan and the United States governing the presence of servicemen stationed in Japan, that treaty did not confer legal authority on the U.S. military to transfer U.S. citizens. To the contrary, the treaty gave the United States authority under certain circumstances to *refuse* transfers of U.S. citizens despite Japan’s territorial jurisdiction; it nowhere conferred additional legal authority to *effectuate* transfers. In other words, Japan agreed in the treaty to surrender some of *its* sovereign authority to the U.S. military by giving the military “the primary right to exercise jurisdiction over members of the United States armed forces,” with respect to certain offenses, while providing that the United States could waive that jurisdiction. *Id.* at 527-28. The entire premise of this treaty provision was that no special authority was necessary for U.S. forces to relinquish an individual held in Japan to the Japanese government, given Japan’s territorial jurisdiction within its borders.

*Munaf* explained as much when the petitioners in that case made the same argument about *Girard* that Petitioner has revived here: “Even though Japan had ceded some of *its* jurisdiction to the United States pursuant to a bilateral Status of Forces Agreement, the United States could *wave* that jurisdiction—as it had done in *Girard*’s case—and the habeas court was without authority to enjoin *Girard*’s transfer to the Japanese authorities.” 553 U.S. at 696 (emphases added). In vacating an injunction against transfer similar to the injunction here, *Girard* never suggested that the Government needed special authority to relinquish an individual held abroad to the custody of another country with lawful jurisdiction over that individual. *See Girard*, 354 U.S. at 530 (finding “no constitutional or statutory barrier” to the transfer and holding that absent “such encroachments, the wisdom of the arrangement is exclusively for the

determination of the Executive and Legislative Branches”). The same is true here, where the Government seeks to relinquish custody of a person captured and detained abroad to a country

*Second*, the district court found that the Ninth Circuit’s decision in *In re Territo*, 156 F.2d 142 (9th Cir. 1946), turned on “positive legal authority” in the “Geneva Convention,” ECF 87 at 3 n.2, but that is likewise mistaken. The Ninth Circuit’s decision did not pass on the propriety of transferring the petitioner in that case and only referenced the Geneva Convention in reciting the district court’s finding that, “under the Geneva Convention, it is the obligation of the United States through the American military authorities to repatriate petitioner to Italy.” *Territo*, 156 F.2d at 144.

The Court nowhere suggested that the Geneva Convention supplied positive legal authority without which a transfer of that petitioner would have been unlawful. And on the issue of whether U.S. citizenship imposes special requirements on the Executive in this context, the court explained it had “reviewed the authorities with care and ... found none supporting the contention of petitioner that citizenship in the country of either army in collision necessarily affects the status of one captured on the field of battle.” *Id.* at 145. Under that reasoning, Petitioner’s status as a U.S. citizen imposes no special constraints on the U.S. military’s authority to transfer him.

C. At bottom, accepting Petitioner’s claim would lead to an extraordinary degree of judicial involvement in military operations overseas. Petitioner does not dispute that the U.S. military is engaged in active hostilities in a volatile region, or that he came into U.S. custody as a result of his choice to travel to an overseas battlefield. U.S. courts have not historically policed—via habeas proceedings or otherwise—day-to-day military operations in that context. That includes transfers of battlefield detainees, which “traditionally have occurred without judicial oversight.” *Kiyemba*, 561 F.3d at 515 (Kavanaugh, J. concurring).

The district court’s reasoning would, if adopted, essentially require the Executive to prevail in Petitioner’s habeas proceeding before it is permitted to relinquish custody of him to another sovereign despite that other sovereign’s clear and legitimate basis for taking custody of him. That is contrary not only to *Munaf*, but also the Supreme Court’s plurality opinion in *Hamdi v. Rumsfeld*. That opinion held “that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized.” 542 U.S. 507, 534 (2004). Here, the Executive has made precisely the opposite determination—seeking to *end* its custody of Petitioner ...

In this sort of context—that is, contexts other than long-term U.S. detention—the *Hamdi* plurality was careful to avoid second-guessing “the judgments of military authorities in matters relating to the actual prosecution of a war.” 542 U.S. at 535. The importance of deference to “military authorities” in this sensitive sphere is why *Hamdi* expressly exempted short-term battlefield detention from judicial oversight, and is further why *Munaf* unanimously rejected the claim that the extradition apparatus applies to every wartime military transfer of a U.S. citizen captured on an overseas battlefield. This Court should exercise similar caution here and reject Petitioner’s effort to use his habeas petition challenging continued U.S. custody as a vehicle for prolonging that custody when the Government seeks to terminate it by relinquishing Petitioner

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It is true that transferring Petitioner involves turning him “over to a foreign government where he will be detained,” ECF 87 at 5, but Petitioner agrees that releasing him in Iraq would provide him complete relief, even though his detention by another sovereign is entirely possible following such release. Petitioner concedes that the Government has no obligation to transport him back to the United States or to shelter him from apprehension by the Iraqi government (or any other government) if he were released in Iraq, as he has requested. Pet’r. Ans. Br. at 33-34; *see also Munaf*, 553 U.S. at 705 (“Habeas corpus does not require the United States to shelter such fugitives from the criminal justice system of the sovereign with authority to prosecute them.”). Petitioner has further conceded that the Government would need to inform Iraq of the time and location of his release should it release him there. Yet providing that notice would enable the Iraqi government (or some other government acting with the Iraqi government’s consent) to detain Petitioner immediately and to hold him in custody for as long as Iraqi law (or that other country’s law) permits.

There is thus little practical difference from the perspective of Petitioner’s habeas petition between the “release” that Petitioner seeks and the “transfer” that the Government proposes to undertake. Both involve termination of U.S. custody and both accordingly extinguish Petitioner’s petition by providing him with all the relief habeas can provide. ...

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The public interest weighs in favor of our Government speaking with one voice in matters of military operations and foreign affairs. Absent a significant harm on the other side of the balance—and Petitioner has not shown one for the reasons discussed—this public interest weighs heavily against the district court’s injunction. For that reason, too, it should be vacated.

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On May 9, 2018, a divided panel of the D.C. Circuit ruled in favor of Doe, holding that the United States did not have authority to transfer him to another country without his consent. Excerpts follow from the majority opinion. *Doe v. Mattis*, No. 18-5032 (D.C. Cir. 2018).

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We first consider the order enjoining the Secretary from transferring Doe to Country B. We address each of the injunction factors in order.

1.

In assessing whether Doe has succeeded on the merits, the relevant question is whether, in the circumstances of this case, involuntarily transferring Doe to Country B would be unlawful. We hold that it would be.

The government makes two species of arguments as to why the Executive has the power to transfer Doe to Country B without his consent. The first rationale has no necessary connection to Doe’s designation as an enemy combatant, or even to the wartime context of this case. It instead relies on a general understanding that, when a foreign country wants to prosecute an American citizen already in its territory for a crime committed within its borders, the Executive

can relinquish him to that country's custody for criminal proceedings. The government's second rationale, unlike the first, hinges on Doe's status as an enemy combatant. That second strand of the argument relies on the military's asserted authority under the law of war to transfer an enemy combatant (including an American citizen) to an allied country in the conflict.

Neither of the government's rationales, we conclude, supports the involuntary transfer of Doe to Country B, at least as things currently stand. In reaching that conclusion, we rely on the same undisputed facts as our dissenting colleague: that Doe is an American citizen, that he is in U.S. custody in Iraq, that the government believes he is an ISIL combatant, and that he objects to the government's forcible transfer of him to the custody of Country B. Dissent, at 3-4, 27. While our colleague would conclude that the Executive can forcibly transfer Doe to Country B in those circumstances, we respectfully disagree for the reasons explained in this opinion.

a. A fundamental attribute of United States citizenship is a "right to...remain in this country" and "to return" after leaving. *Mandoli v. Acheson*, 344 U.S. 133, 139 (1952). That right is implicated when the government seeks to forcibly transfer an American citizen from the United States to a foreign country. To effect such a transfer, the government must both (i) demonstrate that a treaty or statute authorizes the transfer, and (ii) give the citizen an opportunity to challenge the factual basis for the transfer. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936); *Collins v. Loisel*, 259 U.S. 309, 316-17 (1922).

The government's first argument in this case, though, is that a citizen loses both of those protections the instant he leaves U.S. territory. When a citizen sets foot outside the United States, the government says, the Executive can forcibly transfer him to the custody of any country having a "legitimate sovereign interest" in him. The transfer, the government emphasizes, would be "total." No. 18-5110, Gov't Second Supp. Br. 8. Following the citizen's transfer, then, he would be fully—and irrevocably—subject to the power of the foreign sovereign now holding him.

i. The government's contention that it possesses that kind of transfer authority over an American citizen is centrally predicated on *Munaf v. Geren*, 553 U.S. 674, which is itself predicated on *Wilson v. Girard*, 354 U.S. 524. We disagree with the government's understanding of those decisions.

In *Wilson*, William Girard, a U.S. soldier stationed in Japan, was accused by Japan of committing a homicide in its territory. 354 U.S. at 525-26. The Army agreed to relinquish Girard to Japanese custody for pretrial detention. *Id.* at 526.

Girard filed a habeas petition, and the district court issued a preliminary injunction prohibiting the transfer. *Id.* The Supreme Court vacated the order and allowed the handover of Girard to Japanese custody.

The Court began by recognizing that, as a general matter, a "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders." *Id.* at 529. Japan had voluntarily surrendered that prerogative in a security agreement with the United States that governed the treatment of U.S. soldiers stationed in Japan. But the agreement permitted the United States to cede back to Japan the authority to prosecute a service member in a given instance. *Id.* at 527-29. In Girard's case, the United States had done just that. *Id.* at 529. So the question, the Court said, was whether there was any "constitutional or statutory barrier" to the Executive (i) waiving the United States's jurisdiction and (ii) transferring Girard to Japan to face criminal prosecution. *Id.* at 530. Finding no such barrier, the Court sanctioned Girard's transfer to Japanese custody. *Id.*

In *Munaf*, the Court again applied the principle recognized in *Wilson*—*i.e.*, that, when a foreign country wishes to prosecute an American citizen who is within its borders for a crime he committed while there, the Executive can relinquish him to the country’s custody. *Munaf* involved two American citizens who voluntarily traveled to Iraq and allegedly committed crimes while there. 553 U.S. at 679. A multinational military coalition identified the two citizens as security risks, and they were held by U.S. military forces in Iraq “[p]ending their criminal prosecution for those offenses” in Iraqi courts. *Id.* at 705; *see id.* at 681, 683. Both of the citizens filed habeas petitions, asserting (i) that the Executive lacked the power to transfer them to Iraq’s custody for criminal proceedings, and (ii) that transferring them thus would violate the Due Process Clause. *Id.* at 692. The Court rejected their arguments and allowed the military to relinquish them to Iraqi custody. *Id.* at 705.

Relying on *Wilson*, the Court emphasized that a country has a “sovereign right to ‘punish offenses against its laws committed within its borders.’” *Id.* at 692 (quoting *Wilson*, 354 U.S. at 529). That sovereign entitlement, the Court observed, was one that the Court had long and repeatedly recognized. *Id.* at 694-95 (citing, *e.g.*, *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *Neely v. Henkel*, 180 U.S. 109 (1901); *Kinsella v. Krueger*, 351 U.S. 470 (1956)). An order prohibiting the Executive from transferring the two petitioners to Iraqi authorities would infringe that time-honored right. 553 U.S. at 697-98. The Executive thus could transfer the petitioners to Iraqi custody without violating the Due Process Clause. *Id.* at 699-70.

In both *Munaf* and *Wilson*, the authority of the Executive to transfer U.S. citizens had no roots in any military authority over enemy combatants under the law of war. *Wilson*, after all, concerned “the peacetime actions of a [U.S.] serviceman,” not the wartime actions of an enemy combatant. *Id.* at 699. In *Munaf*, meanwhile, it is true that the alleged crimes involved insurgent acts committed in a time of war, for which both suspects had been designated “security internees” and one had been deemed an enemy combatant. *See id.* at 681-84, 705. But the Court’s recognition of the Executive’s power to transfer the two men did not depend on those designations or on the nature of the alleged crimes. That is evident from the Court’s heavy reliance on *Wilson*, a case having nothing to do with military authority in wartime.

In accordance with that understanding, the Court in *Munaf* observed that “[t]hose who commit crimes within a sovereign’s territory may be transferred to that sovereign’s government for prosecution” even if the “crime at issue” is an inherently non-war offense like “embezzlement.” *Id.* at 699-700 (discussing *Neely v. Henkel*, 180 U.S. 109 (1901)). To be sure, “there is hardly an exception to that rule when the crime” is “unlawful insurgency directed against an ally during ongoing hostilities.” *Id.* at 700. So while the war-related context in which the crimes arose in *Munaf* was not a necessary condition for the Executive to possess the transfer authority recognized in *Wilson*, that context of course did not diminish the Executive’s authority.

ii. In holding that the Executive had the power to transfer the *Munaf* petitioners, the Court distinguished its previous decision in *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5. Because Doe chiefly relies on *Valentine* in arguing that the military lacks authority to transfer him to Country B, whereas the government centrally relies on *Munaf* in arguing the opposite, the *Munaf* Court’s treatment of *Valentine* warrants our careful examination.

In *Valentine*, three American citizens fled to New York City after being accused by France of committing crimes within its territory. *Id.* at 6. France requested the citizens’ extradition, and U.S. officials arrested the three men. *Id.* The men then filed habeas petitions, arguing that, because the extradition treaty between the United States and France contained no obligation for either country to hand over its own citizens, the Executive lacked the power to

extradite them. *Id.* The Court agreed, holding that the power to extradite “is not confided to the Executive in the absence of treaty or legislative provision.” *Id.* at 8. *Valentine* thus establishes that the Executive’s power to extradite a citizen from the United States to another country must come from a treaty or statute. *Id.* at 9; see *Munaf*, 553 U.S. at 704.

Relying on *Valentine*, Doe contends that the Executive cannot transfer him from U.S. custody to another country’s custody unless the transfer is authorized by a treaty or statute. The petitioners in *Munaf* made the same argument in resisting their transfer to Iraqi custody. *Munaf*, 553 U.S. at 704. The Court, though, found *Valentine* “readily distinguishable.” *Id.* It explained that *Valentine* “involved the extradition of an individual from the United States.” *Id.* The *Munaf* petitioners, by contrast, had “voluntarily traveled to Iraq and [were] being held there.” *Id.* They were therefore “subject to the territorial jurisdiction of that sovereign, not of the United States.” *Id.*

The Court, for that reason, denied the contention that the Executive invariably “lacks the discretion to transfer a citizen absent a treaty or statute.” *Id.* at 705. *Wilson*, the Court said, “forecloses” that contention. *Id.* That is because the only conceivable authority in *Wilson* was the security agreement governing the treatment of U.S. service-members in Japan— which, while authorized by a treaty, was not itself a treaty or statute. *Id.* “Nevertheless,” the *Munaf* Court observed, “in light of the background principle that Japan had a sovereign interest in prosecuting crimes committed within its borders,” the *Wilson* Court had “found no ‘constitutional or statutory’ impediment to the United States’s waiver of its jurisdiction” over Girard and its ensuing transfer of him to Japanese custody. *Id.*

iii. Because *Munaf* and *Wilson* recognized the Executive’s authority to transfer American citizens to foreign custody without having to satisfy *Valentine*’s treaty-or-statute rule, it is apparent that the Executive need not invariably meet the *Valentine* test to effect a forcible transfer. So some transfers of American citizens to foreign custody are governed by *Valentine*; others are not. Into which of those camps does the proposed transfer of Doe to Country B fall?

In arguing that it can forcibly transfer Doe, the government reads *Valentine*, *Munaf*, and *Wilson* to yield the following set of rules. Under *Valentine*, an American citizen in the United States cannot be forcibly transferred to a foreign country absent a statute or treaty (such as an extradition treaty) authorizing the transfer. But under *Munaf* and *Wilson*, the government says, once a citizen voluntarily leaves the United States, the Executive can pick her up and deliver her to any foreign country that has a “legitimate sovereign interest” in her. No. 18-5032, Gov’t Opening Br. 27; No. 18-5032, Gov’t Reply Br. 15; No. 18-5110, Gov’t Supp. Br. 5; No. 18-5110, Gov’t Second Supp. Br. 3. And a country’s interest in a person qualifies as “legitimate,” the government submits, if, under international law, the country would have “prescriptive jurisdiction” over her—that is, the power to prescribe legal rules regulating her pertinent conduct. No. 18-5032, Gov’t Opening Br. 23 (citing Restatement (Fourth) of the Foreign Relations Law of the United States § 211 (Am. Law Inst. Draft No. 2, 2016)); see also No. 18-5032, Gov’t Reply Br. 15; No. 18-5110, Gov’t Supp. Br. 4-5; No. 18-5110, Gov’t Second Supp. Br. 4.

We cannot accept the government’s submission. *Munaf* and *Wilson* do not suggest a general prerogative on the part of the Executive to seize any American citizen voluntarily traveling abroad for forcible transfer to any country with some legitimate sovereign interest in her. Consider again the facts of *Valentine*. There was no doubt of the legitimacy of France’s interest in the U.S.-citizen petitioners in that case: they had allegedly committed crimes in France. The Executive nonetheless lacked unilateral authority to “dispose of the[ir] liberty” by

extraditing them. 299 U.S. at 9. That is because, the Court said, there is generally “no executive discretion to surrender [a person] to a foreign government, unless... [a] statute or treaty confers the power.” *Id.*

Under the government’s theory, though, everything would have changed the moment one of the *Valentine* petitioners voluntarily ventured outside the United States—say, on a family vacation to the Canadian side of Niagara Falls. At that moment, the unilateral “executive discretion” found lacking in *Valentine* ostensibly would have sprung to life, such that the person—though an American citizen—could have been seized by the Executive and forcibly transferred to France. *Cf. United States v. Alvarez-Machain*, 504 U.S. 655, 669-70 (1992) (involving the seizure in Mexico (of a non-U.S. citizen) for transfer to the United States).

That expansive vision of unilateral Executive power over a U.S. citizen who ventures abroad does not follow from *Munaf* and *Wilson*. Those cases did not involve a citizen forcibly transferred from one foreign country they voluntarily visited to the custody of another foreign country. The cases instead involved “the transfer to a sovereign’s authority of an individual ...already...in that sovereign’s territory.” *Munaf*, 553 U.S. at 704. The petitioners in *Munaf* had “voluntarily traveled” to Iraq, *id.* at 681, 683, and the petitioner in *Wilson*, an Army specialist, was stationed in Japan, 354 U.S. at 525-26. They were “therefore subject to the territorial jurisdiction of [those] sovereign[s], not of the United States.” *Munaf*, 553 U.S. at 704. The petitioners in those cases, already present in the sovereign’s territory, could be relinquished by the Executive to that sovereign for prosecution of offenses allegedly committed while there.

That transfer power, the *Munaf* Court explained, is grounded in the receiving country’s “territorial jurisdiction” over a person who has “voluntarily traveled” to its territory and is “being held there.” *Id.* The government, though, reads *Munaf* and *Wilson* to embrace a transfer power extending to a receiving country’s “prescriptive jurisdiction,” not just its territorial jurisdiction. *E.g.*, No. 18-5032, Gov’t Opening Br. 23. And a country’s prescriptive jurisdiction under customary international law, the government emphasizes, extends to any “individual with a ‘genuine connection’ to the state, *even when the individual is located outside the state’s territory.*” *Id.* (emphasis added); *see also* Restatement (Fourth) of the Foreign Relations Law of the United States § 211 (Draft No. 2, 2016).

The government is surely correct that a sovereign’s prescriptive jurisdiction—its power to regulate conduct— extends to persons located beyond its borders. The practice of extraditing individuals from abroad, and the existence of laws with extraterritorial reach, both illustrate the point. But the fact that a foreign country may have prescriptive jurisdiction over an American citizen who is outside its territory hardly means that, as long as the citizen is somewhere else abroad, the Executive has power to seize her and deliver her to that foreign country.

Indeed, we know of no instance—in the history of the United States—in which the government has forcibly transferred an American citizen from one foreign country to another. (That includes the case of Amir Meshal, in which the government ardently denied a citizen’s allegations that foreign officials, who had moved him from Kenya, to Somalia, to Ethiopia, were acting at the United States’s behest. *See Meshal v. Higgenbotham*, 47 F. Supp. 3d 115, 119 (D.D.C. 2014), *aff’d*, 804 F.3d 417 (D.C. Cir. 2015)). Especially in habeas cases like this one, “history matters.” *Omar*, 646 F.3d at 19.

To that end, the absence of even a single known example of the unilateral power the Executive claims here is illuminating. Indeed, we are unaware of any involuntary transfer of a U.S. citizen from one foreign country to another even pursuant to a treaty or statute. There is all

the more reason, then, to proceed with considerable caution before recognizing such a power as a unilateral (although apparently never-before-exercised) prerogative of the Executive.

\* \* \* \*

The government emphasizes that, on the facts of this case, Doe is not just any citizen who traveled someplace abroad and is suspected of conduct like tax evasion. Rather, he went to an active battlefield; and Country B, a “coalition partner[] in an ongoing armed conflict” against ISIL, has, the government says, “an obvious and legitimate interest in taking custody of” him. No. 18-5032, Gov’t Reply Br. 6.

Those circumstances, however, do not give the Executive transfer power under *Munaf* and *Wilson* that it would otherwise lack. *Munaf* and *Wilson*, as explained, do not rest on the military’s authority under the law of war. And we have declined to read those decisions to manifest a principle of prescriptive jurisdiction under which the Executive can forcibly transfer a U.S. citizen who has traveled abroad to any other country with a legitimate sovereign interest in her. That a country may have an especially important interest in a citizen—including by reason of her allegedly hostile actions against the country’s interests in a time of war—does not affect that conclusion.

Does this mean that the military necessarily is without power in a time of war to transfer an enemy combatant who is a U.S. citizen to an allied country’s custody? No, it does not. It means that the authority to effect such a transfer does not come from the general transfer power recognized in *Munaf* and *Wilson*. The authority instead would come from the Executive’s wartime powers under the law of war, a subject we turn to next.

b. The government, as noted, has said in this case that its “determination that [Doe] is an enemy combatant...is not the basis for the U.S. military’s authority to transfer” him to Country B. No. 18-5032, Gov’t Reply Br. 8. At the same time, though, the government has also said that “battlefield detainees” like Doe are “lawfully transferrable under the laws of war.” *Id.* at 11; *see also id.* at 13 (“[P]etitioner’s status as a U.S. citizen imposes no special constraints on the U.S. military’s ability to transfer him consistent with the laws of war.”); No. 18-5110, Gov’t Second Supp. Br. 3 (arguing that transfer is permissible, in part because of “the Department of Defense’s good-faith determination...that [Doe] is an enemy combatant”).

