

DIGEST OF
UNITED STATES PRACTICE
IN INTERNATIONAL LAW

2020

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 2020.

This is the twenty third edition of the *Digest* published by the International Law Institute, and the eighth 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 2020 *Digest* on ILI's website.

This online version exactly duplicates the *Digest* for 2020 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 2020, to be useful.

Don Wallace, Jr.
Chairman
International Law Institute

DIGEST OF
UNITED STATES PRACTICE
IN INTERNATIONAL LAW

2020

CarrieLyn D. Guymon

Editor

Office of the Legal Adviser
United States Department of State

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Introduction

The 2020 edition of the *Digest of United States Practice in International Law* reflects the ways in which the work of the Office of the Legal Adviser continued during the global coronavirus pandemic. As usual, the *Digest* also covers 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.

The impact of the pandemic is evident in nearly every area of legal practice and, accordingly, every chapter in this volume. Beginning in January 2020, a series of presidential proclamations, memoranda, and other measures suspended and restricted entry into the United States to prevent further spread of COVID-19. Many scheduled international meetings had to be postponed beyond 2020 if they could not be convened virtually, including, for example: the 26th session of the Conference of the Parties (“COP26”) to the UN Framework Convention on Climate Change (“UNFCCC”); the 109th Session of the International Labor Conference; the 10th Nonproliferation Treaty (“NPT”) Review Conference (“RevCon”); and sessions of the Bilateral Consultative Commission under the New START Treaty. United States diplomatic notes argued against onerous restrictions on the basis of reciprocity and asserted inviolability, among other privileges and immunities under the Vienna Convention on Diplomatic Relations (“VCDR”), on behalf of arriving and departing personnel when many governments around the world instituted quarantine and testing requirements as conditions of entry and exit. The United States provided a written statement explaining its position on the 73rd World Health Assembly (“WHA”) resolution on the COVID-19 response and made further statements emphasizing the importance of the International Health Regulations (“IHR”) and transparency and timely sharing of public health data and information. The United States supported UN Security Council resolution 2532, calling for an immediate cessation of hostilities in all situations on its agenda after the UN Secretary General’s call for a worldwide ceasefire to combat the pandemic.

Even in the unusual year that was 2020, representatives of the U.S. government continued to explain U.S. views and positions on critical topics, albeit sometimes virtually. Early in the year, the general counsel for the Department of Defense, Paul C. Ney, Jr., delivered remarks explaining certain legal considerations related to the U.S. air strike against Qassem Soleimani. The United States strongly objected to the ICC Appeals Chamber authorizing an investigation into activities of the Taliban and U.S. and Afghan personnel related to Afghanistan and also objected to the ICC prosecutor’s assertion of jurisdiction over Israel. The United States submitted its observations on the Human Rights Committee (“HRC”) draft General Comment No. 37 on Article 21 of the International Covenant on Civil and Political Rights (“ICCPR”) regarding peaceful assembly (General Comment No. 37 was adopted by the HRC during its

129th session, held online). The United States submitted comments to the International Law Commission (“ILC”) regarding sea-level rise in relation to the Law of the Sea.

There were numerous developments in 2020 relating to U.S. international agreements, treaties and other arrangements. The United States and Sudan signed a claims settlement agreement in relation to the 1998 East Africa embassy bombings, the 2000 attack on the U.S.S. Cole, and the 2008 killing of a USAID employee. The U.S. government, the Bailiwick of Jersey, and the Government of the Federal Republic of Nigeria signed an agreement for the return of more than \$308 million in stolen assets to the Nigerian people. Seven countries signed bilateral instruments with the United States implementing the “Artemis Accords,” relating to international cooperation on and around the Moon, to include the “Gateway,” a habitable station in the Moon’s orbit. The President transmitted to the Senate for advice and consent to ratification several law enforcement-related instruments: instruments related to the U.S.-Croatia Extradition Treaty and the U.S.-Croatia Mutual Legal Assistance Treaty; the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (“Beijing Convention”); and the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (the “Beijing Protocol”). Air transport agreements (“ATAs”) with The Bahamas, Qatar, and Bangladesh entered into force, and the United States negotiated ATAs with Kazakhstan and the United Kingdom and negotiated and signed or initialed amendments to the ATAs with Kenya and Japan. The United States took steps to protect the cultural property of Jordan, Yemen, Ecuador, El Salvador, and Chile by extending an existing memorandum of understanding (“MOU”) pursuant to the 1970 UNESCO Convention, or entering into a new MOU, or taking emergency measures. In 2020, the United States also signed the Mining, Agriculture, and Construction (“MAC”) Protocol to the Cape Town Convention under the auspices of UNIDROIT, which had been concluded in 2019. The United States provided notice of its decision to withdraw from the Treaty on Open Skies, and that withdrawal became effective on November 22, 2020.

In the area of diplomatic relations, the United States took several steps in response to the People’s Republic of China’s (“PRC’s”) actions to undermine Hong Kong’s high degree of autonomy as set forth under the Sino-British Joint Declaration, measures that included suspending or terminating several bilateral agreements; certifying to Congress that Hong Kong no longer warrants treatment under U.S. law in the same manner as it did before July 1, 1997; imposing visa restrictions on PRC officials believed to be responsible for, or complicit in, undermining Hong Kong’s high degree of autonomy or undermining human rights and fundamental freedoms in Hong Kong; and issuing and implementing Executive Order 13936 on Hong Kong Normalization, including imposing sanctions and amending the Export Administration Regulations (“EAR”). The United States witnessed the “Abraham Accords,” a series of agreements and declarations by several countries normalizing relations with Israel, including the United Arab Emirates, Bahrain, Morocco, and Sudan. President Trump issued a proclamation recognizing the entire Western Sahara territory as part of the Kingdom of Morocco.

The U.S. government participated in litigation in U.S. courts in 2020 involving issues related to foreign policy and international law. The Supreme Court issued its opinion in *Monasky v. Tagleri*, unanimously holding that a child’s habitual residence under the Hague Abduction Convention is determined by a totality of the circumstances —a fact-bound inquiry unencumbered by rigid rules or presumptions. The United States filed briefs in *Nestlé/Cargill* on the issue of the liability of domestic corporations under the Alien Tort Statute for aiding-and-abetting international law violations (in these cases, by purchasing cocoa beans from farms that

used forced labor of trafficked children and providing those farms with general technical assistance). The U.S. briefs in the Supreme Court in a pair of cases regarding World War II-era expropriations—*Hungary v. Simon* and *Germany v. Philip*—address issues of international comity and the expropriation exception in the Foreign Sovereign Immunities Act (“FSIA”). The Supreme Court held in *Opati v. Sudan* that plaintiffs in a federal cause of action under the terrorism exception to the FSIA may seek punitive damages for preenactment conduct.