We now take up the latter facet of the government’s claim of authority to transfer Doe: that it can do so pursuant to the Executive’s wartime powers under the law of war. We conclude that the Executive does generally possess authority under the law of war to transfer an enemy combatant to the custody of an ally in the conflict. But that authority, we hold, could potentially support a transfer of Doe only if the government (i) demonstrates that it is legally authorized to use military force against ISIL, and (ii) affords Doe an adequate opportunity to challenge the Executive’s factual determination that he is an ISIL combatant.

i. The starting point for our analysis is the Supreme Court’s decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). (Because the plurality in *Hamdi* issued the controlling opinion, which our court has treated as binding, *see Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010), we will treat the plurality opinion as that of the Court for purposes of this opinion.) There, the Court spoke directly to the military’s authority over an American citizen under the law of war. The case involved Yaser Esam Hamdi, who, like Doe, was captured on a foreign battlefield, where the government alleged he had fought with the Taliban against the United States. *Id.* at

510, 512-13. Hamdi, again like Doe, was a dual citizen of the United States and Saudi Arabia. *See Man Held as Enemy Combatant to Be Freed Soon*, CNN.com (Sept. 22, 2004.)

The military initially detained Hamdi in Afghanistan and at Guantanamo Bay, and then, upon learning he was an American citizen, brought him to the United States for continued detention. 542 U.S. at 510. Hamdi then filed a habeas petition seeking release from his military custody, alleging that his detention without criminal charge violated his rights under the Due Process Clause. *Id.* at 511.

The Court first held that the military had legal authority to detain Hamdi for the duration of the conflict in which he was captured. That power flowed from the 2001 Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224. 542 U.S. at 517. The 2001 AUMF authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons [that] he determines planned, authorized, committed, or aided the terrorist attacks” of September 11, 2001. *Id.* at 510 (quoting 115 Stat. 224, § 2(a)). The Court found “no doubt” that Taliban combatants (like Hamdi was alleged to be) fit within that description. *Id.* at 518. And the Court explained that detention of enemy combatants “for the duration of the particular conflict in which they were captured” is “so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress ha[d] authorized the President to use.” *Id.*

The Court next addressed whether Hamdi’s U.S. citizenship affected the Executive’s power to detain him. On that issue, the Court found “no bar to this Nation’s holding one of its own citizens as an enemy combatant.” *Id.* at 519. After all, “[a] citizen, no less than an alien, can be part of or supporting forces hostile to the United States or coalition partners and engaged in an armed conflict against the United States.” *Id.* (internal citation and quotation marks omitted).

Finally, the Court turned to “the question of what process is constitutionally due to a citizen who disputes his enemy- combatant status.” *Id.* at 524. The government argued that its determination to that effect should be subject to highly deferential review, solely to confirm the existence of some evidence supporting it. *Id.* at 527. The government emphasized the “limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict.” *Id.* The Court disagreed with the government.

Because “due process demands some system for a citizen- detainee to refute his classification,” the Court explained, “the proposed ‘some evidence’ standard [was] inadequate.” *Id.* at 537. Rather, “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” *Id.* at 533. That process, the Court observed, could potentially be afforded in a military proceeding. *Id.* at 538. The Court also clarified, however, that “initial captures on the battlefield need not receive the process” the Court had outlined. *Id.* at 534. Rather, that “process is due only when the determination is made to *continue* to hold” a combatant. *Id.*

After *Hamdi*, we know that if there is legal authority to exercise military force against an enemy, that authority encompasses detention of an enemy combatant for the duration of the conflict. And we further know that the detention authority more generally extends to an enemy combatant who is an American citizen. But a citizen, *Hamdi* instructs, must have a meaningful opportunity to challenge the factual basis for his designation as an enemy combatant in accordance with the procedures set forth by the Court.

ii. Whereas *Hamdi* addressed whether the Executive can detain an alleged enemy combatant who is a citizen, this case (at least at this stage) instead involves whether the Executive can transfer him to the custody of another country. That naturally raises two sets of questions. First, is the Executive's transfer authority (this case) on par with its detention authority (*Hamdi*) as a fundamental incident of waging war? Second, if so, is the Executive's exercise of transfer authority against a U.S. citizen subject to the same conditions attending the exercise of detention authority against a U.S. citizen? In other words, do transfer authority over citizens and detention authority over citizens essentially rise or fall together? We conclude they do.

First, the military possesses settled wartime authority under the law of war to transfer enemy combatants to allied countries. That power, in the words of *Hamdi*, is "a fundamental incident of waging war," such that the Executive generally has the authority to transfer when it has legal authorization to engage in hostilities. *Id.* at 519.

Congress confirmed as much in the National Defense Authorization Act (NDAA) for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (Dec. 31, 2011). There, Congress elaborated on the authority conferred by the 2001 AUMF. It affirmed that the AUMF grants detention authority pending decision of an enemy combatant's "disposition under the law of war"; and it enumerated the available "dispositions" to include "[t]ransfer to the custody or control of the person's country of origin, any other foreign country, or any other foreign entity." *Id.* § 1021(a), (c). Congress thus expressly considers transfer of an enemy combatant to be one option available to the military under the law of war. The Department of Defense's directives are to the same effect. U.S. Dep't of Def., Directive No. 2310.01E, § 3.m (May 24, 2017).

That understanding is firmly rooted in historical practice. "Throughout the 20th Century, the United States transferred or released hundreds of thousands of wartime alien detainees—some of whom had been held in America—back to their home countries, or in some cases, to other nations." *Kiyemba v. Obama*, 561 F.3d 509, 519-20 (D.C. Cir. 2009) (Kavanaugh, J., concurring). In World War I, for instance, the United States regularly transferred captured combatants to France, an ally. See George G. Lewis & John Mewha, *History of Prisoner of War Utilization by the United States Army 1776-1945*, Dep't of the Army Pamphlet No. 20-213, at 59 (1955), available at <https://cgsc.cdmhost.com>. And in World War II, the United States transferred hundreds of thousands of Axis soldiers to allies like Belgium, France, and Luxembourg, where the soldiers were used as agricultural workers and underwent rehabilitation. *Id.* at 240-41. Transfers to allies were also commonplace during the Vietnam and Gulf Wars. See George S. Prugh, *Law at War: Vietnam 1964-1973*, at 62 (1975); U.S. Dep't of Def., Office of Gen. Counsel, *Law of War Manual* at 633 n.742 (Dec. 2016). "Transfers," in short, "are a traditional and lawful aspect of U.S. war efforts." *Kiyemba*, 561 F.3d at 519 (Kavanaugh, J., concurring).

Even if transfers of alien combatants have been a regular feature of warfare, does the traditional authority to transfer enemy combatants extend to a U.S. citizen? On this score, the historical evidence is sparse. As noted, we know of no instance in which the Executive has forcibly transferred a citizen from one foreign country to another; and that includes wartime transfers of enemy combatants.

*Hamdi*, however, instructs that a traditional military power over enemy combatants in wartime should generally be assumed to encompass American citizens. The Court reasoned that a citizen, "no less than an alien," can be a part of an enemy force. 542 U.S. at 519. For that proposition, the Court relied on its decision in *Ex parte Quirin*, 317 U.S. 1 (1942), in which it

had upheld the military trial of a U.S. citizen for his unlawful belligerency in support of the enemy in World War II, *id.* at 30-31.

To be sure, Justice Scalia, dissenting in *Hamdi*, discounted *Quirin* as “not [the] Court’s finest hour.” 542 U.S. at 569 (Scalia, J., dissenting). He would have held that the military’s wartime authority over enemy combatants—including, presumably, transfer authority—does not extend to a U.S. citizen (at least absent a suspension of the writ by Congress). *See id.* at 554. The Court, though, adhered to *Quirin* notwithstanding Justice Scalia’s critique. *Id.* at 522-23. It thus found no reason to exclude U.S. citizens from the Executive’s fundamental authority under the law of war to detain enemy combatants for the duration of a conflict. *Id.* at 519. Following the approach set out in *Hamdi*, we similarly see no basis for excluding a citizen—at least as a categorical matter—from the Executive’s wartime authority to transfer enemy combatants.

*Hamdi* referenced a Ninth Circuit decision upholding the Executive’s power to detain, as a prisoner of war, a dual U.S.- Italian citizen who was a member of the Italian forces in World War II. *Id.* at 524 (discussing *In re Territo*, 156 F.2d 142 (9th Cir. 1946)); *see also* Ronald D. Rotunda, *The Detainee Cases of 2004 and 2006 and Their Aftermath*, 57 Syracuse L. Rev. 1, 13 n.73 (discussing Territo’s dual citizenship). That decision also contemplated that he would be sent from the United States back to Italy at the war’s end. *See* 156 F.2d at 144. True, that contemplated transfer would have been a “repatriation” to the enemy state, which, under the law of war, is distinct from a transfer to an ally (and which, presumably, would result in release rather than continued detention). *Compare* Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 12, Aug. 12, 1949, 6 U.S.T. 3316, *with id.* at art. 118. And Territo’s repatriation might well have been voluntary, especially given his family and other connections to Italy (he sought release from his detention in the U.S, and the opinion gives no indication that he wanted to stay here if released). *See* 156 F.2d at 143. Still, *Territo* offers modest support for the conclusion that the Executive’s power to transfer under the law of war applies to both aliens and citizens. And *Hamdi*, again, teaches that both aliens and citizens may be subject to the Executive’s wartime authority.

*Second*, having determined that the Executive has authority to transfer enemy combatants under the law of war, and that there is no blanket exemption from that power for U.S. citizens, we now assess whether *Hamdi*’s conditions on the exercise of detention authority equally govern any exercise of transfer authority. Those conditions, again, are that the Executive have legal authority to use military force against the relevant enemy (here, ISIL), and that the citizen be afforded the process laid out in *Hamdi* for challenging the factual determination that he is an enemy combatant.

In considering whether transfer should be subject to those conditions, an initial point bears noting: the transfer of a citizen to another country’s custody, unlike continued detention of that citizen, is irrevocable. Once the Executive relinquishes custody of an American citizen to another country, our government, and our laws—including our law’s habeas guarantee, which a detainee can use to seek relief from detention over time—would be unavailable to her, perhaps in perpetuity. Decisions about the duration and conditions of her custody, and about the availability to her of a means of challenging her confinement, would be entirely up to the detaining sovereign.

The government asserts that, when we assess a potential transferee’s liberty interests, we cannot factor in her continued detention in the receiving country. That, the government says, follows from our holding in *Kiyemba*. 561 F.3d at 515-16. Here, though, the central issue is not the prospect of continued detention in Country B, but rather the forcible transfer itself, which

would involuntarily send an American citizen from U.S. custody to the custody of another country.

In that regard, *Kiyemba* is starkly different; there, it was undisputed that the detainees had no cognizable interest against being moved from Guantanamo to a foreign country. (Indeed, because transfer was the only relief available to the petitioners—who, as aliens, had no right to be released into the United States—they affirmatively *sought* to be moved to a foreign country. *Id.* at 519 n.5 (Kavanaugh, J., concurring)). Here, by contrast, the transfer centrally implicates Doe’s interest in not being forcibly moved into Country B’s custody. Indeed, involuntary transfer of a citizen to the custody of another sovereign—including via extradition—undoubtedly involves fundamental liberty interests that can be vindicated in habeas corpus. *E.g.*, *Valentine*, 299 U.S. at 9 (“no executive prerogative to dispose of the liberty of the individual” by way of extradition); *Landon v. Plasencia*, 459 U.S. 21, 36 (1982). *Cf. Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (deportation from the United States can be viewed a more “severe penalty” for criminal misconduct than imprisonment in the United States).

Given that transfers involve fundamental liberty interests, we see no basis for concluding that, for the transfer of a citizen (as opposed to the detention of a citizen), the Executive need not satisfy the *Hamdi* conditions. The 2012 NDAA is instructive in this regard. There, Congress set out four types of “disposition[s] under the law of war” that the Executive could choose for an enemy combatant, including “[d]etention under the law of war without trial until the end of the hostilities,” and “[t]ransfer to the custody or control of the person’s country of origin [or] any other foreign country.” Pub. L. No. 112-81 §1021(c)(1), (4). The statutory structure indicates that Congress saw transfer and detention as two options falling on largely the same plane—not as one option (transfer) broadly available in circumstances in which the other (detention) would not be.

Significantly, our decisions draw an equivalence between transfer of citizens and detention of citizens. We have rejected the notion “that the Executive Branch may *detain or transfer* Americans or individuals in U.S. territory at will, without any judicial review of the positive legal authority for the *detention or transfer*.” *Omar*, 646 F.3d at 24 (emphases added). And we have said that “Congress cannot deny an American citizen or detainee in U.S. territory the ability to contest the positive legal authority (and in some situations, also the factual basis) for his *detention or transfer* unless Congress suspends the writ.” *Id.* (emphasis added). For either “detention or transfer,” then, an<sup>1</sup><sub>SEP</sub> “American citizen” is entitled to challenge both “legal authority” and “factual basis,” as *Hamdi* envisions.

The government reads the just-quoted language from our decision in *Omar* to say that an American citizen can bring a “legal authority” or “factual basis” challenge to her “detention or transfer” only if she is in the United States. *See* No. 18-5032, Gov’t Reply Br. 14. That is an unsustainable reading. *Hamdi* itself rejects the notion that it could “make a determinative constitutional difference” if an American citizen were detained overseas rather than in the United States. 542 U.S. at 524. The Court understood that any such conclusion would “create[] a perverse incentive” to hold American citizens abroad. *Id.*

The *Omar* court’s reference to a challenge brought by “an American citizen or detainee in U.S. territory” thus plainly speaks to a challenge brought by a citizen *anywhere* or by an alien detained in U.S. territory (such as Guantanamo Bay). *Omar*, 646 F.3d at 24 (citing *Boumediene v. Bush*, 553 U.S. 723, 785-86 (2008)); *see also Al Bahlul v. United States*, 767 F.3d 1, 65 n.3 (D.C. Cir. 2014) (Kavanaugh, J., concurring in the judgment in part and dissenting in part) (“As a general matter, the U.S. Constitution applies to U.S. citizens worldwide and to non-U.S. citizens within the 50 states and the District of Columbia[.]”). There is no basis for thinking that

a citizen relinquishes her right to bring a legal challenge to her detention—or, equivalently, to her transfer—if she is detained in (or transferred from) a foreign country. That is why the court in *Omar* went on to explain that Omar (one of the two *Munaf* petitioners), who was still being held in Iraq, had the requisite opportunity to contest the legal authority for his transfer. *Id.* That discussion would have been entirely unnecessary if he had no right to bring that challenge in the first place since he was held overseas.

Consider the implications if there were, in fact, an asymmetry between transfer and detention, such that the Executive could transfer a U.S. citizen to another country without meeting the *Hamdi* conditions. With regard to legal authority, the military could irrevocably transfer a citizen thought to be an enemy combatant even if judicial review would have revealed that the Executive lacked lawful authority to use military force against the particular enemy. In that event, detainees in U.S. custody—and thus protected by U.S. law— would need to be released or criminally charged. But for those who had already been transferred to another country, an American court could not order their return or grant them comparable relief.

With regard to a factual-basis challenge, the *Hamdi* Court sought to “meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error.” 542 U.S. at 534. The procedural guarantees prescribed by the Court were intended to guard against an undue risk of an erroneous military determination. *See id.* But if the transfer of a citizen could be accomplished without affording her those protections, a risk of error thought unacceptable for continued detention would be present for an irrevocable transfer to another country. An “errant tourist” might then be protected against detention but unable to avoid an irrevocable transfer to another country’s custody. *Compare* 31A Am. Jur. 2d Extradition § 120 (2d ed. 2018) (describing process granted to persons subject to extradition); 18 U.S.C. § 3191.

The government, in that respect, relies on its having made a “good-faith determination, supported by extensive record evidence, that [Doe] is an enemy combatant.” No. 18-5110, Gov’t Second Supp. Br. 3. We do not doubt the government’s good faith. Nor do we discount the importance of the need to avoid unduly burdening the Executive’s prosecution of a war, which concerned the *Hamdi* Court as well. *See* 542 U.S. at 531-35. But in *Hamdi*, one point on which eight Justices agreed was that, in the case of an American citizen, the government’s good-faith determination that he is an enemy combatant is not enough to justify his detention for the duration of a conflict. *Id.* at 537; *id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 564-65 (Scalia, J., dissenting). We find the same to be true of an irrevocable transfer to another country’s custody.

In that regard, it is instructive to consider the implications of the government’s argument here for the facts of *Hamdi* itself. Upon holding that the government’s continued detention of Hamdi was contingent on his having a meaningful opportunity to challenge the factual basis for his detention, the Court remanded the matter so that the government could conduct the factfinding process the Court had outlined. *See* 542 U.S. at 538-39. That process would result in a determination of whether Hamdi was a person against whom military force could be applied.

Under the government’s argument here, though, the Executive, rather than grant Hamdi that process following remand, could have simply avoided it by choosing instead to forcibly and irrevocably transfer him to the custody of another country (pursuant to its authority under the 2001 AUMF). True, the government eventually did in fact transfer Hamdi to Saudi Arabia—but with his consent, not over his objection (and after he renounced his American citizenship). Jerry Markon, *Hamdi Returned to Saudi Arabia*, Washington Post (Oct. 12, 2004). There is, of course,

a vast difference between a voluntary transfer and an involuntary one. As to the latter, we do not believe the *Hamdi* Court would have countenanced Hamdi's forcible transfer to another country unless he were first afforded the process the Court held he was constitutionally due.

The government's final argument on this score is that transfer without process is permissible if effected in conjunction with "initial capture[] on the battlefield." No. 18- 5110, Gov't Supp. Br. 8-9 (quoting *Hamdi*, 542 U.S. at 534). But while *Hamdi* allows for temporary detention without process attending "initial capture," a citizen can be released if there ends up being an insufficient factual basis to continue detention. Transfer may be different because it, by nature, is not temporary.

In addition, there would be no citizenship-based limit on transfer unless there were reason to know that a person is a citizen. *Cf.* Asbury Aff. at 4, *United States v. Lindh*, No. Crim. 02-MJ-51 (E.D. Va. Jan. 15, 2002) ("[Harakat ul-Mujahideen] officials told [John Walker Lindh] not to admit to anyone that he was American but to say, if asked, that he was from Ireland.") Here, at any rate, the Executive decided to transfer Doe—and reached an agreement to do so—several months after his capture. *Doe v. Mattis*, No. 17-cv-2069, Notice at 1 (D.D.C. Apr. 16, 2018), ECF No. 77; Status Hr'g Tr. at 8 (D.D.C. Jan. 22, 2018), ECF No. 55 (stating that no final decision had been made on whether to transfer Doe). This transfer decision, then, was not a battlefield judgment. For those reasons, the Executive cannot transfer Doe at this stage unless he receives the process required by *Hamdi*.

c. In light of the above analysis, can the Executive involuntarily transfer Doe to Country B? We conclude it cannot, at least as things stand now. We take up the two strands of the government's argument in order.

i. We first address whether the Executive can forcibly transfer Doe to Country B based on the general transfer authority recognized in *Munaf* and *Wilson*. That authority, as we have explained, does not encompass the forcible transfer of a citizen from one foreign country to the custody of another foreign country. Insofar as the transfer of Doe to Country B would be an inter-country transfer, it falls outside of *Munaf* and *Wilson*.

\* \* \* \*

ii. We now turn to whether the forcible transfer of Doe to Country B can be supported by the Executive's wartime authority over enemy combatants under the law of war. That authority, as we have explained, encompasses transfers of enemy combatants to an allied country. But before the Executive could exercise that transfer power against Doe, the two *Hamdi* conditions would need to be met.

The first condition is a determination that the Executive has legal authority to wage war against ISIL. "For wartime military transfers," we have said, "Article II and the relevant Authorization to Use Military Force generally give the Executive legal authority to transfer." *Omar*, 646 F.3d at 24. Second, Doe would need to be afforded a meaningful chance to rebut the government's factual assertion that he is an ISIL combatant, per the requirements set out in *Hamdi*.

Neither condition has been met at this point. Until those conditions are satisfied, the Executive lacks power under the law of war to transfer Doe to Country B on the basis of his status as an alleged ISIL combatant.

## 2.

Having addressed Doe’s success on the merits of his claim that a forcible transfer to Country B would be unlawful, we now consider whether he has shown he would be irreparably injured absent the injunction. *See Winter*, 555 U.S. at 20. We conclude he has made that showing.

A forcible transfer of Doe to the custody of Country B, the government explains, would be “bona fide and total,” in that “[o]nce transfer is effectuated,” he “would be entirely in [Country B’s] custody,” without any continuing oversight by— or recourse to—the United States. No. 18-5032, Gov’t Reply Br. 15. Doe, wishing to avoid that irrevocable change in his station, objects to his proposed transfer to the custody of Country B. No more is required to demonstrate that he would face irreparable injury if he were involuntarily (and irreversibly) handed over to Country B in violation of his constitutional rights.

\* \* \* \*

## 3.

When a private party seeks injunctive relief against the government, the final two injunction factors—the balance of equities and the public interest—generally call for weighing the benefits to the private party from obtaining an injunction against the harms to the government and the public from being enjoined. *See Pursuing America’s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016). We find the balance to tip in Doe’s favor.

The equities at stake on both sides are manifestly weighty ones. The government seeks to avoid undue interference with its military judgments in connection with ongoing hostilities and with its conduct of foreign relations with a coalition partner in that campaign. Doe, meanwhile, seeks to vindicate his rights as an American citizen to avoid a forcible and irrevocable transfer to (potentially indefinite) custody at the hands of a foreign sovereign.

As the Supreme Court observed in *Hamdi*, a citizen’s “interest in being free from physical detention” is the “most elemental of liberty interests.” 542 U.S. at 529. The Court therefore denied the Executive the ability to continue detaining an alleged enemy combatant in wartime unless it afforded him procedural protections the Court thought he was constitutionally owed. And the Court did so despite the government’s belief that affording additional process would be unnecessary and unworkable. *See id.* at 525. Here, we conclude an injunction barring Doe’s forcible transfer to Country B’s custody is warranted for substantially similar reasons and in substantially similar circumstances.