The United States government also participated in a variety of international court proceedings and arbitrations in 2020. The United States participated in oral proceedings (by videolink) in the International Court of Justice on its preliminary objections filed in the *Alleged Violations of the 1955 Treaty of Amity* case. The Iran-U.S. Claims Tribunal issued a partial award in cases A15 (II:A), A/26 (IV) and B43 (Award No. 604-A15 (II:A)/A26 (IV)/B43-FT) with seven separate dissenting and concurring opinions. The United States made non-disputing party submissions in dispute settlement proceedings in cases in 2020 under NAFTA, the U.S.-Korea Free Trade Agreement (“FTA”), the U.S.-Panama Trade Promotion Agreement (“TPA”), the U.S.-Peru TPA, the U.S.-Colombia TPA, and the U.S.-Morocco FTA.

The *Digest* discusses other forms of U.S. participation in international organizations, institutions, and initiatives. The United States provided notice of its withdrawal from the World Health Organization (subsequently retracted on January 20, 2021). The United States participated in the Human Rights Council’s 36th session of the Universal Periodic Review (“UPR”) and submitted its national report, responding to recommendations during the 2015 UPR. U.S. engagement within the group of government experts (“GGE”) on emerging technologies in Lethal Autonomous Weapons Systems continued with multiple U.S. statements delivered in 2020.

Many attorneys in the Office of the Legal Adviser collaborate in the annual effort to compile the *Digest*. For the 2020 volume, attorneys whose contributions to the *Digest* were particularly significant include Leah Bellshaw, Jamie Briggs, Tiffany Derentz, Jane Farrington, Monica Jacobsen, Anna Melamud, Nathan Nagy, Lorie Nierenberg, and Thomas Weatherall. Sean Elliott at the Foreign Claims Settlement Commission also once again provided valuable input. I express very special thanks to our law librarian, Camille Majors, and her team at the Bunche Library and Office of the Legal Adviser intern Hannah James for ensuring the accuracy of the *Digest*, and to Rickita Grant for her expertise in formatting the *Digest* for final publication. Finally, I thank CarrieLyn Guymon for her continuing outstanding work as editor of the *Digest*.

Richard C. Visek
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 2020 is published exclusively online 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 2020 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 lengthy excerpts (in Times New 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 2021) 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 2021 where they relate to the discussion of developments in 2020.

Updates on most other 2021 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, 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://documents.un.org/prod/ods.nsf/home.xsp>. For UN-related information generally, the UN's home page at <https://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.

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. GPO makes government materials available online at <https://www.govinfo.gov>.

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 is <http://www.state.gov>. The website of the U.S. Mission to the UN 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/internet/opinions.nsf/OpinionsByRDate?OpenView&count=100>;

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/search-opinions>; .

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. 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/supreme-court-briefs>. 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, <https://pacer.uscourts.gov/>. 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. *Fitisemanu v. United States*

On April 14, 2020, the United States submitted its brief on appeal in the U.S. Court of Appeals for the Tenth Circuit in *Fitisemanu v. United States*, Nos. 20-4017 & 20-4019, a case concerning whether American Samoa—a U.S. territory—is “in the United States” for purposes of the Citizenship Clause of the Fourteenth Amendment to the U.S. Constitution. The district court held that American Samoa is “in the United States,” meaning nearly every person born in American Samoa would be a U.S. citizen at birth under the Fourteenth Amendment instead of a U.S. national. See *Digest 2015* at 6-11 for discussion of the D.C. Circuit’s holding (contrary to the district court’s decision in *Fitisemanu*) on the same issue in *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015), cert. denied, 579 U.S. ___, 136 S. Ct. 2461 (2016). Excerpts follow from the U.S. brief on appeal in *Fitisemanu*. The United States filed its reply brief on May 26, 2020 (not excerpted herein) and the Tenth Circuit held oral argument on September 23, 2020. The Government of American Samoa intervened to oppose the holding that American Samoa is “in the United States,” arguing that “the people of American Samoa do not want U.S. citizenship at this time,” and it would be an “exercise of paternalism—if not overt cultural imperialism” for federal courts to impose U.S. citizenship on a population that does not want it. Excerpts follow from the April 14, 2020 U.S. brief on appeal in the Tenth Circuit in *Fitisemanu*.

* * * *

I. American Samoa Is Not “In The United States” For Purposes of The Citizenship Clause

The Citizenship Clause of the Fourteenth Amendment provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. Const. amend. XIV, § 1, cl. 1. Constitutional text, judicial precedent, and historical practice all demonstrate that American Samoa is not “in the United States” for purposes of the Citizenship Clause. The district court’s contrary conclusion principally rests on a clear misreading of *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), which neither presented nor addressed the geographic scope of the phrase “in the United States” for purposes of the Citizenship Clause.

A. Constitutional Text, Judicial Precedent, and Historical Practice Confirm That Unincorporated Territories Are Not “In the United States”

1. The correct reading of the Citizenship Clause is that U.S. territories are not “in the United States” within the meaning of the Clause, because that phrase encompasses only the 50 States and the District of Columbia. From the outset, the Constitution envisioned a United States consisting of states that had ratified the Constitution and one federal district carved from those states, along with future states as Congress saw fit to admit them into the Union. U.S. Const. art. I, § 8, cl. 17; art. IV, § 3, cl. 1; art. VII. Those states were to exercise concurrent sovereignty with the federal government. See U.S. Const. amend. X... These provisions set out a fundamental distinction between “the United States” and the territories belonging to the United States.

In addition, while the Citizenship Clause of the Fourteenth Amendment is confined to individuals born “in the United States, and subject to the jurisdiction thereof,” the Thirteenth Amendment prohibits slavery “within the United States, or any place subject to their jurisdiction.” U.S. Const. amend. XIII, § 1 (emphasis added). The Thirteenth Amendment’s broader language demonstrates that “there may be places subject to the jurisdiction of the United States but which are not incorporated into it, and hence are not within the United States in the completest sense of those words.” *Downes v. Bidwell*, 182 U.S. 244, 336-37 (1901) (White, J., concurring); see also *id.* at 251 (opinion of Brown, J.). The Eighteenth Amendment used similar language distinguishing between “the United States” and the territories, barring “the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes.” U.S. Const. amend. XVIII, § 1.

2. Consistent with this clear textual distinction, the Supreme Court has long recognized that not all constitutional provisions—including specifically the Citizenship Clause of the Fourteenth Amendment—apply in U.S. territories of their own force. In the *Insular Cases*—a series of decisions about the application of the Constitution to territories the United States acquired at the turn of the 20th century, such as the Philippines, Puerto Rico, and Guam—the Supreme Court explained that the Constitution has more limited application in “unincorporated Territories” that are not intended for statehood than it does in States and “incorporated Territories surely destined for statehood.” *Boumediene v. Bush*, 553 U.S. 723, 756-57 (2008). In

those cases, the Supreme Court set out a “general rule” that in an “unincorporated territory,” the Constitution does not necessarily apply in full. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990).

The Supreme Court has explained that this rule is necessary to allow the United States flexibility in acquiring, governing, and relinquishing territories. For example, the Court has observed that some territories (such as the former Spanish colonies) operated under civil-law systems quite unlike our own, and in some cases, like the Philippines, “a complete transformation of the prevailing legal culture would have been not only disruptive but also unnecessary, as the United States intended to grant independence to that Territory.” *Boumediene*, 553 U.S. at 757-58. Such lands “are territories belonging to, but not a part of the Union of states under the Constitution,” and such territories “are not a part of the United States in the sense that they are subject to and enjoy the benefits or protection of the Constitution, as do the states which are united by and under it.” *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 673, 678 (1945), overruled in part on other grounds by *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 360-61 (1984).

While some of the *Insular Cases* may present difficult questions about whether constitutional provisions that are textually silent as to their geographic scope apply in unincorporated territories, the Supreme Court has recognized that provisions like the Citizenship Clause that are expressly limited to “the United States” do not extend to unincorporated territories like American Samoa. In *Downes v. Bidwell*, for example, the Court held that Puerto Rico is not part of “the United States” for purposes of the Tax Uniformity Clause of the Constitution, which states that “all Duties, Imposts and Excises shall be uniform throughout the United States.” U.S. Const. art. I, § 8, cl. 1; see *Downes*, 182 U.S. at 263, 277-78, 287 (opinion of Brown, J.); *id.* at 341-42 (White, J., concurring); *id.* at 346 (Gray, J. concurring).

Justice Brown explained that, from a review of the Constitution’s text and history, “it can nowhere be inferred that the territories were considered a part of the United States.” *Downes*, 182 U.S. at 250-51. The Thirteenth Amendment distinguishes between places “within the United States, or subject to their jurisdiction,” U.S. Const. amend. XIII, § 1, while the Citizenship Clause applies only where a person is both “born or naturalized in the United States and subject to the jurisdiction thereof,” U.S. Const. amend. XIV, § 1, cl. 1. That textual distinction “show[s] that there may be places within the jurisdiction of the United States that are no part of the Union,” *Downes*, 182 U.S. at 251 (opinion of Brown, J.); see *id.* at 336-37 (White, J., concurring).

As particularly relevant here, the Justices in the majority in *Downes* recognized that the Constitution should not be read to automatically confer citizenship on inhabitants of U.S. territories. Justice Brown explained that “the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants.” 182 U.S. at 279; see *id.* at 306 (White, J., concurring); *id.* at 345-46 (Gray, J., concurring). The right to acquire territory “could not be practically exercised if the result would be to endow the inhabitants with citizenship of the United States.” *Id.* at 306 (White, J., concurring). Indeed, Justice Brown observed that, as a historical matter, Congress has needed the flexibility to make a variety of arrangements for the territories, especially at the time they were acquired by the United States. *Id.* at 250-56 (discussing the territories of Louisiana, Florida, Hawaii, and the Philippines). The Justices in the majority thus recognized that when the United States acquires various territories, the decision to afford citizenship is to be made by Congress. *Id.* at 280 (opinion of Brown, J.) (“In all these cases there is an implied denial of the

right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto.”); see *id.* at 306 (White, J., concurring); *id.* at 345-46 (Gray, J., concurring).

Since *Downes*, the Supreme Court has continued to recognize that persons born in U.S. territories obtain citizenship only by Act of Congress, not through the Citizenship Clause. In *Barber v. Gonzales*, 347 U.S. 637 (1954), the Supreme Court noted that individuals “born in the Philippines” during its territorial period “were American nationals entitled to the protection of the United States and conversely owing permanent allegiance to the United States,” but could not “become United States citizens.” *Id.* at 639 n.1; see *Toyota v. United States*, 268 U.S. 402, 410-11 (1925). Similarly, in *Rabang v. Boyd*, 353 U.S. 427 (1957), the Supreme Court rejected “the erroneous assumption that Congress was without power to legislate the exclusion of Filipinos in the same manner as ‘foreigners’” during the Philippines’ period as a U.S. territory, quoting Justice Brown’s opinion in *Downes* to reaffirm Congress’s power “to prescribe upon what terms the United States will receive [a territory’s] inhabitants, and what their status shall be.” *Id.* at 432. These cases underscore that “[n]ationality and citizenship are not entirely synonymous; one can be a national of the United States and yet not a citizen,” as in the case of “residents of American Samoa.” *Miller v. Albright*, 523 U.S. 420, 467 n.2 (1998) (Ginsburg, J., dissenting).

3. Congress’s flexibility in acquiring and governing territories—including the power to determine whether and when the inhabitants of territories acquired by the United States become citizens or nationals—has proven important over time. See *Downes*, 182 U.S. at 279-80 (opinion of Brown, J.). For example, in 1898, when the United States acquired Puerto Rico and the Philippines from Spain by the Treaty of Paris, the Treaty provided that “[t]he civil rights and political status of the native inhabitants of the[se] territories . . . shall be determined by the Congress.” Treaty of Paris, U.S.-Spain, art. IX, Dec. 10, 1898, 30 Stat. 1754, 1759. Congress later extended U.S. citizenship to residents of Puerto Rico, see Organic Act of 1917 (Jones Act), ch. 145, § 5, 39 Stat. 951, 953; see also Nationality Act of 1940, § 202, 54 Stat. 1137, 1139, but it provided that residents of the Philippines would be “citizens of the Philippine Islands,” rather than citizens of the United States, Autonomy Act, ch. 416, § 2, 39 Stat. 546 (1916); see *Barber*, 347 U.S. at 639 n.1. Similarly, although the United States acquired Guam in 1898, see Treaty of Paris, art. II, 30 Stat. at 1755, Congress did not extend citizenship based on birth in Guam until 1950, see Organic Act of Guam, ch. 512, § 4, 64 Stat. 384-85. The United States acquired the U.S. Virgin Islands in 1917, see Convention Between the United States and Denmark for Cession of the Danish West Indies, U.S.-Den., Aug. 4, 1916, 39 Stat. 1706, but Congress did not extend citizenship based on birth there until 1927, and only under certain conditions, see Act of Feb. 25, 1927, ch. 192, 44 Stat. 1234.