## B.

The government also appeals the district court’s order requiring it to give 72 hours’ notice before transferring Doe to either Country A or Country B. With regard to Country B, the government gave the district court the requisite notice before attempting to effect an agreed-upon transfer. When a defendant complies with an injunction in that fashion, its appeal of the injunction becomes moot. *See People for the Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, 421 (D.C. Cir. 2005). At any rate, now that we have sustained the injunction barring Doe’s transfer to Country B, any requirement to give advance notice of such a transfer is beside the point.

The notice requirement still presents an ongoing controversy with regard to Country A, however. An order requiring the government to give advance notice before transferring a detainee to another country cannot be sustained if there could be no grounds for enjoining the

transfer. *See Kiyemba*, 561 F.3d at 514. The government relies on that principle here, contending that any transfer of Doe to Country A invariably would be lawful. We are unpersuaded.

As an initial matter, we note that, because of the way this case developed, Doe did not have a meaningful opportunity to address a potential transfer to Country A. In the government's opening brief, it made three alternative requests for relief: (i) vacatur of the injunction in its entirety, (ii) vacatur of the injunction as applied to any "country that the Executive Branch determines has a legitimate interest" in Doe, or (iii) vacatur as applied only to one specified country. *See* No. 18-5032, Gov't Opening Br. 38. Indeed, the government's opening brief noted the possibility of transferring Doe to Country A only in passing in a footnote. *Id.* at 31 n.5. Such a reference is ordinarily inadequate to preserve an argument. *See CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014). And while the government specifically included Country A as a possible transferee country in its reply brief, that was too late. *See Abdullah*, 753 F.3d at 199-200.

The lateness of the government's suggestion that it might wish to transfer Doe to Country A is magnified, because, on the existing record, we know very little about what such a transfer would entail. Unlike with Country B, with whom the government has reached an agreement to transfer Doe, we are aware of no concrete plans in the works (or on the horizon) to transfer Doe to Country A. Indeed, the government has not submitted a single affidavit or declaration discussing a transfer of Doe to Country A, the reasons that might give rise to an agreement to transfer Doe there, the terms or expectations surrounding such a transfer, or the anticipated conditions of his custody after that transfer. The government has listed at a high level of generality some possible interests Country A could have in mind if it were to accept custody of Doe. *See* No. 18-5032, Gov't Reply Br. 8-9. But even with regard to that array of potential interests, we do not know whether a transfer of Doe would occur only for those reasons.

The government thus essentially seeks blanket preapproval to transfer Doe to Country A, regardless of the reasons or circumstances. We decline to recognize that sort of carte-blanche license in the present circumstances. In *Munaf*, the Supreme Court upheld the transfer of the two habeas petitioners to Iraq's custody, but only after examining the reasons for the proposed transfers and the governing law. *See Omar*, 646 F.3d at 24. Here, the government asks for an all-purpose preapproval without any opportunity to assess a particular transfer before it takes place. Particular transfers to Country A may or may not be unlawful depending on the circumstances. The notice requirement secures the ability to make that assessment at a suitable time.

In these circumstances, we cannot set aside the notice requirement as to Country A. In terms of likelihood of success on the merits, with notice of the possibility of a transfer to Country A and at least some factual information about what such a transfer might entail, Doe would have had an opportunity to show that a particular transfer to Country A would be unlawful. With regard to irreparable injury, a particular transfer arrangement, depending on the circumstances, could irrevocably injure his interests, and Doe did not have an opportunity to address in his briefing the potential harm he would suffer if transferred to Country A. And the remaining injunction factors could favor Doe in the context of a concrete transfer proposal.

\* \* \* \*

After the D.C. Circuit denied the U.S. appeal, the Department of Defense proposed to release Doe back into Syria near the location where he was captured, having determined that release in that area would be safe and consistent with DoD's

policies and obligations under the law of war. On June 6, 2018, the U.S. government provided 72 hours' notice to the district court of the proposed release. The detainee filed a motion for a temporary restraining order to block the release. The court ordered briefing on the motion and the U.S. briefs in opposition were filed on June 22, 2018 and are available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>. The court subsequently stayed the case at the request of the parties. The district court never ruled on the release because, while the case was stayed, the United States government arranged for Doe to return to Bahrain, where he had been living before traveling to Syria. Doe consented to this release, which occurred in October 2018.

**Cross References**

*Global Coalition to Defeat ISIS*, **Ch. 3.B.1.e**

*Children in armed conflict*, **Ch. 6.C.2**

*Ordered departure of U.S. personnel from Basrah, Iraq*, **Ch. 9.A.1**

*Sanctions relating to cyber activity*, **Ch. 16.A.9**

*Afghanistan*, **Ch. 17.B.1**

*Syria*, **Ch. 17.B.2**

*Yemen*, **Ch. 17.B.10**

*Responsibility to Protect*, **Ch. 17.C.3**

*Chemical weapons in Syria*, **Ch. 19.D.2**

## CHAPTER 19

### Arms Control, Disarmament, and Nonproliferation

#### A. GENERAL

##### 1. Compliance Report

In April 2018, the State Department released the unclassified version of its report to Congress on “Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments” (“Compliance Report”), submitted pursuant to Section 403 of the Arms Control and Disarmament Act, as amended, 22 U.S.C. § 2593a. The Compliance Report contains five parts. Part I addresses U.S. compliance with arms control, nonproliferation, and disarmament agreements and commitments. Part II discusses compliance by Russia and other Soviet successor states with treaties and agreements the United States concluded bilaterally with the Soviet Union or its successor states. Part III assesses compliance by other countries that are parties to multilateral agreements. Part IV covers other countries’ adherence to international commitments, such as the Missile Technology Control Regime (“MTCR”). And Part V covers other countries’ adherence to certain unilateral commitments. The 2018 report primarily covers the period from January 1, 2017 through December 31, 2017. The report is available at <https://www.state.gov/2018-report-on-adherence-to-and-compliance-with-arms-control-nonproliferation-and-disarmament-agreements-and-commitments/>. See discussion *infra* of statements in the Compliance Report regarding Russian noncompliance with the Open Skies Treaty.

## 2. Nuclear Posture Review

In February 2018, the U.S. Department of Defense released the 2018 Nuclear Posture Review (“NPR”), completed in response to the President’s January 27, 2017 direction to conduct a new NPR “to ensure a safe, secure, and effective nuclear deterrent that protects the homeland, assures allies[,] and above all, deters adversaries.” The 2018 NPR is available at <https://dod.defense.gov/News/SpecialReports/2018NuclearPostureReview.aspx>. See discussion *infra* of the NPR’s statements regarding the Comprehensive Nuclear Test Ban Treaty.

## B. NONPROLIFERATION

### 1. Non-Proliferation Treaty

On June 28, 2018, Dr. Christopher Ashley Ford, Assistant Secretary of State for International Security and Nonproliferation, delivered remarks on the 50<sup>th</sup> anniversary of the opening for signature of the Treaty on the Nonproliferation of Nuclear Weapons (“NPT”). Dr. Ford’s remarks are excerpted below and available at <https://www.state.gov/remarks-and-releases-bureau-of-international-security-and-nonproliferation/negotiating-the-npt-50-years-on-some-lessons-for-the-future/>.

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I would suggest that the story of how it was that we got an NPT in the first place offers several lessons as we struggle with the challenges of international security and nonproliferation today and in the years ahead.

#### *1. Nonproliferation and International Peace and Security*

First and foremost, I would suggest that a clear-eyed look at the Treaty’s origins should focus us anew upon its drafters’ core insights about the critical importance of nuclear nonproliferation as a *sine qua non* for international peace and security. ...

Nuclear deterrence is an important component of the international security environment and will likely remain so for the foreseeable future ... When more than two “players” become involved in this grim “game,” the potential for problems grow at an alarming rate.

A nuclear deterrent dyad has but one axis along which nuclear relationships occur—and along which potential problems of misperception, miscalculation, or escalation must be managed if nuclear war is to be avoided. ... As the number of players increases arithmetically, ... the number of nuclear relationships that have to be managed without calamity increases geometrically. This makes proliferation a recipe for disaster, vastly increasing the risk of nuclear war.

This was quite clear to the drafters of the NPT as they struggled with negotiating the new treaty in the mid-1960s. ...

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As we approach the 50<sup>th</sup> Anniversary of the NPT's entry into force in 2020, we need to remain focused upon these risks ... .

A second lesson from the NPT's negotiation lies in the drafters' clear emphasis upon the fact that nonproliferation is a security benefit *for all*. ...

These security benefits resulted from possessors' obligation not to transfer nuclear weapons capabilities to non-possessors, coupled with the reciprocal exchange of non-possession commitments by those non-possessors. Together, these complementary promises served to prevent the injection of nuclear weaponry into regional rivalries and disputes—to the benefit of *every* state and the international community as a whole.

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That said, security is not the only benefit the NPT provides. As we look to the future, we should remember that it has been clear all along that nonproliferation is a foundation upon which *additional* benefits can be built. This is my third lesson.

... [I]t was an important selling point for the embryonic NPT ... that the proposed Treaty would “stimulate widespread, peaceful development of nuclear energy.” Because it would surely be difficult to imagine possessors being willing to share peaceful nuclear technology if they did not have assurances against its misuse for weapons purposes, peaceful uses of nuclear energy *depend upon* the solidity of nonproliferation guarantees. Nonproliferation rules, as Foster recognized, would thus “promote the sharing of the peaceful benefits of nuclear energy,” allowing developing nations to participate in “expanding international cooperation in the field of peaceful nuclear activities” and thereby making possible “economic gains which they could not realistically have hoped to achieve on their own.” As President Johnson emphasized to the ENDC, a nonproliferation regime would free nations to devote their efforts to “developing strong, peaceful programs.”

\* \* \* \*

A fourth lesson from the creation of the NPT is of the importance of prudence and pragmatism in multilateral nuclear diplomacy. Since the dawn of the nuclear age, there has been a temptation to respond to the unique and worrisome challenges of managing nuclear risks by proposing dramatic and utopian, but unworkable, solutions. ...

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A fifth lesson of the NPT, at least from an American perspective, suggests the value ... of ensuring appropriate involvement and support from the elected legislators who represent the sovereign People whose security depends upon diplomats getting such things right.

The NPT is a treaty, of course, duly submitted to the U.S. Senate for its advice and consent, and thereafter ratified and in force as the law of the land pursuant to Article VI, Section 2, of the U.S. Constitution. But the Johnson Administration's willingness to work with Congress

during the ... process to ensure that the legislature understood and supported the emerging treaty went well beyond simply submitting it for a Senate vote in 1968.

\* \* \* \*

A sixth and final lesson can be found in the remarkable and decisive role of the United States and the USSR as co-chairs of the ... process and joint authors of the 1967 draft that led to the final text of the Treaty. That year 1967 was, I should remind you, a year deeply mired in Cold War tensions. ...

And yet, despite the bitterness of the East-West divide and the ominous nuclear shadow that hung over global politics, Washington and Moscow found it possible to recognize their shared interest—and the world's shared interest—in stemming the further proliferation of nuclear weapons. These Cold War rivals found it within themselves to sit down, to engage with a wide range of diplomatic partners, and to cooperate effectively and decisively in hammering out the Treaty that today stands as the cornerstone of the global nonproliferation regime.

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I have suggested these six lessons from negotiation of the NPT in the spirit of helping us grapple with the proliferation challenges of the present day, half a century after the Treaty was opened for signature. ...

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Also on June 28, 2018, the foreign ministers of the governments of the United States, the United Kingdom, and the Russian Federation, as the depositaries for the NPT, issued a joint statement on the anniversary of the NPT's opening for signature, which is excerpted below and available at <https://www.state.gov/wp-content/uploads/2019/03/NPT-Joint-Statement.pdf>.

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On July 1, 1968, the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) opened for signature in our respective capitals: London, Moscow, and Washington. Today, 50 years later, we celebrate the immeasurable contributions this landmark treaty has made to the security and prosperity of the nations and peoples of the world.

The NPT has provided the essential foundation for international efforts to stem the looming threat—then and now—that nuclear weapons would proliferate across the globe. In so doing, it has served the interests of all its Parties and has limited the risk that the vast devastation of nuclear war would be unleashed.

We also celebrate the astonishingly diverse benefits of the peaceful uses of the atom, whether for electricity, medicine, agriculture, or industry. This boon to humanity thrives because the NPT, and the nuclear nonproliferation regime built around the Treaty, has helped provide confidence that nuclear programs are and will remain entirely peaceful.

The International Atomic Energy Agency (IAEA) plays a critical role in NPT implementation, both to promote the fullest possible cooperation on the peaceful uses of nuclear energy, and to apply safeguards and verify that nuclear programs are entirely peaceful. An IAEA comprehensive safeguards agreement together with an Additional Protocol provide credible assurances of the absence of undeclared nuclear activities and should become the universal standard for verifying the fulfillment of NPT obligations. We pledge our full and continued support to the IAEA and urge others to do the same.

By helping to ease international tensions and create conditions of stability, security and trust among nations, the NPT has made a vital contribution to nuclear disarmament. The NPT continues to help create conditions that would be essential for further progress on nuclear disarmament. We remain committed to the ultimate goal of the elimination of nuclear weapons, as set forth in the NPT, and are committed to working together to make the international environment more conducive to such progress.

The success of the NPT was not foreordained, nor is its future success guaranteed. It depends on our concerted and sustained efforts to ensure compliance, to promote universalization, to ensure effective safeguards, and to respond to ongoing and emerging proliferation challenges, wherever they occur. Even at the height of the Cold War, our predecessors made this wise investment in our shared security and prosperity. Today, we pledge our unstinting commitment to preserving and deepening this legacy for future generations.

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On September 19, 2018, Dr. Ford delivered further remarks reflecting on lessons learned during the 50 years of the NPT at the Vienna Center for Disarmament and Non-Proliferation. Those remarks are excerpted below and available at <https://www.state.gov/remarks-and-releases-bureau-of-international-security-and-nonproliferation/nonproliferation-lessons-learned/>.

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But remembering the benefits that the NPT provides, and which will be lost if the international community fails to preserve the nonproliferation architecture that is the Treaty's core, should not be our only lesson from the NPT's history. I believe we can also learn valuable things from the nonproliferation regime about *how* international institutions survive and thrive in a complex and changing world—in particular, how the regime has been able to *learn* from its environment and to *adapt* as learning occurs. Let me offer three examples of past and ongoing learning, and one case of lessons not yet fully learned:

1. The regime's ability to change course in working to ameliorate proliferation risks that the regime itself had inadvertently created by supporting the worldwide construction of research reactors fueled with highly-enriched uranium (HEU);

2. The regime's ability to supplement traditional International Atomic Energy Agency (IAEA) safeguards with the Additional Protocol (AP) after it became clear that implementation of Comprehensive Safeguards Agreements (CSAs) was insufficient to provide credible assurances against illicit nuclear activities;
3. The regime's development of increasingly effective, flexible, and efficient approaches to implementing safeguards agreements under the State-Level Concept (SLC); and
4. The regime's as yet inadequate and incomplete response to a case of announced withdrawal, and the need to adopt principles and put in place measures that discourage future such withdrawals.

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## 2. Peaceful Nuclear Uses

Dr. Ford addressed a joint session of the Nonproliferation Directors Group and the Nuclear Safety and Security Group in Quebec, Canada, on October 16, 2018, regarding the benefits of peaceful nuclear uses. His remarks are excerpted below and available at <https://www.state.gov/remarks-and-releases-bureau-of-international-security-and-nonproliferation/sharing-the-benefits-of-peaceful-nuclear-uses/>.

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The approach of the 50th anniversary of the entry into force of the Nuclear Non-Proliferation Treaty (NPT)—which will coincide with the U.S. G7 chairmanship in 2020—makes this a very important and auspicious year, and one full of symbolic and political, as well as substantive, importance for the global nonproliferation regime. Under the circumstances, it is important that we, the G7, continue to be a driving force, both in sharing the benefits of the peaceful uses of nuclear energy in accordance with Article IV of the NPT and in making sure other States Party *know* of our pivotal role in this respect. Since President Eisenhower's *Atoms for Peace* speech in 1953, the countries that now make up the G7 have been leaders in advancing international civil nuclear cooperation and in facilitating access worldwide to the peaceful uses of nuclear energy consistent with the highest standards of safety, security, and nonproliferation.

My focus today is to highlight a few concrete examples of how we, as G7 members, are supporting implementation of Article IV. ...

One could not imagine a world of wide and deep nuclear sharing unless it were clear that such sharing would not lead to the proliferation of nuclear weapons to state or non-state actors. Safeguards, safety, and security are therefore critical *enablers* for nuclear cooperation, and it would be foolish and counterproductive to forget or ignore this.

So that's why it's a pleasure to be able to say a few words about the G7's critical role in supporting peaceful uses, building upon that foundation. As we know, the International Atomic Energy Agency (IAEA) is a focal point for engagement between NPT Parties on peaceful nuclear uses. For many IAEA Member States without nuclear power programs—especially developing countries—the availability of IAEA projects and activities supporting peaceful nuclear uses is a

key incentive for IAEA membership and for the ongoing work that is necessary to implement and comply with nonproliferation requirements and nuclear safety and security “best practices.”

If we consider the period from 2010, when the IAEA launched the Peaceful Uses Initiative (PUI), through 2017, we can see that the G7 back up their commitments of support for peaceful nuclear uses with considerable financial resources. ...

We don’t just contribute financial resources, however. We also contribute expertise that helps ensure peaceful nuclear uses are shared widely, efficiently, and effectively. Together, our financial resources and technical expertise have consistently contributed to the IAEA’s many successes in the field. A few recent examples include the removal of disused radioactive sources from several South American countries (2018), the eradication of the fruit-destroying Mediterranean fruit fly in the Dominican Republic (2017), the first region-wide mapping and assessment of ground water in Africa’s drought-prone Sahel Region (2017), eradication (99%) of the disease-spreading tsetse fly in Senegal (2017), the 20<sup>th</sup> anniversary of the eradication of the tsetse fly from Tanzania’s Island of Zanzibar (2016), and the global eradication of the cattle-destroying rinderpest disease (2011).

\* \* \* \*

As we prepare for the 2020 NPT Review Conference, the United States hopes the international community can remain focused on the common interests of all NPT States Party in promoting peaceful uses, and thus also in ensuring fidelity to the nonproliferation and safety and security practices that *enable* and *underpin* peaceful uses. We hope you will join in pursuing a collective goal of drawing more attention to the peaceful uses of nuclear energy as a shared benefit of the NPT regime.

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Dr. Ford addressed the IAEA ministerial conference on science and technology in Vienna, Austria on November 29, 2018 on the benefits for the developing world of nuclear technical cooperation through the nonproliferation regime. His remarks are available at <https://www.state.gov/nuclear-technical-cooperation-benefits-from-the-nonproliferation-regime-for-the-developing-world/>.

### 3. Proliferation Security Initiative (“PSI”)

On December 17, 2018, the State Department issued a press statement welcoming the decision by the Republic of Palau to endorse the Proliferation Security Initiative (“PSI”). See “Palau Endorses the Proliferation Security Initiative,” available at <https://www.state.gov/palau-endorses-the-proliferation-security-initiative/>. The Republic of Palau is the 106<sup>th</sup> state to become a PSI participant. The press statement includes the following background on the PSI:

Launched in Krakow, Poland in 2003, PSI participants commit to undertake measures, on a voluntary basis and consistent with their authorities and resources, to interdict illicit transfers of weapons of mass destruction and missile-related items, exchange relevant information, and strengthen legal authorities to conduct interdictions. Participants also conduct exercises, workshops, and other activities to improve their capacities to fulfill their PSI commitments. ...

On January 12, 2018, the U.S. Department of State released as a media note the text of a joint statement from PSI partners in support of enforcing UN Security Council resolutions 2375 and 2397 relating to interdictions against the DPRK. The joint statement was signed by Australia, Argentina, Canada, Denmark, France, Germany, Greece, Italy, Japan, the Republic of Korea, the Netherlands, New Zealand, Norway, Poland, Singapore, the United Kingdom, and the United States. The joint statement is excerpted below and available at <https://www.state.gov/joint-statement-from-proliferation-security-initiative-psi-partners-in-support-of-united-nations-security-council-resolutions-2375-and-2397-enforcement/>.

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In September 2003, the original eleven ... [PSI] partners gathered in Paris to adopt the PSI Statement of Interdiction Principles. Currently, 105 nations around the globe have endorsed those principles. The Statement of Interdiction Principles calls on all endorsing States to establish, consistent with national legal authorities and relevant international law and frameworks including ... UN Security Council Resolutions, a more coordinated and effective basis to impede and stop shipments of ... WMD, delivery systems, and related materials flowing to and from States and non-state actors of proliferation concern.

Specifically, the principles commit endorsing States to: (1) Undertake effective measures to interdict the illicit transfer of WMD, their delivery systems, and related materials; (2) Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity; (3) Review and work to strengthen their relevant national legal authorities; and (4) Take specific actions in support of interdiction efforts regarding cargoes of WMD and related materials.

Nearly fifteen years after the establishment of the PSI, WMD proliferation continues to be a threat, and the need for a global effort to counter that threat remains as great as ever. On September 11, 2017, the UN Security Council unanimously adopted UN Security Council Resolution (UNSCR) 2375 in response to the sixth nuclear test conducted by the Democratic People's Republic of Korea (DPRK). On December 22, 2017, the UN Security Council unanimously adopted UNSCR 2397 in response to the DPRK's intercontinental ballistic missile (ICBM) launch conducted on November 28, 2017. UNSCR 2397 further strengthens UN sanctions on the DPRK, sending a clear message that the international community speaks with a single and unambiguous voice in condemning its violations of UN Security Council resolutions, and demanding that the DPRK abandon its prohibited nuclear, ballistic missile, and other WMD

programs. In particular, it is imperative for us to redouble our efforts to put maximum pressure on North Korea through the full implementation of the relevant UN Security Council Resolutions, including non-proliferation related actions, to compel North Korea to change its path to achieve denuclearization of the Korean Peninsula.

As Member States of the United Nations and as PSI-endorsing States, it is our responsibility to implement UNSCR obligations fully, take advantage of the additional actions authorized in those UNSCRs, and continue pursuing our commitments under the Statement of Interdiction Principles. As PSI-endorsing States, we note UNSCR 2375's provisions on maritime interdiction of cargo vessels and take note of how these provisions complement PSI's Statement of Interdiction Principles. We also note UNSCR 2397's provisions that include new maritime interdiction obligations and authorities to help shut down North Korea's illicit smuggling activities.