The “years of past practice in which territorial citizenship has been treated as a statutory, and not a constitutional right,” *Tuaua v. United States*, 788 F.3d 300, 308 n.7 (D.C. Cir. 2015), confirms that the Citizenship Clause does not afford citizenship to those born in American Samoa. Congress has long understood that it has the authority to decide whether and when to deem residents of U.S. territories (particularly residents of unincorporated territories) to be U.S. citizens or nationals, and Congress has exercised that authority to fashion rules for individual territories based on their particular characteristics and political futures. *Downes*, 182 U.S. at 251-58, 267-70 (opinion of Brown, J.). Congress’s longstanding practice provides strong evidence that the Citizenship Clause was not intended to override Congress’s plenary powers with respect to unincorporated territories like American Samoa. See *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (Holmes, J.) (“If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.”); *Tuaua*, 788 F.3d

at 308 n.7 (“[N]o one acquires a vested or protected right in violation of the Constitution by long use. . . . Yet an unbroken practice . . . openly [conducted] . . . by affirmative state action . . . is not something to be lightly cast aside.” (alterations in original) (quoting *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 678 (1970))).

4. In light of the Constitutional text, the Supreme Court’s decisions, and the unbroken historical practice concerning the Citizenship Clause’s application to unincorporated territories, every court of appeals to have considered the question has held that individuals born in unincorporated territories do not receive citizenship by virtue of the Citizenship Clause. Courts of appeals, for example, have uniformly held that the Citizenship Clause does not apply to individuals born in the Philippines while it was a U.S. territory. See *Nolos v. Holder*, 611 F.3d 279, 282-84 (5th Cir. 2010) (per curiam); *Lacap v. INS*, 138 F.3d 518, 519 (3d Cir. 1998) (per curiam); *Valmonte v. INS*, 136 F.3d 914, 917-20 (2d Cir. 1998); *Rabang v. INS*, 35 F.3d 1449, 1451-53 (9th Cir. 1994); see also *Thomas v. Lynch*, 796 F.3d 535, 540-41 (5th Cir. 2015) (holding that a U.S. military base in Germany “was not ‘in the United States’ for purposes of the Fourteenth Amendment”). As those courts have explained, *Downes* “provides authoritative guidance on the territorial scope of the term ‘the United States’ in the Fourteenth Amendment,” *Valmonte*, 136 F.3d at 918, and makes clear that, “as used in the Constitution, the term ‘United States’ does not include all territories subject to the jurisdiction of the United States government,” *Rabang*, 35 F.3d at 1453.

Indeed, the D.C. Circuit reached the same conclusion with respect to American Samoa. As it observed, “there is no material distinction between nationals born in American Samoa and those born in the Philippines prior to its independence in 1946,” such that “the extension of citizenship to the American Samoan people would necessarily implicate the United States citizenship status of persons born in the Philippines during the territorial period—and potentially their children through the operation of statute.” *Tuaua*, 788 F.3d at 305 n.6; see generally 8 U.S.C. § 1401 (outlining acquisition of citizenship by birth for individuals born abroad). That court, too, relied on *Downes* and the Insular Cases more generally in rejecting the claim pressed by plaintiffs here. *Tuaua*, 788 F.3d at 306, 308.

Courts have applied this understanding to other constitutional provisions as well. The Ninth Circuit, for example, has rejected the suggestion that Congress exceeds its power to create “an uniform Rule of Naturalization . . . throughout the United States,” U.S. Const. art. I, § 8, cl. 4, when it creates unique rules applicable to territories; because unincorporated territories are not part of “the United States” for purposes of that clause, the Constitution “does not require” application of “federal immigration law” to an unincorporated territory, *Eche v. Holder*, 694 F.3d 1026, 1031 (9th Cir. 2012). Indeed, Congress has in the past treated the Philippines as a foreign country for purposes of the immigration laws during its territorial period, see generally *Rabang*, 353 U.S. at 432; *Hooven & Allison*, 324 U.S. at 677-78; Philippine Independence Act, § 8, 48 Stat. 456, 462-63 (1934), and has created immigration rules with specific application to other territories, see *Eche*, 694 F.3d at 1027 (Northern Mariana Islands). American Samoa is currently the only U.S. territory permitted to set its own immigration and border control policies. See 8 U.S.C. § 1101(a)(38) (excluding American Samoa from general definition of the “United States” for purposes of application of the Immigration and Nationality Act, except as otherwise specified); see generally Office of Insular Affairs, U.S. Dep’t of the Interior, American Samoa.

B. The District Court’s Contrary Holding Misreads *Wong Kim Ark*

1. In the face of all this, the district court reasoned that the Supreme Court’s decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), required the conclusion that the

Citizenship Clause applies in unincorporated territories. ... That misreads the case, which neither presented nor addressed the question of the Citizenship Clause's geographic scope.

The only "question presented" in *Wong Kim Ark* was "whether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the emperor of China, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the fourteenth amendment." 169 U.S. at 653. The Court answered that question in the affirmative. *Id.* at 705. In doing so, the Court did not dwell on the undisputed proposition that the plaintiff in that case had been born "in the United States" for purposes of the Citizenship Clause, because he was born in a State (California). See *id.* at 652. Instead, the Court simply addressed the question whether the plaintiff was "subject to the jurisdiction" of the United States. See *id.* at 653. The Court's affirmative answer to that particular question, *id.* at 705, in no way suggests that a person born in an unincorporated territory is covered by the Citizenship Clause.

The district court nevertheless believed *Wong Kim Ark* controlled because of its description of the English common law rule of birthright citizenship, including references to birth within the "dominions" or "territory" of the King. See, e.g., *Wong Kim Ark*, 169 U.S. at 688 ("the fundamental rule of citizenship by birth within the dominion of the United States, notwithstanding alienage of parents"); *id.* at 693 ("the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country"). The court reasoned that "if American Samoa is within the 'dominion' of the United States under the English rule, it is 'within the United States' under the Fourteenth Amendment." Aplt's. App. Vol. 3 at 618; see also *id.* at 627 (similar).

But as every other court to consider the question has recognized, whatever the relevance of the general statements about English common law to *Wong Kim Ark*'s resolution of the particular question presented there, they do not address, much less answer, the distinct question presented here of whether unincorporated territories are "in the United States" for purposes of the Citizenship Clause. Because *Wong Kim Ark* did not involve a dispute over whether the plaintiff there had been born "'within the territory' of the United States"—indeed, the United States did not even possess unincorporated territories at the time—it was "unnecessary to define 'territory' rigorously or decide whether 'territory' in its broader sense meant 'in the United States' under the Citizenship Clause." *Rabang*, 35 F.3d at 1454; accord *Thomas*, 796 F.3d at 541-42; *Tuaua*, 788 F.3d at 305; *Nolos*, 611 F.3d at 284; *Valmonte*, 136 F.3d at 920. Indeed, *Wong Kim Ark* itself cautioned against this sort of over-reading, repeating the longstanding "maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Wong Kim Ark*, 169 U.S. at 679 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.)). And no Justice in *Downes*—including the four members of the *Downes* majority who had joined the majority opinion in *Wong Kim Ark*—saw any apparent inconsistency between those decisions in opining on Congress's power to address the citizenship status of individuals born in unincorporated territories.

2. Aside from its erroneous reliance on *Wong Kim Ark*, the district court provided little in the way of other justification for its holding. It suggested that the general "arguments related to the text, structure, and historical evidence of the Citizenship Clause of the Fourteenth Amendment favor the Plaintiffs' position." Aplt's. App. Vol. 3 at 604. The court noted plaintiffs'

argument that the second clause of the Fourteenth Amendment prescribes the apportionment of representatives “among the several States,” suggesting that the “in the United States” must have a broader sweep. *Id.* at 596. But even accepting that premise, no one disputes that the District of Columbia is “in the United States” but also is not “among the several States” entitled to congressional representation. See U.S. Const. art. I, § 8, cl. 17. That distinction thus says nothing about whether unincorporated territories are “in the United States” for purposes of the Citizenship Clause. Indeed, the district court itself acknowledged that the textual and structural arguments supporting the conclusion that American Samoa is not “in the United States” under the Citizenship Clause are “persuasive.” Aplt. App. Vol. 3 at 597.

As for the historical evidence on which the court relied, it largely repeats the misreading of *Wong Kim Ark*, and does not address the status of unincorporated territories or consider whether they are part of the United States. The court described, for example, the Fourteenth Amendment’s “repudiation of the Supreme Court’s *Dred Scott* decision” and its “relation to the American Civil War” as supporting plaintiffs’ position, Aplt. App. Vol. 3 at 601-02, without explaining how those materials could be read to explain whether unincorporated territories are “in the United States.” The court’s reference to scattered statements in the legislative history of the Civil Rights Act of 1866 and the Fourteenth Amendment, *id.* at 602-03, likewise sheds no light on this question, particularly where that history “contains many statements from which conflicting inferences can be drawn.” *Tuaua*, 788 F.3d at 304 (quoting *Afroyim v. Rusk*, 387 U.S. 253, 267 (1967)). Such “[i]solated statements . . . are not impressive legislative history.” *Id.* (quoting *Garcia v. United States*, 469 U.S. 70, 78 (1984)). And whatever the import of those statements with respect to territories that were destined for statehood, they do not address the application of the Constitution to unincorporated territories, because the United States had no such territories at the time. Accordingly, these snippets of inconclusive legislative history provide no basis to disturb the constitutional understanding that has prevailed for over 100 years about the application of the Citizenship Clause to unincorporated territories.

The district court likewise barely considered the implications of discarding that settled understanding. It did not engage with the substantial historical record of Congressional action to address the citizenship status of individuals in unincorporated territories, including the Philippines, Puerto Rico, Guam, and the Virgin Islands. For example, the court did not dispute—or even acknowledge—that the logic of its ruling “would necessarily implicate the United States citizenship status of persons born in the Philippines during the territorial period,” *Tuaua*, 788 F.3d at 305 n.6, rendering every individual born in that territory between 1898 and 1946 a U.S. citizen, and potentially affecting the citizenship status of millions of present-day residents of the Philippines. The most it offered on this point was the statement that the numerous courts of appeals decisions concluding that the Citizenship Clause does not apply to unincorporated territories were “not binding” because they come from other circuits. Aplt. App. Vol. 3 at 607 n.17.

The district court’s mistaken reading of *Wong Kim Ark* likewise led it “to impose citizenship by judicial fiat” over the objections of the democratically-elected representatives of American Samoa and the people they represent. *Tuaua*, 788 F.3d at 302. As intervenors have explained, the American Samoan people have not sought citizenship out of concern for its potential impact on the “traditional Samoan way of life.” *Id.* at 309. This is not to say that the wishes of the people of American Samoa are controlling with respect to the Citizenship Clause. But their opposition counsels strongly against departing from the settled constitutional understanding that has prevailed—and been acknowledged by the Supreme Court and every

other circuit to consider it—since the United States first acquired unincorporated territories. Indeed, the position of the American Samoan government in this case underscores the importance of Congress’s plenary power over the territories. Congress has “broad latitude to develop innovative approaches to territorial governance,” including the power to foster self-determination in the territories by “enabl[ing] a territory’s people to make large-scale choices about their own political institutions.” *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016). Imposing the “political tie” of citizenship, *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 141 (1795), with its concomitant “adoption or ascription of an identity” associated with “a particular sovereign state,” *Tuaua*, 788 F.3d at 311, would disregard these self-determination interests. If the American Samoan people “form[] a collective consensus in favor of United States citizenship,” *id.* at 309, then they could bring that request to Congress through their elected representative in that body. In the meantime, residents of American Samoa who become residents of any State (like the three individual plaintiffs here) and wish to naturalize may do so on favorable terms. See 8 U.S.C. § 1436. Such a framework not only accords with our settled constitutional tradition, but also permits democratic consideration of the issue by the people of American Samoa.

II. At A Minimum, The District Court’s Injunction Should Be Limited To The Plaintiffs

Even if this Court does not reverse the district court’s judgment in its entirety for the reasons discussed above, Article III and basic principles of equity at a minimum require that the district court’s injunction be narrowed to apply only to plaintiffs. As a general matter, in the absence of a certified class action, a court lacks the power to grant relief that goes beyond what is necessary to provide complete relief to the plaintiffs actually before the court. Yet that is precisely what the district court did here: it entered an injunction barring enforcement against any person of 8 U.S.C. § 1408(1) or “any Department of State Foreign Affairs Manual provision that provides that the citizenship provisions of the Constitution do not apply to persons born in American Samoa,” and enjoined defendants from “imprinting” the endorsement code “in the passports of persons born in American Samoa.” *Aplts. App. Vol. 3* at 628-29. Neither plaintiffs nor the district court articulated a justification for the sweeping universal injunctive relief entered here.

* * * *

...Plaintiffs’ alleged injuries are that they are not treated as citizens; that they are unable to take advantage of certain benefits of citizenship (such as the ability to vote or to obtain certain forms of employment); that their passports bear an endorsement code reflecting their U.S. national status; and that they face certain immigration restrictions and costs to become naturalized citizens. *Aplts. App. Vol. 1* at 43-52. Those harms would be fully remedied by an injunction that applies only to plaintiffs. There is no reason why an injunction that applies to non-parties is necessary to “redress the plaintiff[s]’ particular injury,” because plaintiffs do not and could not claim that they personally are injured by the denial of citizenship to third parties born in American Samoa. *Gill*, 138 S. Ct. at 1934. Plaintiffs likewise have not availed themselves of any mechanism to represent the interests of nonparties: they have not sought to certify a class, and they have not asserted (and could not establish) third party standing to represent others in this suit. They therefore have no entitlement to seek relief on behalf of others—many of whom, like fellow American Samoans who oppose the extension of birthright

citizenship, would in fact regard the district court's injunction as an unwelcome imposition of a status they do not seek.