We, the undersigned PSI-endorsing States, reiterate our commitment to upholding the commitments enshrined in the Statement of Interdiction Principles and are postured to help enforce UNSCRs 2375 and 2397 through the following measures, in accordance with national and international legal authorities:

1. Inspect proliferation-related shipments on vessels with the consent of the flag State, on the high seas, if we have information that provides reasonable grounds to believe that the cargo of such vessels contains items prohibited under UNSCRs concerning the DPRK.
2. If there are reasonable grounds to believe that the cargo on a vessel flagged by one of our countries is prohibited for export to or from the DPRK under relevant UNSCRs, cooperate with inspections pursuant to the commitment above.
3. If we, as flag States, do not consent to inspection on the high seas, we will direct the vessel to proceed to an appropriate and convenient port for required inspection.
4. Direct our flagged vessels to a port in coordination with the port State when requested; and deflag any of our flagged vessels designated by the 1718 Committee.
5. Prohibit our nationals, persons subject to our jurisdiction, entities incorporated in our territory or subject to our jurisdiction, and vessels flying our flag, from facilitating or engaging in ship-to-ship transfers to or from DPRK-flagged vessels of any goods or items that are being supplied, sold, or transferred to or from the DPRK.
6. Redouble efforts to implement in full the measures in relevant UN Security Council Resolutions with respect to inspecting, detecting, and seizing items the transfer of which is prohibited by those resolutions.
7. Seize and dispose of (such as through destruction, rendering inoperable or unusable, storage, or transferring to a State other than the originating or destination States for disposal) items the supply, sale, transfer, or export of which is prohibited by relevant UN Security Council Resolutions and consistent with other international obligations.

All PSI endorsing States commit to ensuring that their domestic processes are in place to undertake the above measures.

We call on all UN Member States to enforce all elements of applicable UN Security Council Resolutions. Given our concerted efforts to build our capacities and resolve to act to interdict WMD and related materials, we stand united in our determination to prevent the DPRK from acquiring nuclear and ballistic missile-related technologies, and from engaging in prohibited activities that generate revenue for its illicit WMD program. As PSI endorsing States we remain strongly committed to WMD counter-proliferation, including supporting and

enforcing UNSCRs 2375, 2397, and all other DPRK-related UN Security Council Resolutions.

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#### 4. Country-Specific Issues

##### a. *Democratic People's Republic of Korea ("DPRK" or "North Korea")*

See Chapter 16 for discussion of sanctions in 2018 regarding North Korea. See section B.3. *supra* for discussion of the January 2018 PSI statement on enforcing UN Security Council resolutions regarding the DPRK.

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##### b. *Iran*

On May 8, 2018, a national security presidential memorandum announced that the United States would cease participating in the Joint Comprehensive Plan of Action ("JCPOA") with Iran. National Security Presidential Memorandum, dated May 8, 2018, available at <https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon/>. Excerpts follow from the presidential memorandum.

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Since the JCPOA's inception, ... Iran has only escalated its destabilizing activities in the surrounding region. Iranian or Iran-backed forces have gone on the march in Syria, Iraq, and Yemen, and continue to control parts of Lebanon and Gaza. Meanwhile, Iran has publicly declared it would deny the International Atomic Energy Agency (IAEA) access to military sites in direct conflict with the Additional Protocol to its Comprehensive Safeguards Agreement with the IAEA. In 2016, Iran also twice violated the JCPOA's heavy water stockpile limits. This behavior is unacceptable, especially for a regime known to have pursued nuclear weapons in violation of its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons.

- Iran's behavior threatens the national interest of the United States. On October 13, 2017, consistent with certification procedures stipulated in the Iran Nuclear Agreement Review Act, I determined that I was unable to certify that the suspension of sanctions related to Iran pursuant to the JCPOA was appropriate and proportionate to the specific and verifiable measures taken by Iran with respect to terminating its illicit nuclear program. On January 12, 2018, I outlined two possible paths forward—the JCPOA's disastrous flaws would be fixed by May 12, 2018, or, failing that, the United States would cease participation in the agreement. I made clear that this was a last chance, and that absent an understanding to fix the JCPOA, the United States would not continue to implement it.

- That understanding has not materialized, and I am today making good on my pledge to end the participation of the United States in the JCPOA. I do not believe that continuing to provide JCPOA-related sanctions relief to Iran is in the national

interest of the United States, and I will not affirm what I know to be false. Further, I have determined that it is in the national interest of the United States to re-impose sanctions lifted or waived in connection with the JCPOA as expeditiously as possible.

- Section 1. Policy. It is the policy of the United States that Iran be denied a nuclear weapon and intercontinental ballistic missiles; that Iran's network and campaign of regional aggression be neutralized; to disrupt, degrade, or deny the Islamic Revolutionary Guards Corps and its surrogates access to the resources that sustain their destabilizing activities; and to counter Iran's aggressive development of missiles and other asymmetric and conventional weapons capabilities. The United States will continue to pursue these aims and the objectives contained in the Iran strategy that I announced on October 13, 2017, adjusting the ways and means to achieve them as required.

- Sec. 2. Ending United States Participation in the JCPOA. The Secretary of State shall, in consultation with the Secretary of the Treasury and the Secretary of Energy, take all appropriate steps to cease the participation of the United States in the JCPOA.

- Sec. 3. Restoring United States Sanctions. The Secretary of State and the Secretary of the Treasury shall immediately begin taking steps to re-impose all United States sanctions lifted or waived in connection with the JCPOA, including those under the National Defense Authorization Act for Fiscal Year 2012, the Iran Sanctions Act of 1996, the Iran Threat Reduction and Syria Human Rights Act of 2012, and the Iran Freedom and Counterproliferation Act of 2012. These steps shall be accomplished as expeditiously as possible, and in no case later than 180 days from the date of this memorandum. The Secretary of State and the Secretary of the Treasury shall coordinate, as appropriate, on steps needed to achieve this aim. They shall, for example, coordinate with respect to preparing any recommended executive actions, including appropriate documents to re-impose sanctions lifted by Executive Order 13716 of January 16, 2016; preparing to re-list persons removed, in connection with the JCPOA, from any relevant sanctions lists, as appropriate; revising relevant sanctions regulations; issuing limited waivers during the wind-down period, as appropriate; and preparing guidance necessary to educate United States and non-United States business communities on the scope of prohibited and sanctionable activity and the need to unwind any such dealings with Iranian persons. Those steps should be accomplished in a manner that, to the extent reasonably practicable, shifts the financial burden of unwinding any transaction or course of dealing primarily onto Iran or the Iranian counterparty.

- Sec. 4. Preparing for Regional Contingencies. The Secretary of Defense and heads of any other relevant agencies shall prepare to meet, swiftly and decisively, all possible modes of Iranian aggression against the United States, our allies, and our partners. The Department of Defense shall ensure that the United States develops and retains the means to stop Iran from developing or acquiring a nuclear weapon and related delivery systems.

- Sec. 5. Monitoring Iran's Nuclear Conduct and Consultation with Allies and Partners. Agencies shall take appropriate steps to enable the United States to continue to monitor Iran's nuclear conduct. I am open to consultations with allies and partners on future international agreements to counter the full range of Iran's threats, including the nuclear weapon and intercontinental ballistic missile threats, and the heads of agencies shall advise me, as appropriate, regarding opportunities for such consultations.

On May 21, 2018, Secretary Pompeo delivered a speech at the Heritage Foundation, entitled, “After the Deal: A New Iran Strategy,” which is available at <https://www.state.gov/after-the-deal-a-new-iran-strategy/>. Secretary Pompeo identified twelve steps for Iran to take before a new arrangement could be reached to replace the JCPOA and lift re-imposed U.S. sanctions. Excerpts follow from the Secretary’s May 21 remarks.

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First, Iran must declare to the IAEA a full account of the prior military dimensions of its nuclear program, and permanently and verifiably abandon such work in perpetuity.

Second, Iran must stop enrichment and never pursue plutonium reprocessing. This includes closing its heavy water reactor.

Third, Iran must also provide the IAEA with unqualified access to all sites throughout the entire country.

Iran must end its proliferation of ballistic missiles and halt further launching or development of nuclear-capable missile systems.

Iran must release all U.S. citizens, as well as citizens of our partners and allies, each of them detained on spurious charges.

Iran must end support to Middle East terrorist groups, including Lebanese Hizballah, Hamas, and the Palestinian Islamic Jihad.

Iran must respect the sovereignty of the Iraqi Government and permit the disarming, demobilization, and reintegration of Shia militias.

Iran must also end its military support for the Houthi militia and work towards a peaceful political settlement in Yemen.

Iran must withdraw all forces under Iranian command throughout the entirety of Syria.

Iran, too, must end support for the Taliban and other terrorists in Afghanistan and the region, and cease harboring senior al-Qaida leaders.

Iran, too, must end the IRG Qods Force’s support for terrorists and militant partners around the world.

And too, Iran must end its threatening behavior against its neighbors—many of whom are U.S. allies. This certainly includes its threats to destroy Israel, and its firing of missiles into Saudi Arabia and the United Arab Emirates. It also includes threats to international shipping and destructive ... cyberattacks.

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From my conversations with European friends, I know that they broadly share these same views of what the Iranian regime must do to gain acceptance in the international community. I ask that America’s allies join us in calling for the Iranian Government to act more responsibly.

In exchange for major changes in Iran, the United States is prepared to take actions which will benefit the Iranian people. These areas of action include a number of things.

First, once this is achieved, we’re prepared to end the principal components of every one of our sanctions against the regime. We’re happy at that point to re-establish full diplomatic and commercial relationships with Iran. And we’re prepared to [permit] Iran to have advanced

technology. If Iran makes this fundamental strategic shift, we, too, are prepared to support the modernization and reintegration of the Iranian economy into the international economic system.

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Secretary Pompeo addressed the “United Against Nuclear Iran” summit in New York on September 25, 2018. His remarks are excerpted below and available at <https://www.state.gov/remarks-at-the-united-against-nuclear-iran-summit/>.

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From 2006 to 2010, the UN Security Council passed six different resolutions governing Iran’s nuclear and ballistic missile programs. But from 20[07] to 2015, the IAEA Board of Governors issued less than—no less than 33 reports outlining Iran’s noncompliance with each of those resolutions.

UN Security Council Resolution 1929 stated that, “Iran shall not undertake any activity related to ballistic missiles capable of delivering nuclear weapons.” But Iran conducted multiple ballistic missile launches between 2010 and 2015, every one of them in flagrant violation of UN Security Council resolutions.

And even when, in connection with the JCPOA sanctions relief, the Security Council superseded this provision in UN Security Council Resolution 2231 with a call upon Iran not to undertake any activity related to such missiles, Iran’s pace of missile activity, missile launches, and tests did not diminish. Iran has conducted multiple ballistic missile launches since January 2016, when the deal was first implemented. Today Iran has the largest ballistic missile force in the Middle East, each of those ballistic missiles costing more than a million dollars.

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I don’t think I need to offer much more evidence than I have laid out here today. These are destructive activities undertaken by Iran in a global scope. It is therefore incumbent on every country to join our efforts to change the regime’s lawless behavior. The ongoing, multi-national, multi-continental nature of Iranian malign activity leaves no room for indecision.

The United States will continue to coalesce international efforts to change Iranian behavior through pressure, deterrence, and support for the Iranian people. We want every single country on board. This is among the President’s top diplomatic priorities.

The consensus—the consensus that already exists—on Iran nonnuclear activities is reflected in Security Council resolutions, the ones I just mentioned.

But enforcement of those resolutions should be the bare minimum we ask of every nation.

In the wake of President Trump’s decision to pull the United States out of the nuclear deal, countries are now facing a choice on whether to keep doing business in Iran. Reimposing sanctions and discouraging international business with Iran is not something we’re doing out of spite. This is a necessary security measure. The regime must no longer be allowed to get its hands on billions of dollars that it’s already proven it will spread around the world to its client states, rebel groups, and terrorists. Doing business in Iran only pours money into a regime that

hoards it for itself and misuses it for violent ends. This all happened, of course, during the JCPOA.

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As President Trump and I have said many times, a new agreement is possible. Indeed, he said it even today. But change must come in the 12 areas I outlined in May, as well as with Iran's human rights record.

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On November 29, 2018, Special Representative for Iran Brian Hook provided a special briefing at a military base in Washington, D.C. on Iran's transfers of arms to proxy groups and ongoing missile development. The briefing was presented before a display of Iranian missiles. Excerpts follow from that briefing, which is transcribed in full at <https://www.state.gov/the-iranian-regimes-transfer-of-arms-to-proxy-groups-and-ongoing-missile-development-2/>.

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Today, the United States is unveiling new evidence of Iran's ongoing missile proliferation. The Iranian threat is growing and we are accumulating risk of escalation in the region if we fail to act. ...

The inventory in this display has expanded since December. This is a function of Iran's relentless commitment to put more weapons into the hands of even more of its proxies, regardless of the suffering. Iran has been prohibited by several UN resolutions from exporting arms for a decade. These restrictions were in place starting in 2006 under UN Security Council Resolution 1737 and 1747, which I helped to negotiate. The prohibitions have continued since 2015 under UN Resolution 2231. This display and the items we have added to it reveal an outlaw regime exporting arms as it pleases.

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I want to now highlight the Iranian regime's investment in missile testing and development. It is increasing. The regime's pace of missile launches did not diminish after implementation of the Iran nuclear deal in January of 2016. Iran has conducted numerous ballistic missile launches and space launches since this time as it continues to prioritize missile development as a tool of revolution. We assess that in January of 2017, Iran launched a medium-range missile, believed to be the Khorramshahr. It can carry a payload of more than 500 kilograms and could be used to carry nuclear warheads. Its suspected range is over 1,200 miles, which is far enough to target some European capitals. Iran's ongoing missile development puts Europe in its range.

Iran has the largest ballistic missile force in the region, with more than 10 ballistic missile systems either in its inventory or under development. Any environment where Iran is able to operate freely can become a forward-deployed missile base for such systems and for many other

kinds of weapons that you see here today. This threatens Israel and other partners, especially Saudi Arabia and the UAE.

Just this month, rockets rained down on Israel from territory controlled by Iran's Palestinian partner Hamas. In Lebanon, we have evidence that Iran is helping Hizballah build missile production facilities. In Iraq, credible reports indicate that Iran is transferring ballistic missiles to Shia militia groups. This comes as these militias carried out highly provocative attacks on U.S. diplomatic facilities in Baghdad and Basra in September, which we know that Iran did nothing to stop.

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On December 12, 2018, Secretary Pompeo addressed a UN Security Council meeting on Iran. His remarks are excerpted below and available at <https://www.state.gov/remarks-at-the-united-nations-security-council-meeting-on-iran/>.

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Just two days ago, the head of the IRGC's airspace division, Amir Hajizadeh, boasted that Iran is capable of building missiles with a range beyond 2,000 kilometers. ... He bragged that Iran does 40 to 50 tests per year.

As I'll talk about further, it is clear that the Iranian regime's ballistic missile activity has grown since the nuclear deal. Iran has exploited the goodwill of nations and defied multiple Security Council resolutions in its quest for a robust ballistic missile force. The United States will never stand for this.

No nation that seeks peace and prosperity in the Middle East should either.

Since 2006, this Council has been telling Iran to stop testing and proliferating ballistic missiles in one form or another. From 2010 to 2015, Iran was subject to UN Security Council Resolution 1929—the strictest resolution addressing the Iranian ballistic missiles to date.

In that resolution, the Security Council decided that, “Iran shall not undertake any activity related to ballistic missiles capable of delivering nuclear weapons, including launches using ballistic missile technology, and that States shall take ... necessary measures to prevent the transfer of technology or technical assistance to Iran related to such activities.” This provision of UNSCR 1929 imposed a legal prohibition on Iran's ballistic missile activity. There was force of law behind these words.

Nevertheless, Iran conducted multiple ballistic missile launches between 2010 and 2015, in flagrant violation of that resolution.

So what did we do in response? Did we increase accountability on Iran for serial violations of international law? Quite the opposite. ...

In connection with the Iranian regime's engagement in nuclear talks, and at the Obama administration's urging, the Security Council replaced Resolution 1929 with Resolution 2231. Resolution 2231 “calls upon” Iran not to undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons. Notwithstanding that change in language, the world's concerns remain.

When we collectively “call upon” Iran to cease its ballistic missile activity, we must agree to stop it now. ...

Iran’s pace of missile activity, including missile launches and tests, did not diminish since the JCPOA. In fact, Iran’s missile testing and missile proliferation is growing. Today Iran has the largest ballistic missile force in the Middle East. It has more than 10 ballistic missile systems in its inventory or in development. It has hundreds of missiles which pose a threat to our partners in the region.

From more recent times: In 2016, during the time of the JCPOA, Iran unveiled two new short-range ballistic missiles, which it claims are capable of striking targets between 500 and 700 kilometers. In January of 2017, during the time of the JCPOA, Iran launched a medium-range missile designed to carry a payload greater than 500 kilograms, and which could be used to carry nuclear warheads. Its suspected range also approaches 2,000 kilometers, which is far enough to target Athens, Sofia, Bucharest, and other major European cities. If the IRGC airspace commander is telling the truth, and Iran has capabilities beyond 2,000 kilometers, other European capitals are at risk as well.

In July of 2017, while the United States was still in the JCPOA, Iran tested a Simorgh space launch vehicle. The United States, France, Germany, and the UK all assessed that the launch was inconsistent with 2231, because space launch vehicle ... uses a similar technology as intercontinental ballistic missiles.

Iran has exported ballistic missile systems as well, most recently to Yemen. We have hard evidence that Iran is providing missiles, training, and support to the Houthis, and the Iranian-Houthi missile force is fully engaged. This poses a threat to innocent civilians—including Americans—living in Riyadh, Abu Dhabi, Dubai, as well as people of all nationalities who travel on civilian aircraft in that region.

Iran is also transferring ballistic missile systems to Shia militias in Iraq.

And just look at the last two weeks. The Iranian regime test-fired a medium range ballistic missile that is capable of carrying multiple warheads.

Our goodwill gestures have been futile, futile in correcting the Iranian regime’s reckless missile activity and its destructive behaviors. No nation can dispute that Iran is in open defiance of UN Security Council Resolution 2231.

The United States is not alone in raising these concerns. I’d like to thank France and Germany and the United Kingdom for raising concerns about Iranian missile proliferation to the secretariat.

I would also like to thank our partners from Saudi Arabia and the United Arab Emirates, who are working with UN inspectors in recovering material debris of Iranian-supplied missiles, rockets, and UAVs launched into their countries by Houthi forces in Yemen.

Our Israeli allies have brought further evidence to the Security Council about Iran’s continued launches of ballistic missiles that are inherently capable of carrying nuclear weapons. Israel has also given evidence to the secretariat of Iran’s transfer of weapon systems to its proxies all around the Middle East, and in defiance of what we have insisted that they do.

... What steps ought we take to confront this Iranian malign activity? We risk the security of our people if Iran continues stocking up on ballistic missiles. We risk escalation of conflict in the region if we fail to restore deterrence. And we convey to all other malign actors that they too can defy the Security Council with impunity if we do nothing.

... The United States seeks to work with all other members of the Council to reimpose on Iran the ballistic missiles restrictions outlined in 1929.

Beyond addressing Iran's ballistic missile activities, the Council should not lift the arms embargo in 2020 on Iran. This is a country in noncompliance with multiple UN Security Council resolutions, including those related to al-Qaida, Afghanistan, Lebanon, Yemen, and Somalia. Iran is harboring al-Qaida, supporting Taliban militants in Afghanistan, arming terrorists in Lebanon, facilitating illicit trade in Somali charcoal benefiting al-Shabaab, and training and equipping Shia militias in Iraq, even as we sit here today.

It is also stoking conflict in Syria and Yemen. The Council must address these malign activities. It cannot reward Iran by lifting the arms embargo.

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... The Trump administration clearly defined in May the 12 areas in which we are demanding change from Iran.

If Iran makes a fundamental strategic shift and honors these demands, we are prepared to ease our pressure campaign and support the modernization and reintegration of the Iranian economy into the international economic system.

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### **c. *Russia***

On October 22, 2018, Dr. Ford addressed the International Advisory Council of the James Martin Center for Nonproliferation Studies in Washington, DC. He discussed the challenges and potential of nonproliferation cooperation with Russia. Dr. Ford's remarks are excerpted below and available at <https://www.state.gov/remarks-and-releases-bureau-of-international-security-and-nonproliferation/the-challenge-and-the-potential-of-u-s-russian-nonproliferation-cooperation/>.

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I think it is ... important to be honest and clear about the challenges that exist to nonproliferation cooperation. Some of these challenges relate to big and obvious things such as the range of malign activities in which Russia has engaged in recent years—destabilizing and invading its neighbors in 2008 and 2014, conducting routine exercises that play-act targeting nuclear weapons against NATO countries, violating arms control treaties, and meddling in elections in both the United States and European countries. These clearly make it harder, both politically and practically, to engage in cooperative endeavors of other sorts.

I don't want to emphasize those broader problems too much, however, because the example of the NPT itself suggests that cooperation in support of shared interests on nonproliferation is possible even while other aspects of our relationship remain problematic.

More troubling to me, from the perspective of pursuing cooperation in the nonproliferation arena, is the degree to which Russia's malign behavior has now come to manifest itself, not just in other areas that could conceivably be compartmented off from

nonproliferation, but in fact *in the nonproliferation arena* as well. As you can imagine, this makes it much more difficult to imagine Russia as a potential partner. Nevertheless, Russia's nonproliferation record is not entirely bad—and the areas where things have been working can perhaps point us toward a more constructively cooperative future together. Let me offer some examples.

#### A. PROBLEM AREAS

##### (1) Nuclear Safeguards

Let's start with the problem areas. At the International Atomic Energy Agency (IAEA), Russia has made it a diplomatic objective to undermine support for the IAEA's "State Level Concept" (SLC) for effectively implementing the safeguards agreements that are negotiated between NPT States Party and the IAEA and are intended to cover all nuclear material in peaceful use in the state, as required by Article III of the Treaty. Most recently, for instance, Russia tried to block the expanded use of the SLC by introducing a competing safeguards resolution at the IAEA General Conference.

Russian diplomats have also worked to undermine the IAEA's long-established ability to consider and professionally evaluate all available relevant information in conducting safeguards work—trying, in effect, to prevent the IAEA from taking action based on information it did not itself directly acquire through safeguards declarations and its own verification activities. We know from experience that the IAEA cannot—and must not—ignore credible information indicating the possible existence of undeclared nuclear material or activities. If successful, this campaign against the SLC and sound safeguards analytics would blind and hobble safeguards implementation around the world and undercut decades of progress in strengthening nuclear safeguards, and damage the nonproliferation regime. So far, other IAEA Members have remained strong in resisting Russia's campaign against effective nuclear safeguards, but Russia has not relented.