* * * *

These concerns are particularly acute here: by issuing an injunction that applies to all “persons born in American Samoa,” Aplt. App. Vol. 3 at 629, the district court effectively nullified the government’s (and the Government of American Samoa’s) victory in *Tuaua*, granting relief the plaintiffs in that suit did not obtain and would be barred from attempting to seek through a second suit. The breadth of the injunction also cuts short further percolation of the issues, despite the D.C. Circuit’s contrary decision. And if the government ultimately prevails in this suit, that does not preclude others from bringing the same claim in a different forum in the future. Equity does not permit litigation on these terms. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (noting that overbroad relief “take[s] a toll on the on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch”).

Indeed, in this case, there is firm reason to conclude that the district court’s injunction would afford “relief” to many persons born in American Samoa who do not want to be United States citizens: the Government of American Samoa and its delegate to Congress, the democratically-elected representatives of the people of American Samoa, intervened to oppose the ruling the plaintiffs obtained on the merits. The sweeping relief entered by the district court is especially out of place in these circumstances.

* * * *

2. Indication of Sex on U.S. Passports

a. *Zzyym v. Pompeo*

As discussed in *Digest 2019* at 7 and *Digest 2018* at 5-12, 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 alleged violation of the APA and deprivation of due process and equal protection under the Fifth Amendment. In 2018, the district court decided that the State Department’s policy and denial of the requested passport violated the APA, and enjoined the Department from relying on the policy to deny the requested passport listing Zzyym’s sex as “X.” Oral argument on the merits of the case on appeal to the U.S. Court of Appeals for the Tenth Circuit was held on January 22, 2020. On May 12, 2020, the Court of Appeals issued its opinion that the Department “acted within its authority but exercised this authority in an arbitrary and capricious manner.” *Zzyym v. Pompeo*, 958 F.3d. 1014, 1018. The court found that only two of the five reasons cited by the Department for denying Zzyym’s request in 2017 were supported by the administrative record. The Court of Appeals remanded to the State Department for reconsideration of

its policy and re-adjudication of the passport application, taking into account developments regarding the issuance of non-binary birth certificates, driver's licenses, and identification cards in the United States since the Department's 2017 denial. Excerpts follow from the opinion of the Court of Appeals.

* * * *

C. The State Department had statutory authority to deny Zzyym's passport application based on the binary sex policy.

The Passport Act allows the Secretary of State to "grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries . . . under such rules as the President shall designate and prescribe for and on behalf of the United States and no other person shall grant, issue, or verify such passports." 22 U.S.C. § 211a. In turn, the President has delegated the authority to prescribe rules to the Secretary of State. Executive Order 11295, 31 Fed. Reg. 10,603 (Aug. 5, 1966). We must consider the scope of statutory authority delegated to the Secretary of State and the State Department.

The statutory language is permissive, authorizing the State Department to deny passports for reasons not listed in the Act. *Haig v. Agee*, 453 U.S. 280, 290 (1981). . . .

The Passport Act is silent about the State Department's authority to deny a passport to applicants who do not identify as male or female. Given this silence, Zzyym disputes the State Department's statutory authority to deny a passport to an applicant unwilling to check the box for either male or female.

The Supreme Court has addressed other challenges to the State Department's authority to deny passports for reasons that are not listed in the Passport Act. In these cases, the Supreme Court has analyzed the State Department's statutory authority by considering past administrative practice and congressional acquiescence. *See, e.g., Kent v. Dulles*, 357 U.S. 116, 127–30 (1958); *Zemel v. Rusk*, 381 U.S. 1, 7–13 (1965); *Haig v. Agee*, 453 U.S. 280, 291–301 (1981).

* * * *

The Supreme Court inferred such congressional acquiescence in *Haig v. Agee*, 453 U.S. 280 (1981). There the State Department revoked the passport of a former CIA officer who had exposed undercover CIA operatives while travelling abroad. 453 U.S. at 283–86. In the past, the State Department had rarely encountered the need to revoke a passport based on national security or foreign policy. *Id.* at 303. But the infrequency of previous challenges didn't matter; the Court reasoned that the State Department had "openly asserted" its power to revoke a passport for reasons involving national security and foreign policy and Congress had not stepped in. *Id.* at 303–06 (quoting *Zemel*, 381 U.S. at 9). The Court thus concluded that Congress had implicitly approved the State Department's exercise of statutory power. *Id.* at 306. So the Court upheld the State Department's revocation of the passport. *Id.*

Agee's logic fits here. Prior to Zzyym's application, the State Department had never denied a passport based on an applicant's unwillingness to identify as male or female. But under *Agee*, the infrequency of enforcement does not strip the State Department of statutory authority.

In denying a passport to Zzyym, the State Department followed a binary sex policy that had been in place for roughly 39 years.

Zzyym argues that the passport application itself did not alert Congress to the State Department's policy. But the binary sex policy was hardly a secret, for the State Department had enacted regulations requiring every applicant to use particular forms and to answer all of the questions on those forms. 22 C.F.R. § 51.20(a)–(b). Congress could have said if it wanted to allow applicants to bypass certain questions. Given the longevity of the State Department's policy and Congress's apparent acquiescence, we conclude that the binary sex policy fell within the State Department's statutory authority.

Despite Congress's apparent acquiescence, Zzyym contends that the State Department can deny passports only for the reasons identified in *Kent*, *Zemel*, and *Agee*: citizenship, allegiance, unlawful conduct, foreign policy, and national security. *See* pp. 9–11, above. We disagree. Though the Supreme Court has crystallized some lawful and unlawful justifications for denying a passport, these justifications are illustrative—not exhaustive. The Supreme Court addressed them only because they were at issue in the three cases. *See, e.g., Kent*, 357 U.S. at 127–28 (focusing only on established reasons for denying a passport that are “material here”). The Supreme Court didn't suggest that these were the only reasons that could justify denial of a passport. We thus conclude that the State Department had statutory authority to deny a passport to Zzyym for failing to identify as a male or female.

V. The State Department's reliance on its binary sex policy was arbitrary and capricious.

The resulting issue is whether this application of the binary sex policy was arbitrary and capricious based on the existing administrative record. ...

* * * *

A. Only two of the State Department's five reasons are supported by the administrative record.

The State Department gave five reasons for relying on the binary sex policy:

1. The policy ensured the accuracy and reliability of U.S. passports.
2. The policy helped identify individuals ineligible for passports.
3. The policy helped make passport data useful for other agencies.
4. No medical consensus existed on how to determine whether someone was intersex.
5. Creating a third designation for sex (“X”) was not feasible.

We conclude that the first, fourth, and fifth reasons lack record support, but the second and third reasons are supported.

* * * *

1. The State Department's first reason (that the binary sex policy ensured the accuracy and reliability of U.S. passports) lacks support in the record.

The State Department justified the binary sex policy in part as a way to promote accuracy and reliability, reasoning that every U.S. jurisdiction had identified all citizens as either male or female. For this justification, the State Department focused on how it determines eligibility for passports. This determination ordinarily requires the State Department to verify an applicant's identity through identification documents issued by other U.S. jurisdictions. So the State

Department considered how those jurisdictions identify characteristics such as an individual's sex.

* * * *

Zzyym's experience illustrates the inevitable inaccuracies of a binary sex policy. Zzyym had two original identification documents that would ordinarily establish the sex: The original birth certificate identified Zzyym as male, and the driver's license said female. With conflicting identification documents, the State Department instructed Zzyym to either identify as female or obtain a medical certification showing transition to male. Appellants' App'x vol. 1, at 67–68. But this instruction didn't make sense because Zzyym hadn't transitioned from female to male, and Zzyym's original birth certificate said that Zzyym was male.

The State Department's policy effectively allowed Zzyym to obtain a passport by claiming to be either male or female. But the State Department's binary sex policy assumes that Zzyym must be one or the other. How could Zzyym be neither male nor female and accurately identify as either sex?

Given the State Department's willingness to allow Zzyym to identify as either male or female, the binary sex policy sunders the accuracy and reliability of information on Zzyym's passport application.

* * * *

2. The State Department's second reason (that the binary sex policy helped the State Department identify individuals ineligible for passports) is supported by the record.

The State Department also explained that the binary sex policy helpfully matches how other federal agencies record someone's sex. This explanation is supported by the record.

The State Department denies passport applications for various reasons. *See* 22 C.F.R. §§ 51.60–51.62. To evaluate these applications, the State Department must gather a broad range of information from federal, state, and local authorities. For example, the State Department may need to collect information from other federal agencies to decide whether an applicant has defaulted on a federal loan (22 C.F.R. § 51.60(a)(1)), has committed a sex offense (22 C.F.R. § 51.60(g)), or has obtained a conviction for drug trafficking (22 C.F.R. § 51.61).

* * * *

3. The State Department's third reason (that the binary sex policy helped make passport data useful for other agencies) is supported by the record.

The State Department also reasoned that using a third sex designation could burden other state and federal agencies when they use the State Department's data. Again, the State Department noted that (1) most agencies' systems accommodate only two sexes and (2) allowing a third sex designation could complicate searches. These complications, the State Department reasoned, would burden other agencies that use passport data...

* * * *

4. The State Department's fourth reason (that a lack of medical consensus existed on how to identify individuals as intersex) is unsupported by the record.

The State Department also concluded that the medical community lacks a consensus on how to determine whether someone is intersex, rendering an "X" designation "unreliable as a component of identity." Appellants' App'x vol. 1, at 86. But this reasoning lacks support in the administrative record and does not apply to unquestionably intersex individuals like Zzyym.

According to the State Department, medical experts vary on whether to base intersexuality solely on somatic characteristics, self-identification as intersex, or both. But the State Department cites no scientific evidence of this disagreement about the medical definition of intersexuality.

* * * *

Even if the medical community disagreed on whether some individuals are intersex, the State Department would need to explain why the lack of a consensus would justify denying Zzyym's application. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (stating that administrative decisions must rationally connect the factual findings to the decision being made).

The State Department didn't provide such an explanation, assuming instead that disagreement about whether some applicants were intersex would prevent classification of anyone as intersex. Why? The State Department has never questioned whether Zzyym is intersex. Given Zzyym's undebatable intersexuality, the State Department failed to explain why a lack of consensus about other individuals would justify forcing intersex individuals like Zzyym to inaccurately identify themselves as male or female. Without such an explanation, we conclude that the State Department lacked record support for its fourth reason to rely on a binary sex classification.

5. The State Department's fifth reason (that adding a third sex designation ("X") would be infeasible) lacks support in the record.

Finally, the State Department reasoned that a third sex designation would be infeasible because of the required time and expense. But the State Department did not estimate the additional time or expense. The State Department said only that it anticipated "considerable" challenges ...

After the district court granted judgment to Zzyym, the State Department moved to stay the court's order. With this motion, the State Department attached a declaration quantifying the time and expense to alter the passport system. ...We decline to consider these estimates because "review of agency action 'generally focuses on the administrative record in existence at the time of the agency's decision.'" ...

In the absence of any meaningful explanation, the State Department lacks record support for its reliance on additional time and expense.

* * * *

B. The State Department did not fail to consider alternatives.

Zzyym insists that the State Department had to consider the alternative of a third sex designation before deviating from international standards. *See Motor Vehicle Mfrs. Ass'n of U.S.*,

Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 51 (1983). But the State Department did consider those standards, and reliance on the binary sex policy conformed to those standards

The International Civil Aviation Organization (ICAO) sets standards to ensure that every country's passports are machine-readable. The State Department followed that policy, making every U.S. passport machine-readable.

In recognizing gender changes and intersex individuals, the ICAO noted that some countries might issue passports with an "unspecified" designation, using an "X" printed letter and a "<" machine-readable character. In explaining its decision to adhere to the binary sex policy, the State Department attached a document entitled "Use of a Third Sex Marker by Contracting States as Permitted by ICAO." Appellee's Supp. App'x at 56. The attachment of this document showed that the State Department had recognized the ICAO change.

The binary sex policy conforms to the ICAO standard. The ICAO allowed use of a third sex designation but did not require it. Appellants' App'x vol. 3, at 220 ("Since 1999, ICAO standards have allowed, but do not require, countries to permit a third sex designation: 'unspecified.'"). The State Department simply decided not to use the ICAO's option, reasoning that it would not have matched how any U.S. jurisdiction was treating the designation of sex in original identification documents. The State Department thus considered the alternative of using a third sex designation.

VI. Given the existence of two reasons that are supported and three others that are unsupported, the State Department must reconsider its denial of Zzyym's application.

* * * *

...The State Department never said

- whether the State Department's five reasons were independent or
- what the State Department would have decided if it had not considered the inevitability of inaccuracies, surmised a lack of medical consensus, and assumed the infeasibility of a third sex designation.

It certainly appears that concern for accuracy was key to the State Department's decision. Congress has criminalized false information in a passport application, 18 U.S.C. § 1542, and the State Department separately requires applicants to truthfully answer every question on the application. 22 C.F.R. § 51.20(b). In the face of a criminal penalty and regulatory requirement, we cannot simply assume that the State Department would have relied on the binary sex policy even after learning that it would create inaccuracies in passports.

These inaccuracies are inevitable because some people, like Zzyym, are indisputably intersex. But the State Department has not acknowledged the inherent inaccuracies that arise when applying the binary sex policy to these individuals.