Russia, unfortunately, has also sometimes worked to undermine IAEA investigative authorities in Iran. This manifested itself last year, for example, in a Russian effort to redefine and downgrade IAEA investigative authorities under the Joint Comprehensive Plan of Action (JCPOA)—in effect, to erase from that agreement both the IAEA's responsibility under the JCPOA's "Section T" to monitor against Iran's resumption of nuclear weaponization and the site-access authorities given by the JCPOA's "Section Q." Thankfully, this effort was rebuffed, with the IAEA Secretariat and most member States remaining committed to the integrity of the IAEA's work and authorities. But it was a disturbing episode that may bode ill for the future.

##### (2) Chemical Weapons Accountability

As for chemical weapons, I won't belabor here the history of Moscow's continuing efforts to shelter the Syrian regime of Bashar al-Assad from accountability for the chemical weapons atrocities it has committed. Russia has engaged in a disinformation campaign to obscure responsibility for Syrian abuses. More troublingly still, it has also acted to immunize Syria against responsibility for its use of chemical weapons in concrete ways—thus becoming an enabler for the regime's barbarism and continuing erosion of global norms against chemical weapons possession and use.

As most of you will remember, it was Russia that involved itself in defusing international horror and anger when Syria first began using nerve agent in its civil war several years ago, stepping in to facilitate Syria's accession to the Chemical Weapons Convention (CWC) and the destruction of Syria's chemical weapons stockpile under supervision of the Organization for the Prohibition of Chemical Weapons (OPCW). In retrospect, however, it is tragically clear that this

Russian-facilitated “solution” was little more than a way to protect Syria from a serious accounting and meaningful accountability.

Syria clearly *kept* its clandestine chemical weapons program going, and was soon back in the business of using these weapons on its own people, including the same nerve agent it had employed earlier. And Russia has continued to protect its ally from consequences after the Joint Investigative Mechanism confirmed that Syria was responsible for use of chemical weapons on four separate occasions. Moscow also fought fiercely to oppose efforts at the OPCW to establish new authorities—in the wake of the Joint Investigative Mechanism’s demise—to assess attribution of chemical weapons use. And Russia continues to oppose the work of the U.N. Secretary General’s mechanism for investigating chemical and biological weapons use. None of this, certainly, is what one would ordinarily expect of a country particularly serious about nonproliferation.

### (3) Chemical Weapons Use

And that’s not even counting Russia’s *own* use of chemical weapons—specifically, in an attempt to assassinate Sergei Skripal and his daughter in March—for which the United States recently imposed sanctions against Russia, and the European Union may also target as part of a new sanctions mechanism.

To be sure, both the United States and Russia have declared Cold War-era stocks of chemical weaponry to the OPCW, and worked hard for years to destroy them. Russia finished destroying what it declared to the OPCW with substantial help from the United States and our EU partners. But the U.S. government has had longstanding concerns about the completeness of Russia’s declarations, and recent events made it clear that this is not just an accounting problem. The United States expressed concern about Russia’s potential military stockpiling of fentanyl following its use in the Dubrovka Theater 15 years ago. More disturbing in the Skripal case, Russia’s attack demonstrates that Russia possesses novel nerve agents, colloquially known as “novichoks,” designed to be more lethal and less detectable than traditional ones such as the sarin used in Syria. This is troubling indeed and why the United States certifies that Russia is in non-compliance with its obligations under the Chemical Weapons Convention.

## B. MIXED RECORDS

### (1) Biological Weapons

With regard to biological weapons, Russia’s record is also poor, but not nearly as confrontational. On the one hand, Moscow still engages in wild and baseless accusations about United States bioweapons activity, and it dismisses all requests for accountability for, or clarity about the current status of, its own prior biological weapons program—the existence of which President Boris Yeltsin admitted in 1992, and that defectors have confirmed, but that Yeltsin’s successors have gone back to denying. On the other hand, Russia was helpful in 2017 in working with us and the United Kingdom to get the Biological and Toxin Weapons Convention process back on track.

### (2) Nuclear Energy

When it comes to nuclear energy cooperation, Russia’s record is also mixed. On the one hand, modern Russia thankfully no longer does what the Soviet Union did in using nuclear energy cooperation as a cover for providing facilities, technological assistance, and training—and very nearly a prototype nuclear weapon—to the nuclear weapons program of Maoist China in the 1950s. On the other hand, Russia is consistently willing to deviate downward from global nonproliferation “best practices” in order to make money and develop strategic relationships from the massively state-subsidized export of nuclear power technology. The Kremlin uses the

civil nuclear sector to advance its own foreign policy and security aims, with nonproliferation goals a distant afterthought.

By not insisting upon sound nonproliferation practices as a condition for such supply, Russia has been encouraging a “race to the bottom” in terms of the nonproliferation requirements. Unlike the United States, Moscow does not require that countries it supplies with nuclear reactors, equipment, and fuel have in force an IAEA Additional Protocol to help reassure the international community against the presence of undeclared and illicit nuclear activities. Nor does Russia observe OECD financing guidelines for nuclear power plants, or ask for all of the nonproliferation protections that the U.S. requires in all nuclear cooperation agreements with other countries. The Nuclear Suppliers Group was established so that suppliers would adopt high nonproliferation standards and would not use lax requirements for commercial advantage. Russia is, unfortunately, not the only global nuclear supplier to use proliferation irresponsibility as a marketing tool, but there is clearly much room for improvement here.

### (3) Nuclear Security

In nuclear security, Russia’s track record is also mixed. On the one hand, the world was horrified by the Kremlin’s use of radioactive material Polonium-210 to assassinate Alexander Litvinenko in London in 2006. In response to the UK’s inclusion of information about that poisoning in the IAEA’s Incident and Trafficking Database (ITDB), Russia compounded the damage by trying to undermine the legitimacy and credibility of that database. This is worrying, for the ITDB is the only international mechanism for tracking State-confirmed incidents and facilitating information-sharing on radioactive or nuclear material that has fallen out of regulatory control, and its operation is a significant contribution to maintaining security standards and preventing nuclear terrorism worldwide.

So that is clearly a problem, and not the sort of thing one would expect from a good nonproliferation partner. It was also disappointing that after many years of good cooperative work together—during which U.S. “Nunn-Lugar” Cooperative Threat Reduction program dedicated many resources to improve nuclear security practices of the former Soviet Union—Russia decided in 2013 not to extend this project that had made the world much safer.

On the other hand, Russia’s cooperative track record is good when it comes to things such as implementing the 1997 U.S.-Russia Plutonium Production Reactor Agreement (PPRA), which required the permanent shutdown of 13 Russian and 14 U.S. production reactors from the Cold War era. The PPRA mandates annual inspections of each side’s shutdown reactors and inspections of the safe and secure storage of the more than 10 tons of weapon-grade plutonium produced by the last three Russian PPRA reactors prior to their shutdown under the agreement.

So that is clearly a success story, although we should not forget that U.S. funding played a pivotal role in providing the replacement heat and electricity that facilitated the last three of those reactor shutdowns in Siberia more than a decade ago. Joint U.S. and Russian implementation of the 2004 Russian Research Reactor Spent Fuel Return Agreement has also been highly successful, resulting in the removal and blend-down of more than two tons of Russian highly enriched uranium (HEU) from 16 countries—12 of which are now considered “HEU-free” as a result. Russia has been a good partner in that effort, and the agreement was extended for 10 more years in 2013, to continue this important HEU minimization effort for the handful of remaining countries still holding Russian-origin HEU.

Another success is the Global Initiative to Combat Nuclear Terrorism (GICNT), which the United States and Russia jointly established more than a decade ago, and of which we have served as co-chairs ever since. Under these auspices, Russia routinely sends experts to engage in

GICNT events promoting “best practices” and sharing experiences in nuclear security, and it has supported an effective multilateral work program. In GICNT, Russia and the United States remain good partners, helping enable the Initiative’s 88 other partners to work together to address critical practical issues at the nexus between nuclear security and counterterrorism.

(4) Nonproliferation Sanctions

The record is also clearly mixed with regard to the enforcement of proliferation sanctions against rogue proliferators such as North Korea and Iran. Russian support—or at least its *non-opposition*, given its Security Council veto rights—was obviously critical to imposing U.N. sanctions against both of those countries in the first place, and for the most part Russia has complied with such sanctions as indeed international law requires.

However, Russia has recently failed to uphold its DPRK sanctions commitments. Russia has become increasingly active in its efforts to circumvent international mechanisms associated with U.N. sanctions enforcement against North Korea, including blocking designations, by the United Nations’ “Resolution 1718 Committee,” of vessels caught in illegal sanctions evasion, and in conducting illicit ship-to-ship transfers of prohibited North Korean commodities. This is a worrying trend that, unchecked, could sabotage the global pressure campaign, which is necessary to achieve the final fully verified denuclearization of the DPRK.

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**d. United Kingdom**

On May 4, 2018, the Agreement for Cooperation between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for Cooperation in Peaceful Uses of Nuclear Energy, was signed at Washington and on May 7, 2018 the Agreement (U.S.-UK 123 Agreement) was transmitted by the President to the Congress. Under the Atomic Energy Act of 1954, as amended, such agreements must undergo a Congressional review period of 90 days of continuous session. If during that time no resolution of disapproval is enacted, they may be brought into force. The President approved the proposed Agreement pursuant to section 123 b of the Atomic Energy Act in Presidential Determination No. 2018–07 of April 30, 2018. 83 Fed. Reg. 20,711 (May 8, 2018). The Presidential determination, based on views, recommendations, and statements from interested departments and agencies, is that performance of the proposed Agreement “will promote, and will not constitute an unreasonable risk to, the common defense and security.”

**e. Mexico**

The Agreement between the Government of the United States of America and the Government of the United Mexican States for Cooperation in Peaceful Uses of Nuclear Energy was signed at Washington on May 7, 2018, and transmitted by the President to the Congress on May 8, 2018. Like the U.S.-UK 123 agreement, the U.S.-Mexico agreement may be brought into force if no resolution of disapproval is enacted during a Congressional review period of 90 days of continuous session. The President approved

the proposed Agreement pursuant to section 123 b of the Atomic Energy Act in Presidential Determination No. 2018–06 of April 30, 2018. 83 Fed. Reg. 20,709 (May 8, 2018). The Presidential determination, based on views, recommendations, and statements from interested departments and agencies, is that performance of the proposed Agreement “will promote, and will not constitute an unreasonable risk to, the common defense and security.”

## **C. ARMS CONTROL AND DISARMAMENT**

### **1. United Nations**

#### ***a. Treaty Banning Nuclear Weapons***

On October 24, 2018, the P5 issued a joint statement reiterating their opposition to the Treaty on the Prohibition of Nuclear Weapons (“TPNW”). The statement includes the following:

We remain committed under the [NPT] to the pursuit of good faith negotiations on effective measures related to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control. We support the ultimate goal of a world without nuclear weapons with undiminished security for all. We are committed to working to make the international environment more conducive to further progress on nuclear disarmament.

It is in this context that we reiterate our opposition to the Treaty on the Prohibition of Nuclear Weapons. We firmly believe that the best way to achieve a world without nuclear weapons is through a gradual process that takes into account the international security environment. This proven approach to nuclear disarmament has produced tangible results, including deep reductions in the global stockpiles of nuclear weapons.

The TPNW fails to address the key issues that must be overcome to achieve lasting global nuclear disarmament. It contradicts, and risks undermining, the NPT. It ignores the international security context and regional challenges, and does nothing to increase trust and transparency between States. It will not result in the elimination of a single weapon. It fails to meet the highest standards of non-proliferation. It is creating divisions across the international non-proliferation and disarmament machinery, which could make further progress on disarmament even more difficult.

We will not support, sign or ratify this Treaty. The TPNW will not be binding on our countries, and we do not accept any claim that it contributes to the development of customary international law; nor does it set any new standards or norms. We call on all countries that are considering supporting the TPNW to reflect seriously on its implications for international peace and security.

On October 30, 2018, Assistant Secretary Ford delivered remarks on the TPNW at a disarmament conference in Reykjavik, Iceland. His remarks are excerpted below and available at <https://www.state.gov/remarks-and-releases-bureau-of-international-security-and-nonproliferation/the-treaty-on-the-prohibition-of-nuclear-weapons-a-well-intentioned-mistake/>. See *Digest 2017* at 792-93 for Dr. Ford’s 2017 remarks on the nuclear weapons ban treaty.

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[T]he proposed Treaty would neither make nuclear weapons illegal nor lead to the elimination of even a single nuclear weapon. Contrary to what its supporters might wish, it makes no impact that would support any new norm of customary international law that would in any way be binding on any state having nuclear weapons today. In particular, all NPT nuclear-weapon States consistently and openly oppose the “Ban,” along with their military allies around the world. The text of the treaty *itself* is inconsistent with creation of any norm of non-possession of nuclear weapons, inasmuch as it does not actually prohibit States from joining while still having nuclear weapons, and only envisions them relinquishing such devices at an unspecified future date and under unspecified future circumstances. Far from contributing to some kind of non-possession norm, the Treaty seems itself to prove there’s no such thing.

Nor could the TPNW ensure *verification* of nuclear weapons elimination even if it occurred, for the text carefully declines to say anything intelligible about verifying compliance with the very prohibition it purports to bring about. Specifically, it envisions three separate scenarios—and then it gets each one of them wrong. For states that do not possess nuclear weapons, for instance, it relies on outdated system for International Atomic Energy Agency (IAEA) inspections that was designed for different purposes, and which has been known for a quarter century to be inadequate to the challenge of rooting out clandestine nuclear activity. This standard is already demonstrably inadequate in the NPT context, and it would be no better in connection with a “Ban.”

For states that possess nuclear weapons, the TPNW drops the ball even more emphatically. The Treaty offers a “disarm then join” scenario or a “join then disarm” scenario, but without spelling out any of the details such states would need to know in before accession—either in order to have confidence in effective verification or in order to protect against the disclosure of proliferation-sensitive information in the course of disarming.

- For those that disarm *before* joining, verification of this disarmament is to be done pursuant to an agreement negotiated only after accession. Such countries, therefore, are asked to come aboard without knowing the verification regime to which they would be subject under the Treaty.
- Those that opt to disarm *after* joining would be in an even more problematic situation, inasmuch as it is not just verification but the very process of disarmament *itself* that is to be worked out only after a possessor state joins the treaty. One would be asked to accede, in other words, without any assurance of protecting against the compromise of weapons design information, the disclosure of which could fuel proliferation to state or non-state actors.

No possessor state would willingly agree to disarm under those conditions, nor could anyone have any real confidence ahead of time that disarmament on such terms would actually work.

Almost amusingly, the TPNW also trips over its own feet by barring a nuclear weapons possessor that joins the treaty from assisting with the safe and effective removal and dismantlement of *another* country's nuclear weapons. Article I of the TPNW would thus, in effect, prohibit cooperative efforts to achieve the fundamental purpose of the "Ban" by the only people who might be able to provide such help without this aid becoming itself a proliferation risk. Did the TPNW's proponents *really* intend to create an instrument that might prohibit negotiated, cooperative denuclearization efforts such as those the United States is pursuing with the North Korea? One gets the impression that this is just another area in which things just weren't thought through.

In short, the idea that the Ban Treaty provides any kind of viable framework for bringing about or verifying the dismantlement of a state's nuclear weapons program is wishful, and indeed simply magical, thinking.

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Nor would the international community necessarily be able to rely upon the well-established, tried and true institutions of the NPT and the broader global nonproliferation regime to control the pernicious nuclear dynamics that could be set in motion by the TPNW, for the "Ban" works at cross-purposes to these nonproliferation institutions. As I noted earlier, the TPNW deliberately ignores—and backs away from—decades of progress in making the Additional Protocol into the global safeguards standard by reifying the outdated verification system of the INFCIRC/153 IAEA comprehensive safeguards agreement. TPNW proponents have claimed that the "Ban" does not interfere with the NPT, but the TPNW explicitly provides that between parties to the treaty *it* takes precedence over pre-existing international agreements to the extent they contain inconsistent obligations. And, despite solemn promises to the contrary from "Ban" supporters, TPNW debates are already beginning to intrude upon and poison discourse within multilateral fora such as the NPT review process and the IAEA Board of Governors and General Conference.

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Supporters of the "Ban" effort seem to be struggling a bit to persuade states that it would really be in their interest to sign up, and while they may still eventually get enough accessions to meet the requirements TPNW's entry-into-force provisions, a number of countries seem to be gradually waking up to the potential real-world costs and risks of joining. ...

In saying this I do *not* simply refer to the bizarre withdrawal provision of the TPNW, which would penalize ... any state that joins the treaty, insofar as it explicitly prevents the effective withdrawal of such a state so long as it is a party to an armed conflict. ...

... I mostly refer to more immediately practical dangers. ... Any country that joins the TPNW would be required to enshrine the purported illegality of nuclear weapons in its own national law by taking "legal, administrative, and other measures, including the imposition of penal sanctions, to prevent and suppress any activity" prohibited under the Treaty. ...

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For all of these reasons, therefore, the TPNW is clearly a colossal mistake . . . .

And, fortunately, there *is* a better way. . . . [O]ther people are thankfully working to develop concrete ways to *improve* those conditions in ways that will facilitate further disarmament progress.

- Technical and policy experts have been hard at work, for instance, in the International Partnership for Nuclear Disarmament Verification (IPNDV) and the Nuclear Verification “Quad” process, as well as the UN Group of Governmental Experts on Nuclear Disarmament Verification, to explore how to answer the practical and technical challenges associated with being able to undertake and verify dismantlement of nuclear weaponry in nonproliferation-responsible ways.
- In addition, responsible countries . . . support effective nuclear safeguards—including universalization of the Additional Protocol and its establishment as a condition for nuclear supply—as well as sternly effective compliance enforcement when countries break the rules. They also support sound nuclear safety and security best practices, to protect against accidents and malicious acts and keep state and non-state actors alike from acquiring nuclear weapons capabilities. And they work to ensure that the IAEA gets and uses the support and resources it needs in order to play its critical role in nuclear safeguards, safety, and security around the world.
- A broad coalition of diplomats from around the globe are also working to overcome Chinese and Pakistani stonewalling in the Conference on Disarmament, in order to allow that body finally to begin negotiating a Fissile Material Cutoff Treaty (FMCT), while others are promoting the universal adoption of moratoria on nuclear weapons testing and working to ensure that the International Data Center (IDC) and the International Monitoring System (IMS) in Vienna are properly resourced to help guard against clandestine nuclear testing. A similarly broad coalition is working tirelessly to protect and reinforce the Chemical Weapons Convention (CWC) and the international norm against the use of chemical weapons from countries determined to shield the Syrian regime of Bashar al-Assad and others from accountability for atrocities committed with chemical weapons.
- In the United States, moreover, we are continuing our dismantlement of retired nuclear weapons, proud of the extraordinary and unprecedented nuclear disarmament success we have had over the last three decades in cutting the size of our arsenal by some 88 *percent* from its Cold War peak. The United States and Russia have both met the New START Treaty’s central limits, capping strategic arsenals at the lowest levels since early in the Cold War, and we continue to implement the Treaty. We also continue to encourage stability-focused engagement by and between *other* nuclear weapons possessors around the world in order to minimize the dangers of such possession and ensure the safe management of nuclear deterrence during whatever period still remains before to the long hoped-for final elimination of such weapons.
- Still other experts from around the world are currently developing plans, under the new “Creating the Conditions for Nuclear Disarmament” (CCND) initiative, for a broad, multilateral dialogue—one involving not just diplomats and government officials but a range of more nontraditional stakeholders, on both a global and a regional basis—to identify ways in which states can do more, as the NPT Preamble exhorts all of us, to ease tension and strengthen trust between states in order to facilitate nuclear disarmament. We hope and expect to be able to reveal more of these plans in the near future.

All of these efforts are, in important ways, disarmament efforts, for they contribute to changing actual security conditions in the real world in ways that are likely to facilitate future progress on disarmament. As “effective measures” for facilitating nuclear disarmament, all of these efforts contribute to the fulfilment of the disarmament objectives described in the NPT and the obligations set forth in its Article VI. All of them, together, are in effect thus part of a broad and growing collective endeavor that offers a far more serious, thoughtful, and indeed *viable* way forward than does the confused and counterproductive TPNW.

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**b. P5 Approach to Disarmament**

On December 10, 2018, Dr. Ford addressed a conference on nonproliferation looking forward to the 2020 NPT Review Conference (“RevCon”). The topic for the conference on December 10<sup>th</sup> was the role of the five permanent members of the Security Council (“P5”) in global nonproliferation and disarmament policy in the lead-up to the 2020 NPT RevCon. Dr. Ford’s remarks are excerpted below and available at <https://www.state.gov/the-p5-process-and-approaches-to-nuclear-disarmament-a-new-structured-dialogue/>.

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[T]he P5 states have made very clear—most recently in a joint statement issued at the United Nations First Committee in October—their continuing commitment to the NPT in all its aspects.

One of those aspects, of course, is the pursuit of good-faith negotiations on nuclear disarmament ... The P5 have proclaimed their continued commitment to this goal, declaring at the First Committee that they “support the ultimate goal of a world without nuclear weapons with undiminished security for all ... [and] are committed to working to make the international environment more conducive to further progress on nuclear disarmament.” And indeed, with the exception of China, the actions of the P5 states in eliminating the vast majority of their nuclear weapons stocks after the end of the Cold War epitomize the sort of extraordinary progress that is achievable when conditions in the security environment make such movement possible.

The critical question now, however, is: “Where do we go next?” The P5 have engaged regularly on NPT matters, and will continue to do so, but despite their shared commitments and central role in the NPT, they do not form a unified front on NPT matters. ...

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Some of these problems, of course, stem from the destabilizing and provocative actions of rogue regimes such as Iran and North Korea, but others stem directly from the conduct of P5 states—in particular, the determination by two of them to use military coercion to expand the territories under their control. Moreover, Russia has been blithely violating arms control agreements for years while seeking to shift blame to others, maintains a vast arsenal of non-

strategic weapons, and all but boasts of constructing for itself a sprawling new and destabilizing array of nuclear delivery systems. For its part China remains opaque regarding its strategic intentions and the motivations behind its continuing and steady buildup of both its conventional and nuclear forces. These actions have contributed to a deteriorating global security environment, eroding the disarmament-conducive conditions that prevailed for years after the end of the Cold War.

Making things worse, from the perspective of our collective disarmament goals, these global and regional security challenges emerged at a time when traditional post-Cold War approaches to disarmament were running out of steam. Notwithstanding widespread complaints of the supposed lack of progress on disarmament, those traditional approaches had been hugely successful—leading, for instance, to a United States reduction by about 88 percent in the number of nuclear warheads we had at our Cold War peak. Nevertheless, by definition, eliminating weapons made unnecessary by the end of the Cold War was not an approach that could continue to move disarmament forward indefinitely so as long as any nuclear deterrence still remained necessary in our complex and troubled world, let alone in a world beset by worsening security problems.

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Painfully aware of how the traditional approach to disarmament has exhausted itself, and of the deteriorating security environment in which real-world disarmament decisions must necessarily be made, we in the United States undertook a bottom-up review of nuclear disarmament policy in the summer of 2017. That autumn, our interagency approved a new approach to disarmament policy based around dialogue aimed at identifying and addressing negative factors in the global security environment, and in regional contexts, that presently stand in the way of movement toward the ultimate goal of nuclear disarmament as envisioned in the Preamble and Article VI of the NPT.

The new U.S. approach to a reality-based dialogue was publicly announced in October 2017, and subsequently informed the discussion of disarmament issues that appeared in the new U.S. Nuclear Posture Review. In May 2018, it formed the basis of a seminal United States' position paper at the NPT Preparatory Committee (PrepCom) meeting in Geneva, entitled "Creating the Conditions for Nuclear Disarmament," which announced a new initiative by that same name—under the acronym "CCND."

This new initiative aims to move beyond the traditional approach that had focused principally upon "step-by-step" efforts to bring down the number of U.S. and Russian nuclear weapons, but that did so in ways that did *not* provide a pathway to address the challenge of worsening security conditions, did *not* address nuclear build-ups by China, India, and Pakistan, and did *not* provide an answer to challenges of deterrence and stability in Europe and the Indo-Pacific, and that had clearly stalled.

This new discourse, building on the foundation provided by our 2017 review, is both more realistic than these traditional modes of thought and more consonant with the security challenges facing the real-world leaders whose engagement is essential for disarmament. ...

#### IV. A Productive Start ... But More is Needed

Since the announcement of this new initiative by U.S. officials, our diplomats have had success in promoting these concepts in bilateral engagements and in multilateral fora. These concepts have been reflected in the disarmament language of the Japanese-sponsored "United Action" resolution adopted with U.S. support at the UN General Assembly's First Committee in 2017, and in the nonproliferation language of the 2018 G7 Foreign Ministers and

Nonproliferation Directors Group (NPDG) documents, and it has influenced national policy and diplomatic statements by a number of likeminded states—including the disarmament statement issued by the P5 at the First Committee in October.

This concept of a “conditions” discourse has also elicited notable interest and even support from some influential think tanks and civil society actors who are not normally well disposed toward U.S. nuclear weapons policy, some of which have expressed interest in hosting “conditions”-focused programming or are already beginning to do so. The new “conditions” discourse is also now a critical part of U.S. diplomatic messaging and public diplomacy as we head toward the NPT RevCon in 2020, marking the 50th anniversary of the NPT’s entry into force.

We recognize, however, that merely *announcing* a desire for a “conditions” dialogue to help the international community find a viable path toward disarmament is not enough. ...

Accordingly, in October 2018, the United States stepped up its efforts to solicit input from international partners and other relevant stakeholders ...

... We propose, therefore, to use the same basic organizational model for operationalizing the “conditions” discourse as is currently being used by the International Partnership for Nuclear Disarmament Verification (IPNDV).

As many of you already know, the IPNDV is a multilateral effort that has brought more than 25 states with and without nuclear weapons together to try to address specific, practical problems related to how actually to verify the achievement of nuclear weapons dismantlement to international audiences without contributing to proliferation by spreading weaponization knowledge. ... The IPNDV, in other words, is a demonstrably successful model that already resonates with the international stakeholders who would be involved in “conditions” engagements.

Accordingly, we have decided to establish a notionally titled “Creating the Conditions Working Group,” or CCWG. Like the IPNDV, the CCWG will include functional subgroups. This is necessary because in contrast to the IPNDV, which speaks solely to the specific challenges associated with disarmament verification, the CCWG will need to address differing practical aspects of the broader disarmament challenge. The goal of the CCWG will be to identify aspects of the real world security environment that present major obstacles to further disarmament movement and to develop specific proposals for how those obstacles might be overcome.

As we envision it, the CCWG would consist of perhaps 25 to 30 countries selected on the basis of both regional and political diversity, and united both by the understanding that further progress on disarmament requires addressing the security issues which impede it, and by a shared commitment to finding ways to do so. As long as states are committed to constructive dialogue aimed at finding ways to make regional and global conditions more conducive to disarmament, both ardent disarmers and disarmament skeptics would all be welcome.

The program of work for the CCWG would begin with an identification of key issues that, if addressed effectively, could improve prospects for progress on nuclear disarmament. The United States has already provided some thoughts in the working paper submitted to the NPT PrepCom in May 2018, but all participants will be invited to offer their own views. An initial deliverable for the CCWG will be to come to at least provisional agreement on such a list, which would thereafter be the basis upon which the Group would establish sub-groups to look at functional challenges.

After that, the next step will be to identify which specific issues from the list are most suitable for initial in-depth study by subgroups. Up to three subgroups will be established, with associated co-chairs, each assigned a specific functional topic. The co-chairs will be chosen to reflect the diversity of opinion on how to achieve progress on a given topic, but they would also be chosen from among states and individuals most able to provide constructive contributions. We in the United States would organize a small Executive Secretariat for the overall CCWG, staffed by the United States, which would also facilitate the functioning of each subgroup. As with the IPNDV, much of the work of these subgroups would be conducted virtually, through the exchange of working papers, but the working groups would also meet periodically for in-person consultations, hosted by one of the partners. (Concurrent, co-located sessions of all the groups, would allow for states with limited resources to participate as fully as they wish.) Once every 12 to 18 months, a plenary session will be held to review the work of the individual groups and plan for next steps.

We also envision identifying a suitable NGO to assist the CCWG both with logistics and resource support and with substantive input, as has proven helpful for the IPNDV. The subgroups and plenaries would be largely funded by the participant hosting them, our experience at IPNDV having shown that having additional funding sources allows for more diversity in hosting. This would not necessarily exclude other mechanisms for dialogue, and we will need to consider how to engage with states that are not part of the CCWG. Outside the structure of the CCWG itself, additional NGOs would also be encouraged to convene complementary efforts—such as colloquia on “conditions”-related issues that would bring academics and former policymakers together in “Track 1.5” or “Track 2” contexts in order to explore particular challenges, as one partner government has very helpfully already suggested.

We hope to have implementation planning for the new CCWG well underway by the time of the 2019 NPT PrepCom next spring, and to have the working group and its subgroups in full swing before the 2020 Review Conference.

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**c. *Conference on Disarmament***

Permanent Representative to the United Nations Nikki Haley issued a statement on May 29, 2018 on Syria assuming the presidency of the Conference on Disarmament in Geneva for a four-week period. The presidency of the CD rotates among members and the rules of the CD do not allow any member to block another member’s rotation. Her statement is excerpted below and available at <https://usun.usmission.gov/press-release-ambassador-haley-on-syria-assuming-the-presidency-of-the-conference-on-disarmament/>.

During this period, the United States will limit participation in informal sessions convened by the presidency and will continue to highlight the hypocrisy of Syria holding this position in spite of its continued use of chemical weapons and disregard for its other disarmament obligations.

It is shameful that a regime that continues to use chemical weapons to murder its own people has the audacity to accept the presidency of the very

organization that established the Chemical Weapons Convention. The Assad regime does not have the moral authority to chair an organization that helped establish the global norms for ending the use of these heinous weapons. It should immediately relinquish the presidency, and every country that supports accountability for the use of weapons of mass destruction should share our outrage and join us in opposing Syria's presidency.

## 2. Comprehensive Nuclear Test Ban Treaty

The 2018 NPR (which is discussed in section A.2, *supra*) conveys the U.S. decision not to seek ratification of the Comprehensive Nuclear Test Ban Treaty ("CTBT"), though the NPR also states that the United States will continue its support for the CTBT Organization Preparatory Committee, the International Monitoring System, and the International Data Center. Excerpts follow from pages 63 and 72 of the 2018 NPR.

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Along with its nuclear weapon development and production infrastructure, NNSA [National Nuclear Security Administration] will maintain the capability to resume underground nuclear explosive testing if called upon to do so. The United States will not seek Senate ratification of the Comprehensive Nuclear Test Ban Treaty, but will continue to observe a nuclear test moratorium that began in 1992. This posture was adopted with the understanding that the United States must remain ready to resume nuclear testing if necessary to meet severe technological or geopolitical challenges.

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Although the United States will not seek Senate ratification of the Comprehensive Nuclear Test Ban Treaty, it will continue to support the Comprehensive Nuclear Test Ban Treaty Organization Preparatory Committee as well as the related International Monitoring System and the International Data Center, which detect nuclear tests and monitor seismic activity. The United States will not resume nuclear explosive testing unless necessary to ensure the safety and effectiveness of the U.S. nuclear arsenal, and calls on all states possessing nuclear weapons to declare or maintain a moratorium on nuclear testing.

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## 3. International Partnership for Nuclear Disarmament Verification

As discussed in *Digest 2014* at 824-25, and *Digest 2015* at 863-66, the United States advocated for and led the way in establishing the International Partnership for Nuclear Disarmament Verification ("IPNDV"). On April 27, 2018, Anita E. Friedt, Principal Deputy Assistant Secretary of State for Arms Control, Verification and Compliance delivered

remarks at an IPNDV side event at the 2018 NPT PrepCom. Her remarks are excerpted below and available at <https://www.state.gov/remarks-at-the-ipndv-side-event-at-the-2018-npt-prepcom/>.

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[T]he Partnership began as a collaboration between the U.S. Department of State and the Nuclear Threat Initiative to foster collaborative engagement between states with and without nuclear weapons on the technical challenges associated with verifying nuclear disarmament.

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The work of the past three years has really highlighted the utility of collaboration between states with and without nuclear weapons, and demonstrated clearly that all states have something useful to contribute to this important subject.

Given the gaps in verification technology, the Partners were able to produce an excellent body of work during Phase I. That work was focused narrowly on potential procedures and technologies applicable to warhead dismantlement. In Phase II the working groups will build off of that work and expand their scope to the broader elements of the nuclear dismantlement process.

To conclude this discussion, I would like to offer some thoughts on why the United States, and I think all of the Partner states, see this work as important to helping lay the groundwork for future nuclear disarmament.

Despite the great work produced during Phase I, substantial technical challenges remain. However, we are hopeful that, thanks to the Partnership's broad range of technical expertise, the IPNDV is uniquely suited to identifying solutions that will provide for credible means and methods of future verification. Now and in the future, verification will remain a key element of taking steps toward a world without nuclear weapons.

Over the three years of the Partnership's existence, more than 30 countries have participated in IPNDV activities. This collaboration among states with and without nuclear weapons is leading to the development of technologies, capabilities, and experience that can provide a basis for that verification.

During the most recent meeting in Stockholm, the Partners welcomed representatives from Hungary, Nigeria, and Pakistan, which will participate in the upcoming Group of Governmental Experts (GGE) on Nuclear Disarmament Verification. The inclusion and contributions of these states, which were not already members of the Partnership, will only help to further advance the work of both the IPNDV and the Nuclear Disarmament Verification GGE.

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#### **4. New START Treaty**

On February 5, 2018, the central limits set out in Article II of the New START Treaty took effect. See February 5, 2018 State Department press statement, available at

<https://www.state.gov/new-start-treaty-central-limits-take-effect/>. Both the United States and Russia have met these central limits as required under the Treaty. The Fifteenth Session of the Bilateral Consultative Commission under the New START Treaty was held in Geneva April 10-20, 2018. See April 19, 2018 State Department media note, available at <https://www.state.gov/fifteenth-session-of-the-bilateral-consultative-commission-under-the-new-start-treaty/>. The delegations to the BCC discuss practical issues related to the implementation of the Treaty. The Sixteenth Session of the BCC was held in Geneva from October 10–18, 2018. See October 18, 2018 State Department media note, available at <https://www.state.gov/sixteenth-session-of-the-bilateral-consultative-commission-under-the-new-start-treaty/>.

## 5. INF Treaty

On December 4, 2018, the State Department issued a fact sheet regarding Russia’s violation of the Intermediate-Range Nuclear Forces (“INF”) Treaty. The fact sheet is excerpted below and available at <https://www.state.gov/russias-violation-of-the-intermediate-range-nuclear-forces-inf-treaty/>. See Chapter 4 of this *Digest* for the text of the December 4, 2018 diplomatic note from the Embassy of the United States of America to the Russian Federation providing notice that the United States would suspend its obligations under the INF Treaty effective 60 days from the date of the note.

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Since 2013, the United States has raised its concerns with Russia regarding Russian development of a ground-launched cruise missile (NATO designator: SSC-8, Russian designator: 9M729) with a range capability between 500 and 5,500 kilometers on repeated occasions. These include more than 30 engagements at all levels of the Russian government.

Russia has repeatedly changed its cover story regarding its violating missile. For more than four years, Russia denied the existence of the missile and provided no information about it, despite the U.S. provision to Russia of the location of the tests and the names of the companies involved in the development and production of the missile. Russia only admitted that the missile existed after we publicly announced the missile system’s Russian designator but claimed that the missile was incapable of ranges beyond 500 kilometers and, therefore, INF Treaty-compliant. Russia refuses to provide the United States any more information about the missile, its capability, or its testing history to support Russia’s contention that the missile is Treaty-compliant. Despite such obfuscation, Russia claims that it wants to preserve the Treaty.

The United States has convened five meetings of the parties’ technical experts to discuss Russia’s INF Treaty violation since 2014. These meetings included two sessions of the Special Verification Commission, the Treaty body responsible for addressing compliance concerns, in November 2016 and December 2017, and three bilateral U.S.-Russia meetings of technical experts in September 2014, April 2015, and June 2018. At each of these meetings, the United States pressed Russia on its violating missile, urged it to come back into compliance, and

highlighted the critical nature of our concerns. These actions were met with denials, obfuscation, and falsehoods. In contrast, Russia has initiated zero expert meetings with the United States on this topic during this time period and has not engaged in a substantive manner.

The United States has provided detailed information to Russia regarding its violation over the course of these bilateral and multilateral engagements, giving more than enough information for Russia to engage substantively on the issue. ...

If Russia had decided it wanted to return to compliance, it had a clear path forward. There are measures in the Treaty that were used for eliminating systems, which Russia could have adopted to verifiably destroy the SSC-8 and its associated equipment. Russia decided not to do so.

It is important to note that, in addition to violating the INF Treaty, Russia is also not complying with its obligations under several other arms control treaties, including the Open Skies Treaty, the Chemical Weapons Convention, and the Conventional Armed Forces in Europe Treaty.

#### **U.S. Compliance with the INF Treaty**

The United States is in compliance with its obligations under the INF Treaty, and Allies affirmed this most recently in the NATO Summit declaration in July 2018. In contrast to Russia's refusal to answer substantively key U.S. questions about the SSC-8/9M729, the United States has provided Russia with detailed information explaining why the United States is in compliance with the INF Treaty. The United States has even presented some of this information publicly, including in a separate factsheet on the State Department webpage.

#### **U.S. Response to Russia's Violation**

The United States is declaring that Russia's ongoing violation of the INF Treaty constitutes a material breach of the Treaty. As a consequence of Russia's material breach, the United States will suspend its obligations under the Treaty effective in 60 days from December 4 unless Russia returns to full and verifiable compliance.

Russia must return to full and verifiable compliance; Russia's failure to do so will result in the demise of the INF Treaty. We should be clear that Russia has not shown any indications that it seeks to return to compliance.

As described in the 2018 Nuclear Posture Review, the United States is committed to arms control efforts that advance U.S., allied, and partner security; are verifiable and enforceable; and include partners that comply in a verifiable manner with their obligations. An arms control treaty that restrains only one side, while the other side violates it, is not effective in making us safer. Rather, it undermines the very idea of arms control as a tool to enhance our collective security.

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Also on December 4, 2018, Secretary Pompeo delivered remarks at NATO headquarters in Brussels, declaring Russia to be in material breach of the INF Treaty. Secretary Pompeo's remarks are excerpted below and available at <https://www.state.gov/press-availability-at-nato-headquarters/>.

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These violations of the INF Treaty cannot be viewed in isolation from the larger pattern of Russian lawlessness on the world stage. The list of Russia's infamous acts is long: Georgia, Ukraine, Syria, election meddling, Skripal, and now the Kerch Strait, to name just a few.

In light of these facts, the United States today declares it has found Russia in material breach of the treaty and will suspend our obligations as a remedy effective in 60 days unless Russia returns to full and verifiable compliance.

We're taking these steps for several reasons. First, Russia's actions gravely undermine American national security and that of our allies and partners. It makes no sense for the United States to remain in a treaty that constrains our ability to respond to Russia's violations. Russia has reversed the trajectory of diminishing nuclear risk in Europe, where America has tens of thousands of troops and where millions more American civilians are living and working. These Americans live and work alongside many more millions of Europeans who are put in danger by Russian missile systems.

Second, while Russia is responsible for the demise of the treaty, many other states—including China, North Korea, and Iran—are not parties to the INF Treaty. This leaves them free to build all the intermediate range missiles that they would like. There is no reason the United States should continue to cede this crucial military advantage to revisionist powers like China, in particular when these weapons are being used to threaten and coerce the United States and its allies in Asia.

If you ask the question why the treaty wasn't enlarged to include more nations, including China, keep in mind that it has been tried three times without any success already, and it has failed each time.

Third, inertia will not drive policy in the Trump administration. As President Trump has made clear and as I spoke about this morning, the United States will not support international agreements that undermine our security, our interests, or our values.

Finally, and I want to be clear about this, America is upholding the rule of law. When we set forth our commitments, we agree to be bound by them. We expect the same of our treaty counterparts everywhere, and we will hold them accountable when their words prove untrustworthy. If we do not, we'll get cheated by other nations, expose Americans to greater risk, and squander our credibility.

Earlier today, I spoke on America's enduring leadership role in the international order and I reiterate that powerful American leadership means never abandoning our responsibility to protect our security and our nation's sovereignty. I've stated our position in no uncertain terms. The United States remains hopeful that our relationship with Russia can get better, can get on better footing.

With that being said, the burden falls on Russia to make the necessary changes. Only they can save this treaty. If Russia admits its violations and fully and verifiably comes back into compliance we will, of course, welcome that course of action. But Russia and Russia only can take this step.

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On December 6, 2018, U.S. Ambassador to Russia John M. Huntsman and Under Secretary of State for Arms Control and International Security Andrea L. Thompson provided a briefing on the INF Treaty. Their remarks are excerpted below and available at <https://www.state.gov/briefing-on-the-intermediate-range-nuclear-forces-treaty-inf/>.

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**AMBASSADOR HUNTSMAN: ...**

Let me just start by saying this. We've discussed our concerns about Russia's longstanding violations of the Intermediate-Range Nuclear Forces Treaty for many years now ... under two administration[s] ... . We've had probably 30 engagements over five years at a high level. We've had probably five engagements by expert-level groups, including two SVC—that's our verification commission—at a request by the United States, both in 2016 and 2017.

So we have been at this for many years now. We in NATO have gone to great lengths to preserve this treaty. However, no one believes, nor is there any reason to believe, that Russia is going to resolve this problem—of its own creation, by the way—and come back into compliance even after the President's October 20 announcement.

So we are now moving ahead with implementing the President's October 20 decision because Russia's violation poses a clear threat to U.S., European, and global security. The United States is declaring that Russia's ongoing violation of the INF Treaty constitutes a material breach of the treaty. The United States will suspend its obligations under the treaty effective 60 days from December 4th, which is when Secretary Pompeo just a couple of days ago laid it out in very clear terms, unless Russia returns to full and verifiable compliance.

Now Russia must return to full and verifiable compliance, or their failure to do so will result in the demise of the INF Treaty. But we should be clear: Russia has not shown any indication so far that it seeks to return to full compliance.

This also does not mean we are walking away from arms control. We are doing this to preserve the viability and integrity of arms control agreements more broadly. We remain committed to arms control, but we need a reliable partner and do not have one in Russia on INF, or for that matter on other treaties that it's violating.

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**UNDER SECRETARY THOMPSON: ...** [W]ith the Secretary and the United States formally declaring on Tuesday that Russia is in material breach of the INF, that ... decision really demonstrates to all nations ... that this administration ... takes our arms control treaties seriously ... .

And just as a reminder, as Ambassador Huntsman raised, Moscow began cheating on the INF Treaty in 2008 when they began flight-testing of the SSC-8, the cruise missile that has the excess of ranges that the treaty permits. And as he mentioned, we've confronted Russia multiple times over the course of the five-plus years and the 30 detailed engagements and raised it with them. We confronted them with the evidence of the violation. They feigned ignorance. The Obama administration has raised it, as the ambassador raised it as well. November of last year our administration raised it. We named the missile in question, and Russia went from denying the missile's existence and now claiming it is in compliance. And as the vice chairman, as Paul Selva testified to Congress and we've stated as well, that Moscow has filled in multiple battalions of the SSC-8, and all of them are positioned for offensive purposes.

We've exercised patience with this across two administrations; like the ambassador mentioned, over 30 occasions since 2013. We've raised it at the highest levels to the Putin regime that a failure to return to the status quo would have consequences, and they've—continue to violate the treaty. And this—President Trump has said repeatedly our first responsibility is to protect the safety and security of the American people, and that promise relies upon a credible military deterrent. With our INF Treaty that it doesn't bind the likes of China or Iran or North Korea, and if we want credible arms control agreements we've got to demonstrate that our treaties are worth the paper they're written on. It's important to me as under secretary, to Secretary Pompeo and the President that our arms control agreements are adhered to.

We've engaged with partners and allies. I'm sure we'll talk about that this afternoon. You saw the very strong statement from NATO and the remarks by the secretary-general. Again, we've engaged with partners and allies both before, during, and we'll continue for next steps. But it's very clear that President Putin broke the terms of the INF Treaty. He's done other violations, which I'm sure we'll talk about. And again, I look forward to your questions this afternoon, and thanks for making the time.

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**AMBASSADOR HUNTSMAN: ...**

The issue of INF compliance comes up in virtually every high-level meeting we have. It comes up at high-level meetings, it comes up at working-level meetings, and not only during the year-plus that I have been here but certainly for the previous almost five years as well. So there is a consistency with which this issue has been raised, a consistent messaging now over two administrations. Information has been presented that makes our case on the SSC-8.

Frankly, I heard somebody today say that we were somehow giving an “ultimatum,” I think was the word that they used. And I had to say no, this is exactly the opposite of an ultimatum. This has been very methodically worked now over two administrations, five years, dozens of engagements at the very, very senior level. When you have two signatories to the 30-year-old agreement taking us back to 1987, arguably one of the most important and successful launch control agreements in the history of arms control, and you find that today—indeed over the better part of the last five years—one of two of those signatories is abiding by the obligations, it becomes foolhardy to carry on.

So here we are. The decision has been made, and the 60-day clock has started. I think we're two days into it. And Russia has the ability over the 60-day period to return to full, verifiable compliance, or the result will be the end of the INF as we know it today.

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**AMBASSADOR HUNTSMAN:** One can only surmise that they're trying to get ahead in the game, a little bit like violations we're seeing with other treaties, whether it's the Open Skies Treaty or whether it's the Chemical Weapons Convention. It's an ability to somehow seek an advantage, and that's something that we're not willing to put up with. It's a straight-up violation of the agreement. We've been very, very clear about it. And now we've finally reached the point where we're willing to do something about it.

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**UNDER SECRETARY THOMPSON:** ... [T]he legal effect of suspension for us means that we're no longer obligated to implement the treaty's provisions. So the treaty remains in force during this period of suspension, so for the 60-day period we remain in force. But again, if and when that next step is made, then we would not be obligated by that, so would be able to continue the efforts. But next steps on the funding, building, and deploying of those systems, I would refer to my DOD partners, but I have the utmost faith and confidence that they will do whatever it takes to defend our security and prosperity. But again, reiterate that we are still adhering to our treaty's provisions under this time.

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## 6. Open Skies Treaty

In the 2018 Compliance Report, discussed in section A.1., *supra*, the United States summarized the limited, reversible, Treaty-compliant measures it was taking in response to Russian violations of the Treaty on Open Skies ("OST"), a regime governing observation flights over the territories of Treaty Parties using specified types of sensors. Excerpts follow from the 2018 Compliance Report, Part III.

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Belarus and the Russian Federation (hereafter, Russia) participate in the Treaty as the Belarus/Russian Federation Group of States Party. The United States first began addressing compliance concerns regarding the Belarus/Russian Federation Group of States Party in the 2004 Compliance Report. All OST issues that rise to the level of violations or compliance concerns that impact the United States in 2017 are related to Russia alone.

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The United States will continue to raise and discuss implementation issues in the context of multilateral consultations and bilaterally with the Russian Federation to improve common understanding of Treaty requirements and expectations.

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### **BELARUS/RUSSIAN FEDERATION GROUP OF STATES PARTY (RUSSIA) FINDING**

In 2017, the United States determined that Russia was in violation of Section III of Annex A to the Treaty and OSCC Decision 3/04 for imposing and enforcing a sublimit of 500 kilometers over the Kaliningrad Oblast for all flights originating out of Kubinka Open Skies Airfield. The United States informed all States Party of this determination on June 20, 2017, at the OSCC.

**CONDUCT GIVING RISE TO FINDING**

In 2014, Russia introduced a 500-kilometer sublimit on the distance that any observation mission could fly over the Kaliningrad Oblast, including any mission originating from Kubinka Open Skies Airfield, which otherwise has a maximum flight distance of 5,500 kilometers and provides sufficient range to observe the entire Kaliningrad Oblast. In 2017, Russia refused three proposed flight plans from the United States that had flight distances of greater than 500 kilometers over the Kaliningrad Oblast: 1) in September, Norway, and the United States proposed a flight distance of 1,102 kilometers over Kaliningrad; 2) on another flight in September, the United States and Ukraine proposed a flight distance of 685 kilometers over Kaliningrad; and 3) in October, Sweden and the United States submitted a flight distance of 581.2 kilometers. After Russia rejected these flight plans, the observing Parties modified the plans, under protest, to include a distance of less than 500 kilometers over Kaliningrad in order to be able to conduct the observation mission. In the corresponding mission reports, the United States cited Russia's imposition of the sublimit as the reason for the modifications, which were made without prejudice to the observing Parties' Treaty rights.

**ANALYSIS OF FINDING**

As established in Section III of Annex A to the Treaty, flights originating from the Kubinka Open Skies Airfield are subject to a maximum flight distance of 5,500 kilometers. No Treaty provision permits a State Party to establish a sublimit within the maximum flight distance of an established Open Skies Airfield, as Russia did for missions originating from the Kubinka Open Skies Airfield for the territory of Kaliningrad. To the contrary, subparagraph 1(b) of OSCC Decision 3/04 precludes a State Party from decreasing the maximum flight distance of an Open Skies Airfield. Russia's 500-kilometer sublimit on flights over the Kaliningrad Oblast is therefore inconsistent with Section III of Annex A to the Treaty and OSCC Decision 3/04.

**FINDING**

In 2017, the United States determined that Russia was in violation of provisions of Article VI of the Treaty for refusing access to observation flights in a ten kilometer corridor along its border with the Georgian regions of South Ossetia and Abkhazia.

**CONDUCT GIVING RISE TO FINDING**

Although no State Party submitted a flight plan in 2017 that included a proposed flight path within ten kilometers of Russia's border with the Georgian regions of Abkhazia and South Ossetia, Russia stated during the reporting period that it would continue to reject such flight plans because it considered those regions independent nations that are not States Party to the Treaty.

**ANALYSIS OF FINDING**

Paragraph 2 of Section II of Article VI of the Treaty prohibits flight within ten kilometers of a border with a non-State Party. Russia claims that the South Ossetia and Abkhazia regions of Georgia are independent States and not party to the Treaty, and thus takes the position that Paragraph 2 of Section II of Article VI prohibits flight within ten kilometers of its border with those regions. However, South Ossetia and Abkhazia are within the internationally recognized borders of Georgia, and are considered by all other States Party to be part of Georgia, which is a State Party to the Treaty. Accordingly, the U.S. position is that there is no basis within the Treaty to prohibit observation flights from within ten kilometers of any portion of the Russian-Georgian border, thereby denying States Party the right to observe those parts of Russia's territory. Russia's policy with regard to such flights is therefore inconsistent with Russia's obligations under Article VI of the Treaty. The United States notes that the operational question

of facilitating flights could be resolved without prejudice to Parties' political views on the status of Abkhazia and South Ossetia, should Russia choose to do so.

### **EFFORTS TO RESOLVE FINDING**

As in previous years, in 2017 the United States and other States Party raised their compliance concerns repeatedly at meetings of the OSCC and in bilateral and multilateral consultations with Russia. The United States continued to oppose any restriction inhibiting an observing Party's right to observe any point on the observed Party's territory in accordance with the Treaty.

In March 2016, the United States, Allies, and partners decided to engage Russia diplomatically in an effort to try to understand and resolve these concerns with Russia through consultation. Allies sought to engage Russia as early as April 2016, but Russia declined to discuss these issues until July 2016. At that time, Russia agreed to experts meetings in a Small Group format that included Russia and several other States Party.

This group met three times between September 2016 and March 2017. After the last meeting in March 2017, the United States came to the conclusion that Russia did not share the U.S. interest in engaging substantively toward a mutually agreeable resolution. At the March 2017 meeting, Russia's representatives rejected U.S. proposals to agree on areas where the United States might document progress from the discussions and questioned the value of further engagement on the U.S. concerns in the Small Group format, bringing the effort the United States initiated in 2016 to a disappointing close.

At the OSCC Plenary on September 26, 2017, the United States announced it would take several limited, Treaty-compliant, and reversible measures aimed at encouraging Russia to return to full compliance with the Treaty. Specifically, the United States said it would:

- revise the flight distance associated with the access to the leeward Hawaiian Islands to a maximum of 900 kilometers as part of the special procedures provided for in subparagraph 5(b)(2) of Annex E to the Treaty;
- cease the practice of waiving certain published Federal Aviation Administration (FAA) rules, procedures, and guidelines on flight safety for Open Skies flights; and
- no longer allow courtesy overnight accommodations at certain mainland Open Skies Refueling Airfields (OSRAs) that are not needed to enable territorial access.

On October 23, 2017, the Russian Delegation to the OSCC stated that Russia would take "reciprocal" actions in response to the U.S. measures.

At the December 11, 2017, OSCC Plenary, Russia stated that it would cease implementing a series of bilateral, operational agreements/arrangements instituted in 2006, 2007, 2008, and 2011 to facilitate Open Skies Treaty implementation. As of December 31, 2017, the impact of Russia's actions on U.S. Treaty implementation was still being assessed.

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**D. CHEMICAL AND BIOLOGICAL WEAPONS****1. General****a. OPCW Special Session**

On June 26, 2018, Deputy Secretary of State John J. Sullivan addressed the Fourth Special Session of the Conference of States Parties to the Organization for the Prohibition of Chemical Weapons (OPCW) at The Hague. Deputy Secretary Sullivan's remarks are excerpted below (with emphases omitted) and available at <https://www.state.gov/statement-at-fourth-special-session-of-the-conference-of-the-states-parties/>.

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For much of the Chemical Weapons Convention's long history, the OPCW and States Parties had a singular focus of destroying legacy chemical weapons stockpiles. The use of chemical weapons was an issue for a bygone era, or so we thought. But, sadly, that is no longer the case.

State and non-State actors are challenging the international norm against chemical weapons use. Allowing chemical weapons use to continue with impunity threatens our rules-based order and all nations around the world.

Chemical weapons have been used recently, to tragic effect, across the world—in Asia, the Middle East, and here in Europe. The Assad regime has continued to use chemical weapons to terrorize and kill Syrians civilians. In March 2018, we saw the use of an unscheduled military-grade nerve agent in a brazen assassination attempt on UK soil. Last year, the chemical agent VX was used to assassinate Kim Jong-Nam in the Kuala Lumpur International Airport. Further, the Islamic State of Iraq and Syria has used chemical weapons repeatedly in Iraq and Syria in recent years. These barbaric acts must stop now.

The United States believes that the OPCW, State Parties, and indeed the Chemical Weapons Convention itself, are up to the task. The Chemical Weapons Convention can—and should—adapt and remain relevant to the changing security environment.

The OPCW is a Nobel Peace Prize winning organization for a reason. It has proven its ability to adapt readily to change, to respond ably and quickly to wide-ranging crises, with highly professional and dedicated experts implementing its mission.

The draft decision put forward by the United Kingdom and a number of co-sponsors, including the United States, provides a roadmap to reaffirming the international norm against the use of chemical weapons. It provides concrete actions to attribute responsibility to those who have violated this value that we all share.

Today, on behalf of the United States, I call on all State Parties to support this decision and to provide the OPCW with the tools it needs to further our shared goals of deterring, preventing, and responding to chemical weapons use.

Removing the ability to use chemical weapons with impunity is a first step towards restoring deterrence against chemical weapons use. We must first empower the OPCW so that it

can ably identify those who are responsible for the confirmed instances of chemical weapons use in Syria.

The OPCW Fact-Finding Mission has been investigating credible allegations of chemical weapons use in Syria since 2014, and, relying on its cadre of chemical weapons experts, has confirmed such use many times over. Unfortunately, the fact-finding mission is limited by its mandate from following the facts to identify those responsible.

The OPCW-UN Joint Investigative Mechanism (The JIM) in Syria proved that it is possible, through countless hours and dogged investigative work, to put forward a thorough, independent, and impartial analysis to determine CW attribution. There is no reason to believe that the same Organization involved in such work for the JIM is not up to the same task itself. The United States deeply regrets that Russia vetoed the JIM renewal in the UN Security Council. Russia has also been campaigning against any action in the OPCW Executive Council on Syria.

The second tool OPCW needs is the ability to build on its existing mandate to assist States Parties in the event of chemical weapons use on their territory. As we have seen in the UK and Iraq, the OPCW provides State Parties with technical assistance related to national investigations of chemical weapons use. To further provide assistance, the Director General has established the Rapid Response and Assistance Mission. The United States supports the Technical Secretariat expanding assistance options to help State Parties *prevent* chemical weapons use before it occurs.

Third, is the ability of the OPCW to further facilitate enhanced capacity-building. This includes tools to allow the OPCW to help Parties to implement their Chemical Weapons Convention obligations, enhance chemical security, and enable international cooperation in the field of chemical activities for those purposes not prohibited by the Convention.

Finally, the OPCW needs to be able to share information with other investigative efforts. This collaboration would allow us to feed into the work and expertise of other investigative mechanisms, such as the Commission of Inquiry and the International, Impartial, and Independent Mechanism, which support our goals of ensuring that chemical weapons cannot be used with impunity.

To conclude, I want to emphasize the United States' determination that restoring the norm against chemical weapons use is a collective responsibility that calls for collective action. We are grateful to the diplomatic coalition of countries that are working to uphold the norms against the use of chemical weapons—the International Partnership against Impunity for the Use of Chemical Weapons and the Australia Group.

We must continue to use the Partnership as an instrument to share information on chemical weapons use and counter false narratives. Through the Partnership, we can build the capacity of Participating States to coordinate our response in the face of chemical weapons use. These economic, judicial, and political arrangements exist for coordinated action. Now is the time to put them into action – to impose serious costs for those actors who make that fateful decision to use chemical weapons. It is absolutely vital that we stand united and use the tools at our collective disposal to deter the future use of CW by anyone, anywhere.

Although the drafters of the Chemical Weapons Convention did not imagine a world where chemical weapons use would increase over time, they nonetheless drafted a treaty that can be responsive to our current environment. Chemical weapons use may have created a crisis, but we as States Parties can put an end to that crisis, by taking decisive action to further enable the OPCW Technical Secretariat to address chemical weapons use and further prevent its re-emergence.

As many of you know, President Trump stated in April 2017: “it is in the vital national security interest of the United States to prevent and deter the spread and use of deadly chemical weapons.” We have taken this to heart and are committed to doing our utmost to stop, *and hold accountable*, those who use chemical weapons.

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**b. *Fourth Special Session of the Conference of the States Parties to Review the Operation of the Chemical Weapons Convention (REVCON IV)***

On November 22, 2018, Ambassador Kenneth D. Ward, U.S. Representative to the OPCW, addressed the Fourth Special Session of the Conference of the States Parties to Review the Operation of the Chemical Weapons Convention (“REVCON IV”). His remarks are excerpted below and available at <https://www.state.gov/remarks-at-the-fourth-special-session-of-the-conference-of-the-states-parties-to-review-the-operation-of-the-chemical-weapons-convention-revcon-iv/>.

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It is an honor to join you today as part of the Fourth Review Conference of the Chemical Weapons Convention (CWC) to evaluate the implementation of the Convention and address significant developments over the last five years. Without a doubt, the Organization for the Prohibition of Chemical Weapons (OPCW) has undergone more change and faced more challenges in the last five years than in the preceding fifteen years combined, greatly deserving its Nobel Peace Prize.

Indeed, the OPCW is a Nobel Peace Prize winning organization for a reason. As highlighted by U.S. Deputy Secretary of State Sullivan at the historic special session of the Conference of the States Parties in June, the Organization has proven, again and again, its ability to adapt readily to change, to respond ably and quickly to wide-ranging crises, and to remain relevant to the ever changing security environment, with its highly professional and dedicated experts. It is essential that the Organization retain this adaptability. Responsible states parties must continue to find ways to deter future CW use and restore the international norm against the use of chemical weapons.

One of the founding principles of the CWC is to “exclude completely the possibility of use of chemical weapons, through implementation of the provisions” of the CWC. The success of this principle depends entirely on all States Parties’ compliance with their obligations. When States Parties fail to meet these obligations, they must be held accountable. No one should think that they can develop, retain, use, or transfer chemical weapons and get away with it. Unfortunately, there are States Parties in this room that think their conduct has no consequences and that they can act with impunity. Today, I would like to focus on non-compliance by those States Parties and highlight what we have done and what we need to do to take on the challenges posed by these States. Member States should join together, just as we did in June, and hold those responsible accountable.

***First, let me start with addressing the Syrian regime's chemical weapons program and its repeated use of chemical weapons against its own people.***

Although destruction of the declared Syrian regime stockpile was completed in August 2014, the Syrian regime has used chemical weapons against its people from before it joined the Chemical Weapons Convention and its repeated use has continued. The Syrian regime repeatedly used chemical weapons to compensate for its lack of military manpower to achieve battlefield goals and to compel rebel surrender.

The Syrian Arab Republic was found responsible for four attacks in 2014, 2015, and 2017. It likely would have been found responsible for additional chemical weapons use if Russia had not used its veto on the UN Security Council to block renewal of the OPCW-UN Joint Investigative Mechanism.

To be clear, Syria has retained the ability to produce and use more chemical weapons. The United States assesses the regime still has chemicals—specifically sarin and chlorine—that can be used in future attacks. The Syrian military also has a wide variety of chemical capable munitions—including grenades, aerial bombs, and improvised munitions—that can be used with little or no warning. Indeed, the June CSP decision concludes that the Assad regime has failed to declare and destroy all of its chemical weapons and chemical weapons production facilities.

***Next, I will turn to two states that are enabling Syria's chemical weapons use by shielding the Assad regime from consequences in international fora, while at the same time pursuing their own offensive chemical weapons programs.***

*Iran.* The United States has had longstanding concerns that Iran maintains a chemical weapons program that it failed to declare to the OPCW. The United States is also concerned that Iran is pursuing Central Nervous System-Acting Chemicals for offensive purposes. These efforts are especially concerning because Iran is the world's leading state sponsor of terrorism and remains the most significant challenge to Middle East stability. I would like to highlight three examples of Iran's declaration failures:

- First, Iran failed to declare its transfer of chemical weapons to Libya in the 1980s. When the post-Gadhafi Libyan government found these weapons in 2011, Iran never declared the transfer of the weapons, despite OPCW formal requests to States Parties about their origin. They were clearly of Iranian origin as evidenced by the Farsi writing on the boxes containing the artillery shells.
- Second, Iran has not declared all of its riot control agents. Iran has marketed delivery systems and chemicals, including CR at defense expos. Iran has not declared any holdings of CR.
- Third, Iran failed to submit a complete chemical weapons production facility declaration, specifically a CWPF filling capability. In light of the discovery of chemical-filled artillery projectiles and aerial bombs that Iran transferred to Libya and assessed Iranian-origin chemical-filled 81mm mortars found by Iraq during United Nations Special Commission inspections, the United States assesses that Iran filled and possessed chemical weapons. Iran, however, did not declare a CWPF filling capability.

*Let me turn now to Russia.* In March 2018, only months after claiming to have completed destruction of its chemical weapons stockpile, Russia used an unscheduled, military-grade nerve agent in an assassination attempt of the Skripals in Salisbury, the United Kingdom. The UK's investigation into the assassination attempt on Sergei and Yulia Skripal concluded that two Russian nationals were responsible for the attack and that these two individuals are officers from the Russian military intelligence service, also known as the GRU.

The use of this nerve agent in Salisbury demonstrates that Russia has not met its obligations under the CWC and still maintains a chemical weapons program, in clear violation of Article I. The United States again urges Russia to abandon its chemical weapons program, declare and fully eliminate it under international verification. Russia must be held accountable for flouting its international obligations under the Chemical Weapons Convention.

Further, as the United States has underscored repeatedly, the Russian Federation's actions to shield the Syrian regime from international accountability also make it complicit in the Syrian regime's use of chemical weapons.

***Now let me turn to what we are doing to address non-compliance and what other States Parties can also do together so that when this august body meets again in five years' time we may be closer to fully realizing a world free of chemical weapons.***

***First, ensuring accountability.*** In June, responsible states joined together in adopting the decision "Addressing the Threat from Chemical Weapons Use" which provides the OPCW Technical Secretariat with additional tools to respond to chemical weapons use, including the means to identify the perpetrators of chemical weapons attacks in Syria. Importantly, the decision also directs the OPCW to share information it collects with the United Nations, to build capability to defend against chemical weapons use, and to obtain the advice of outside experts for Technical Assistance Visits, if needed. These tools should serve as a deterrent for State and non-State actors considering the use of chemical weapons in the future. It is incumbent upon all of us to ensure that the special CSP decision is fully implemented.

***Second, updating the Chemical Weapons Convention Schedules.*** Last month, the United States, Canada, and the Netherlands submitted to the Director-General a technical proposal to update the Annex on Chemicals in accordance with CWC Article XV, paragraph 5. Specifically, we seek to add two families of chemicals to the Schedules that include the novichok chemical agent used in Salisbury and that claimed a life in Amesbury. Novichoks are military-grade nerve agents with no known purposes not prohibited by the CWC. We call on all States Parties to support the technical change proposal so that these heinous chemicals can be added to Schedule 1 of the Annex on Chemicals without delay and thus be subject to the CWC's stringent verification regime.

***Third, retaining OPCW capability, flexibility, and expertise through Voluntary Contributions to the Future OPCW Center for Chemistry and Technology.*** The United States strongly supports this initiative of the Director-General to ensure that the laboratory further enhances its analytical capabilities and maintains its stature as a world-class institution. We are further reviewing our options to financially contribute toward such an important effort and encourage other States Parties to also lend financial support to this important undertaking.

***Fourth, endorsing a CNS-acting Chemical Non-Use Policy Statement.*** The United States calls on responsible states to endorse a non-use policy regarding aerosolisation of CNS-acting chemicals. This endorsement would include international support recognizing that the aerosolised use of CNS-acting chemicals is not consistent with the law enforcement exception to the Chemical Weapons Convention. The United States proposed taking this step last year, and we propose it once again. Let us not wait to take action on this issue until it is too late.

To conclude, the United States believes that all of us gathered here today have a vested interest in the success of the mission of the OPCW. Restoring the norm against chemical weapons use is a collective responsibility that calls for collective action. I challenge us all never to forget why this organization was awarded the Nobel Peace Prize in 2013 and to channel our collective determination to rid the world, once and for all, of all chemical weapons.

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## 2. Chemical Weapons in Syria

### a. *Attack in Douma*

On April 10, 2018, the Security Council considered different draft resolutions on the use of chemical weapons in Syria. Ambassador Haley delivered the U.S. explanation of vote on each of the drafts. First, Ambassador Haley delivered remarks before the vote on the drafts. Those remarks are excerpted below and available at <https://usun.usmission.gov/remarks-before-a-vote-on-a-draft-un-security-council-resolution-on-the-use-of-chemical-weapons-in-syria/>.

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We have reached a decisive moment as a Security Council. On Saturday, the first haunting images appeared from Douma in Syria. We gathered around this table yesterday to express our collective outrage. We then collectively agreed that this Council must take steps to determine exactly what happened in Douma, and to put an end to these barbaric attacks.

The United States has put forward a resolution that accomplishes these shared goals. For weeks, we have been working with every single delegation on this Council to develop a new attribution mechanism for chemical weapons attacks in Syria. We held open and transparent negotiations, so every delegation could provide their input.

And we went the extra mile for one Council member. We adopted paragraph after paragraph of Russia's proposed resolution. We tried to take every Russian proposal that did not compromise the impartiality, independence, or professionalism of a new attribution mechanism.

After the Douma attack, we updated our resolution with common-sense changes. Our proposal condemns the attack. It demands unhindered humanitarian access for the people in Douma. It calls on the parties to give maximum cooperation to the investigation. And it creates the attribution mechanism that we worked so hard with each of you to develop. This resolution is the bare minimum that the Council can do to respond to the attack.

The United States did everything possible to work toward Security Council unity on this text. Again, we accepted every recommendation that did not compromise the impartiality and independence of the proposed attribution mechanism.

I want to say a brief word about Russia's resolution, which is also before us for a vote. Our resolutions are similar, but there are important differences. The key point is our resolution guarantees that any investigations will truly be independent. Russia's resolution gives Russia itself the chance to choose the investigators and then to assess the outcome. There is nothing independent about that.

The United States is not asking to choose the investigators, and neither should Russia. The United States is not asking to review the findings of any investigation before they are final, and neither should Russia.

All of us say we want an independent investigation. Our resolution achieves that goal. Russia's does not. This is not an issue that more time or more consultations could have resolved. At a certain point, you're either for an independent and impartial investigation, or you're not. And now that the Douma attack has happened, this is not a decision that we can delay any longer.

The United States calls on all Security Council members to vote in favor of our resolution and to abstain or vote against the Russian draft. The Syrian people are counting on us.

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Next, Ambassador Haley provided the U.S. explanation of vote after the Security Council voted on the draft resolutions on the use of chemical weapons in Syria. That statement, excerpted below, is available at <https://usun.usmission.gov/explanation-of-vote-on-a-draft-resolution-on-the-use-of-chemical-weapons-in-syria-2/>.

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The votes have been cast. The record will show that today, some countries decided to stand up for truth, accountability, and justice for the Syrian people. Most countries saw the horror that took place in Douma last weekend at the hands of the Assad regime and realized that today was a time for action.

Month after month, the Assad regime, with full support of Russia and Iran, has strung along this Council. They ignored our calls for a ceasefire. They ignored our calls for political dialogue. They ignored our calls for deliveries of humanitarian aid. They ignored our calls to stop using chemical weapons – weapons that are universally banned from war. And then, last weekend, the Assad regime forced a moment of reckoning on all of us by gassing people of Douma.

The United States and the countries that joined us today could not allow this attack to go unanswered. The record will not be kind to one permanent member of this Council. Unfortunately, Russia has chosen the Assad regime again over the unity of this council. We have said it before that Russia will stop at nothing to shield the Assad regime. And here is our answer.

Russia has trashed the credibility of the Council. They are not interested in unity or compromise. Whenever we propose anything meaningful on Russia, Russia vetoes it. It's a travesty. They have now officially vetoed resolutions that would hold these barbaric uses of chemical attacks by Assad six times. It did not need to turn out this way.

For weeks, the United States has led transparent, good faith negotiations with all Security Council members to establish an attribution mechanism for chemical weapons in Syria. We started from a simple premise—that every Council member would want to know who was responsible for using these barbaric and illegal weapons. We did everything to accommodate Russia's views. Russia surprised us with a proposed resolution, calling all of us into the Security Council and handing out a draft on the spot. After hearing widespread concerns about their draft, Russia moved ahead anyway—accommodating no one's views.

We could have done the same thing. But instead, we tried to take as much as we could from Russia's draft, while maintaining an impartial and independent process. We were

negotiating in good faith. Many aspects of our resolutions were similar. Russia said investigators should have safe access to the places where chemical weapons were used. We agreed. Russia said they wanted an impartial, independent, and professional investigation. We agreed. Russia said that the investigators should be recruited on as wide a geographical basis as possible. We agreed. Russia said they wanted reports on the activities of non-State actors involving chemical weapons. Even though this sounded to us like an attempt to distract from the Assad regime, we included Russia's request. We even gave our mechanism the name Russia wanted—the United Nations Independent Mechanism of Investigation.

There were really only two key differences between our draft and Russia's. But those differences speak volumes. First, Russia wanted to give themselves the chance to approve the investigators who were chosen for the task. And second, Russia wanted to have the Security Council assess the findings of any investigation before any report was released. Does any of that sound independent or impartial?

So Russia's proposal wasn't about an independent and impartial investigation at all. It was all about protecting the Assad regime. This is a sad day. The United States takes no pleasure in seeing Russia exercise its sixth veto on the issue of chemical weapons in Syria.

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Ambassador Haley provided an additional explanation of vote for the United States, excerpted below, and available at <https://usun.usmission.gov/explanation-of-vote-on-a-draft-resolution-on-the-use-of-chemical-weapons-in-syria/>.

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[T]oday, Russia vetoed for the sixth time a resolution condemning Assad for chemical weapons attacks on his own people. So no matter what we do, Russia will be consistent. They'll continue to play the games. And once again, they're putting forward yet another surprise resolution. The first time any of us saw it was today at 11:00 a.m. They held no negotiations. They took no input. And when Sweden asked that the Council be allowed to discuss the resolution, they allowed it, but they didn't allow any changes to it. So there's a reason Russia didn't want to discuss their resolution, because it doesn't accomplish anything.

The draft resolution mainly asks for the Organization for the Prohibition of Chemical Weapons to send a fact-finding mission to Douma, but the fact-finding mission is already traveling to Douma. They already have a mandate to investigate and collect samples. But what makes it worse is Russia includes several provisions in its resolution that are deeply problematic and that yet again seek to compromise the credibility of the international investigation. The resolution puts Russia and the Assad regime itself in the driver's seat for making arrangements for the fact-finding mission investigators. We're just supposed to trust that the same government who says everything about the Douma attack was fake will work in good faith with the OPCW. This draft also tries to micromanage how the FFM should carry out its investigation, dictating where the investigators should go. Like we've always said, for an investigation to be credible and independent, the investigators must choose where they think they should go. This Council,

least of all Russia, should not be calling the shots. For these reasons, the United States voted “no” on this resolution.

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On April 16, 2018, Ambassador Kenneth D. Ward, U.S. permanent representative to the OPCW, delivered the U.S statement to the OPCE’s 58<sup>th</sup> Executive Council meeting regarding the attack in Douma. His remarks are excerpted below and available at <https://www.state.gov/statement-by-the-united-states-to-the-opcw-58th-meeting-of-the-executive-council/>.

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It is utterly deplorable that, once again, the Executive Council must address a horrific chemical weapons attack by Syria. On 7 April, just three days after this Council convened—on the anniversary of the 4 April 2017, Khan Shaykhun attack—the Syrian city of Douma came under an intense chemical weapons attack which killed dozens of innocent civilians and injured hundreds more. Initial reports indicate the attack in Douma could result in a similar level of civilian casualties as experienced by the town of Khan Shaykhun last year. These horrors need to stop.

After years of repeated and systematic use of chemical weapons, the chemical weapons attack in Douma represents yet another escalation of the Assad regime’s barbaric chemical weapons attacks on its own people. The Assad regime continues to terrorise its own citizens despite international condemnation for its use of chemical weapons. This use has been confirmed by the independent and impartial OPCW-United Nations Joint Investigative Mechanism. It remains undeniable that the Syrian Government is in flagrant, indeed contemptuous, violation of international law, including the Chemical Weapons Convention and United Nations Security Council resolutions.

The United States of America would like to commend the Director-General for promptly mobilising the Fact-Finding Mission (FFM) to investigate the Douma attacks. We call on all parties to ensure that the FFM can investigate the Douma attacks safely, quickly, and with unfettered access. However, it is our understanding the Russian Federation may have visited the attack site. We are concerned they may have tampered with it with the intent of thwarting the efforts of the OPCW Fact-Finding Mission to conduct an effective investigation. This raises serious questions about the ability of the FFM to do its job.

On 13 April, U.S., French, and British forces undertook military operations against the Syrian regime. Our strikes were focused on degrading Syria’s chemical weapons capabilities and deterring further use, consistent with U.S. and our allies’ policies on Syria. The U.S. and its allies made efforts to minimise the risk of civilian casualties in the planning and execution of these strikes. The military strikes by the United States of America and our allies were legitimate, proportionate, and justified.

The United States of America has tried repeatedly to use diplomatic, economic, and political tools to stop the Assad regime’s use of chemical weapons. We have sought action at the United Nations. We have tried imposing sanctions in partnership with the EU and other

countries. However, the Russian Federation has stood in the way of every effort the United States of America and our partners have taken to address this unacceptable situation. The Russian Federation has repeatedly undermined efforts at the OPCW to pressure the regime to surrender its remaining chemical weapons stockpiles and completely dismantle its programme. The Russian Federation has also used its veto power six times over the past year to block United Nations Security Council resolutions and prevent the regime from being held accountable for its continuous use of chemical weapons. Although Russia agreed to a cessation of hostilities under United Nations Security Council resolution 2401 (2018), it has not abided by any of its terms and has only used the resolution as a tool to further the Assad regime's military aims and facilitate Syria's further use of chemical weapons against its own people.

Perhaps most telling, the Russian Federation took away the world's ability to attribute the chemical weapons attacks in Syria by vetoing the renewal of the OPCW-United Nations Joint Investigative Mechanism—an impartial, independent technical body mandated to investigate responsibility for chemical weapons use in Syria. Indeed, just days ago on April 9 and 10, the United Nations Security Council met in emergency session, and once again the Russian Federation vetoed a draft resolution that would have re-established an independent and impartial attribution mechanism that could hold the perpetrators accountable for their atrocities.

By shielding its ally, the Russian Federation has failed to live up to its guarantee underpinning the 2013 Framework Agreement that Syria would cease all use of chemical weapons and fully declare its entire stockpile for verifiable destruction. By continuing to cover for Assad's chemical weapons use, the Russian Federation has not only become morally complicit, but has betrayed the Chemical Weapons Convention and United Nations Security Council Resolution 2118 (2013). As Ambassador Haley said, "Russia could stop this senseless slaughter if it wanted to, but it stands with the Assad regime and supports it without any hesitation."

Syria's continued use of chemical weapons, and the Russian Federation's continued refusal to rein in its Syrian ally through bilateral and international action, necessitated—indeed demanded—a response. The purpose of these recent military operations taken together with key partners is not simply to hold Assad and other regime officials accountable for these atrocities, but to degrade the regime's capability to commit them, and to deter the use of these grotesque weapons in the future by the Syrian regime.

The images of dead and dying children following the Syrian regime's most recent chemical weapons attack represent a call to action among the world's civilised nations. Countries that have the ability—but fail—to hold chemical weapons users accountable render themselves enablers, if not complicit, in these outrages. Further, the failure to respond will not only embolden the Assad regime, but also convince despots around the world that weapons of mass destruction can be used with impunity.

Responding to the use of the world's most abhorrent weapons is essential to preventing their normalisation. With each chemical attack that goes unaddressed, the world grows progressively desensitised to their horror. If this trend continues, we can expect the increased acquisition and use of these weapons by additional states in the future, and that undermines the security of all.

Our strikes against Syria are part of a broader U.S. effort to deter and de-normalise the use of chemical weapons. Over the last year, we have imposed hundreds of sanctions on individuals and entities complicit in chemical weapons use in Syria and in North Korea, and designated entities in Asia, the Middle East, and Africa that have helped facilitate WMD

proliferation activities. We also expelled 60 Russian intelligence officers working under diplomatic cover in response to the Russian Federation's involvement in the Salisbury attack. We will continue to identify those aiding, abetting, or performing such atrocities, to call them out, and prevent their illicit activities. Everyone must be made to understand that the costs of using chemical weapons will always outweigh any military or political benefits.

The United States of America and our allies call upon Syria to immediately cease all use of chemical weapons, to immediately declare for destruction its chemical weapons, to immediately declare and dismantle all aspects of its chemical weapons programme, and to end the charade and cooperate fully with the OPCW in resolving all outstanding issues with respect to its declaration. We call on Syria's protectors to ensure that this time Assad complies.

The Syrian chemical weapons crisis has been going on for over five years. It is long overdue that this Council faces the reality of Syria's despicable assault on the Chemical Weapons Convention and this Organisation. It is long overdue that this Council condemns the Syrian Government for its reign of chemical terror and demands international accountability for those responsible for these heinous attacks. How many more lives must be lost to chemical weapons before we take action? How many more lives must be lost to chemical weapons before we take action?

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**b. Security Council Briefing on Chemical Weapons in Syria**

On September 6, 2018, Ambassador Haley delivered remarks at a UN Security Council briefing on the use of chemical weapons in Syria. Her remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-use-of-chemical-weapons-in-syria/>.

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History's verdict on the conflict in Syria is not yet written. There have been plenty of missteps, miscalculations, and willful negligence over the course of the war. There has been evil. There has been honor. And many things in between. I would say it should be a cause of deep shame for the members of the Council who have fought relentlessly to shield the Assad regime from accountability. Instead, those members have made a clear display of their cynicism, their penchant for brutality, and their lack of capacity for shame. ...

Today's Security Council session is devoted to chemical weapons; but make no mistake, an Assad regime offensive on Idlib would be a reckless escalation even if chemical weapons were not used. It is up to Russia to keep this from happening, and we will discuss the humanitarian consequences of the Idlib offensive in greater detail tomorrow.

In the meantime, the Russian Federation has recently been building up its naval forces off the coast of Syria—signaling that Moscow is pre-positioning itself to once more abet the murder and mayhem of the Assad regime. And, as has happened numerous times in the past, there are signs that the Assad regime is planning to use chemical weapons to finish off the siege of Idlib.

As in the past, the Syrian regime and its Russian and Iranian allies are spreading lies about who is behind chemical weapons attacks in Syria. Their claims are baseless. ... In fact, if the past is any guide, the Syrian and Russian attempts to blame others for the use of chemical agents is an indication that the Syrian regime still believes it can use these horrific weapons with impunity and an indication that the Syrian regime may be preparing to use these horrific weapons in future attacks. ...

Here are the terrible facts of the war in Syria. Five years ago, the Assad regime launched missiles containing a cocktail of deadly gas at the people of Ghouta. One thousand, four hundred, twenty-nine people were killed. On April 4, 2017, the Assad regime dropped sarin gas from the sky on the people of Khan Sheikhoun. The attack killed over 70 innocent Syrians—including dozens of children. An independent investigative group, the UN-OPCW Joint Investigative Mechanism, found the Assad regime responsible for the attack. The fact that the Russians later succeeded in killing the JIM doesn't change its conclusions. Their finding was credible, and it was definitive: Assad killed his own people with chemical weapons at Khan Sheikhoun. Then, in April 2018, over 40 people died, and hundreds received treatment for exposure to chemical weapons in Douma.

In all, the United States estimates—conservatively—that the Assad regime has used chemical weapons on its own people at least 50 times since the war began. That's easily—conservatively—1,500 innocent children, women, and men killed by the Syrian regime with chemical weapons. Fifteen hundred murders covered up by the Russian regime. And 1,500 reasons to disbelieve the claims that others are responsible for the atrocities.

As these ridiculous claims are repeated again and again, I ask everyone listening to remember this: the Syrians' and Russians' lies do not exonerate them. The Syrians' and Russians' lies only reveal Assad's guilt. The United States will not stop pushing back forcefully on these lies. We will not abandon the Syrian people.

Along with France, the United States has announced new sanctions against individuals and entities that support Assad's chemical and conventional weapons program.

In June, the Special Conference of the States Parties to the Chemical Weapons Convention decided that the Organization for the Prohibition of Chemical Weapons should identify the perpetrators of chemical attacks in Syria. Even though the United States believes the primary responsibility for addressing the use of chemical weapons belongs to the Security Council, we welcome this decision. Anything that brings us closer to bringing the Assad regime to account for its crimes enhances the security, not just of the Syrian people, but all of us.

In referencing accountability, we have a message for the Assad regime and anyone contemplating using chemical weapons in Syria. In the past 18 months, I have stood on this floor twice, promising that the United States would respond to the use of chemical weapons in Syria. Both times, this administration followed through. The United States and its allies forced the Assad regime to pay its price for its crimes. So we want to take this opportunity to remind Assad and his Russian and Iranian partners: you don't want to bet against the United States responding again.

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### 3. International Partnership Against Impunity for the Use of Chemical Weapons

On January 23, 2018, the State Department issued a fact sheet on the International Partnership Against Impunity for the Use of Chemical Weapons. The fact sheet is excerpted below and available at <https://www.state.gov/international-partnership-against-impunity-for-the-use-of-chemical-weapons/>.

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The international community is at a critical juncture in the fight to uphold the international norm against chemical weapons use. Repeated obstruction by some countries at the Organization for the Prohibition of Chemical Weapons (OPCW) and the United Nations ha[s] undermined the ability of the international community to hold accountable those who use chemical weapons.

The “International Partnership against Impunity for the Use of Chemical Weapons,” initiated by France, represents a political commitment by participating countries to hold to account those responsible for the use of chemical weapons. Countering weapons of mass destruction is a priority reflected in the new U.S. National Security Strategy. The Secretary of State’s participation in the January 23, 2018 Partnership launching conference illustrates the importance that the United States places to hold accountable those involved in the use of chemical weapons.

The Partnership supports and complements existing organizations and mechanisms, including the Chemical Weapons Convention (CWC). OPCW Director-General Ahmet Üzümcü’s participation in the launch reinforces this message of support.

#### **The Partnership**

Participating States will work together in six core areas, as stated by its Declaration of Principles:

- Collecting, compiling, retaining, and preserving relevant information to support efforts to hold accountable those responsible for the proliferation or use of chemical weapons;
- Facilitating the sharing of such information with Participating States and international or regional organizations, so that those responsible may be brought to justice;
- Using relevant mechanisms to designate individuals, entities, groups, and governments involved in the proliferation or use of chemical weapons for sanctions;
- Publicizing the names of individuals, entities, groups or governments placed under sanctions for their involvement in the proliferation or use of chemical weapons through a dedicated website;
- Strengthening the capacity of Participating States to hold accountable those involved in the use of chemical weapons, including by enhancing States’ legal and operational capabilities to identify and sanction or prosecute individuals involved in the proliferation or use of chemical weapons; and
- Supporting, where appropriate, common positions in existing fora regarding the use of chemical weapons, for example, the OPCW Executive Council and the UN Security Council and General Assembly.

Over 25 countries signed on to the Declaration of Principles on January 23, 2018.

Additional countries are welcome to join the Partnership, as long as they agree to the Declaration of Principles and Terms of Reference. Additional information on the Partnership can be found at: [www.noimpunitychemicalweapons.org](http://www.noimpunitychemicalweapons.org).

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#### 4. Russia's Use of Chemical Weapons

See Chapter 16 for further discussion of the consequences of the Secretary of State's determination that the Government of the Russian Federation used chemical weapons in violation of international law or lethal chemical weapons against its own nationals. On April 18, 2018, the State Department issued a press statement on holding Russia accountable for the March 4, 2018 chemical weapon use in Salisbury, United Kingdom. The statement is excerpted below and available at <https://www.state.gov/holding-russia-accountable-for-chemical-weapons-use-in-salisbury-uk/>.

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Today, the UN Security Council and the Executive Council of the Organization for the Prohibition of Chemical Weapons (OPCW) met to discuss the OPCW's recent findings related to the March 4 use of a military-grade nerve agent in Salisbury, UK.

The OPCW's independent report, released last week, confirms the UK lab analysis regarding the identity of the chemical used in Salisbury. We applaud the OPCW's expeditious support and technical efforts to uncover the facts.

We fully support the UK and the need for today's special meetings of the OPCW Executive Council and the UN Security Council to discuss the chemical weapons attack in Salisbury and the OPCW's detailed independent analysis.

As we have made clear, the United States agrees with the UK's assessment that Russia is responsible for this use of chemical weapons on UK soil—either through deliberate use or through its failure to declare and secure its stocks of this nerve agent.

Only the Government of Russia has the motive, means, and record to conduct such an attack. Russia developed the type of military-grade nerve agent used in Salisbury and has a record of conducting state-sponsored assassinations.

Rather than changing its harmful and destructive behavior, the Russian government offers only denials and counteraccusations to deflect attention from its culpability.

The United States condemns the use of chemical weapons anywhere, anytime, by anyone, under any circumstances. We urge our colleagues on the UN Security Council and the OPCW Executive Council to join us, as they have before, to create a unified front against the use of chemical weapons. We cannot allow the normalization of chemical weapons use.

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## 5. **Australia Group**

On January 23, 2018, the United States congratulated India on joining the Australia Group, “an informal forum that seeks to prevent the proliferation of chemical and biological weapons,” which, with India, reached 43 members. See State Department press release, available at <https://www.state.gov/u-s-congratulates-india-on-joining-the-australia-group/>. The State Department press release goes on to say:

This latest accomplishment underscores the Indian government’s excellent nonproliferation credentials and commitment to preventing the proliferation of weapons of mass destruction, including by regulating the trade of sensitive goods and technologies. Its accession bolsters the effectiveness of the regime’s nonproliferation efforts.

India is a valued nonproliferation partner. We look forward to continuing our work with India in the Australia Group in furtherance of our shared nonproliferation goals.

## 6. **Biological Weapons Convention**

The United States welcomed the Central African Republic’s deposit of its instrument of ratification to the Biological and Toxin Weapons Convention (“BWC”) in a September 26, 2018 State Department media note, available at <https://www.state.gov/united-states-applauds-central-african-republics-ratification-of-the-biological-weapons-convention/>.

**Cross References**

*Termination of Treaty of Amity with Iran*, **Ch. 4.B.1**

*Suspension of obligations under the INF Treaty*, **Ch. 4.B.6**

*Leibovitz v. Iran (regarding JCPOA)*, **Ch. 5.A.3**

*Iran v. United States (ICJ case relating to JCPOA)*, **Ch. 7.B.1**

*Russia*, **Ch. 9.A.5**

*Disarmament aspects of outer space*, **Ch. 12.B**

*Iran/JCPOA*, **Ch. 16.A.1.a**

*DPRK sanctions*, **Ch. 16.A.5**

*Russia sanctions*, **Ch. 16.A.6**

*Nonproliferation sanctions*, **Ch. 16.A.7**

*Conventional weapons*, **Ch. 18.B**