Without this acknowledgment or an explanation for forcing indisputably intersex applicants to apply as either male or female, the State Department undermined the accuracy of Zzyym's identifying information and assumed without any evidence that an intersex designation would be too costly and lack a medical consensus.

... In our view, the State Department reasonably concluded that its policy matched how most jurisdictions identified an individual's sex, facilitating the State Department's assessment of eligibility for passports and other agencies' use of passport data. We thus

- vacate the district court’s entry of judgment for Zzyym and the court’s issuance of a permanent injunction against enforcement of the binary sex policy as to Zzyym and
- remand with instructions to vacate the State Department’s decision and reconsider Zzyym’s application for an intersex passport.

* * * *

b. *Morris v. Pompeo*

Oliver Bruce Morris filed suit in federal district court for the District of Nevada in 2019 after the State Department denied Morris’s request for a passport in the sex of male without a certificate from a licensed physician certifying Morris’s transition from the sex of female indicated on Morris’s birth certificate. Morris asserted violations of the APA and of due process and equal protection rights under the Fifth Amendment. In *Morris v. Pompeo*, ___ F. Supp. 3d ___ (D. Nev. No. 19-cv-00569, Nov. 23, 2020), the district court found that the Department’s policy requiring a medical certification of gender transition discriminates against certain transgender individuals, *i.e.*, those who neither receive nor require the care of a physician. The court held that, as applied to Morris, the policy violates the Equal Protection Clause, and ordered the Department to re-adjudicate Morris’s passport application without requiring a physician’s certificate of Morris’s transition from female to male. Excerpts follow from the opinion of the court.*

* * * *

Plaintiff argues that the State Department’s Policy violates his Fifth Amendment equal protection rights by subjecting him to an increased burden to verify his gender that similarly situated cisgender passport applicants do not face. (*See* Am. Compl. ¶¶ 51, 53); (Pl.’s MSJ 19:4–21:5). Plaintiff asserts both a facial and as-applied challenge to the State Department’s gender certification Policy. (*Id.*). Defendant, moving to dismiss, argues that: (1) the Court should dismiss the claim because Plaintiff has not plausibly alleged discriminatory intent against transgender applicants; and (2) even if Plaintiff has sufficiently alleged discriminatory intent, the Policy survives under either rational basis review or heightened scrutiny. (MTD 12:19–15:12, 19:1–22:16). The Court first addresses Defendant’s Motion to Dismiss the claim.

i. Defendant’s Motion to Dismiss

Defendant argues that Plaintiff’s equal protection claim should be dismissed because the Amended Complaint fails to allege sufficient facts indicating that Defendant promulgated the policy to intentionally discriminate against transgender applicants. (MTD 12:19–15:12). Defendant argues that if the Court reaches the constitutional analysis regarding the claim, rational basis review should apply and save the Policy. (*Id.* 19:1–20:5). The Court denies Defendant’s Motion to Dismiss because the Policy’s text categorically treats transgender and

* Editor’s note: On February 18, 2021, the Department of Justice filed a protective notice of appeal in *Morris* and simultaneously notified Congress, consistent with 28 U.S.C. § 530D, of its decision not to seek further review of the District Court’s decision. The U.S. Court of Appeals for the Ninth Circuit subsequently granted the Department of State’s unopposed motion to dismiss the appeal. *Morris v. Pompeo*, No. 21-15302 (9th Cir. Mar. 23, 2021).

cisgender passport applicants differently, and the Court cannot grant dismissal because Defendant bears the burden to establish that the Policy survives heightened scrutiny.

* * * *

The Policy plainly distinguishes between transgender passport applicants and cisgender passport applicants. While the policy itself does not use the term “transgender,” it requires a doctor’s certification of the applicant’s gender if the individual “has had appropriate clinical treatment for gender transition to the new gender of either male or female.” 8 FAM 402.3-2(B). Any person who has undergone a “gender transition” to a new gender is, by definition, transgender. Therefore, the policy only applies to transgender passport applicants. As applied to Plaintiff, the Policy discriminates against Plaintiff because he is a transgender man who cannot supply the required physician certification as he has undergone hormone therapy administered by a nurse practitioner, and there is no indication his transition has been overseen by a physician. (See Nevada Legal Services Letter, AR 11). If Plaintiff were cisgender, he would not have to verify his gender identity beyond the submission of consistent identification corroborating his gender.⁶ 8 FAM 403.3-2(A)(b). Therefore, the policy discriminates against Plaintiff on the basis of his transgender status, and the policy is thus subject to “something more than rational basis but less than strict scrutiny[.]” *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019) (analyzing a ban on military service for transgender persons or persons suffering from gender dysphoria and finding that discrimination against transgender persons qualifies as discrimination on the basis of sex that triggers heightened scrutiny).

Under heightened scrutiny, Defendant bears the burden of establishing that “the policy ‘significantly furthers’ the government’s important interests, and that is not a trivial burden.” *Id.* at 1202 (internal quotations omitted) ... Given that the Court only assesses a motion to dismiss based upon the sufficiency of the facts alleged in a plaintiff’s complaint, but Defendant cannot satisfy his burden to demonstrate that the Policy survives heightened scrutiny at the motion to dismiss stage, the Court cannot grant dismissal of Plaintiff’s Amended Complaint... Thus, the Court denies Defendant’s Motion to Dismiss with respect to Plaintiff’s equal protection claim. The Court next assesses Plaintiff’s Motion for Summary Judgment regarding his as-applied equal protection challenge.

ii. Plaintiff’s Motion for Summary Judgment

The remaining question for the Court is whether Defendant has met his burden to demonstrate that the Policy survives intermediate scrutiny. The Court finds that Defendant has provided no evidence demonstrating that the State Department has an important interest in verifying a passport applicant’s gender identity or that the Policy significantly furthers the interest.

At summary judgment, the Court cannot assume that the Government has a substantial interest in a policy that discriminates against a suspect class; rather, the Government “must establish ‘an exceedingly persuasive justification’ for the classification.” *United States v. Virginia*, 518 U.S. 515, 523, 532–33, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) ...

This Court’s decision is one based on the law and not policy: in this specific case, Defendant has failed to meet his burden at summary judgment. As explained above, Defendant has a burden to *present evidence* demonstrating the importance of its interest, and that the Policy significantly furthers that interest. Although the Court ultimately rules for Plaintiff in this case, the Court’s decision should in no way be construed to mean that the State Department cannot

meet its burden to justify the Policy requiring a doctor's certification of gender for transgender passport applicants. Rather, only with respect to this Plaintiff's equal protection challenge, the Government has failed to meet its burden in this case.

Here, the Government frames its purported interest too broadly and fails to provide evidence that the interest is exceedingly persuasive. Defendant asserts interests in verifying passport applicants' identities and "[i]ssuing passports that accurately state the bearer's identity[.]" (MTD 19:27–20:2, 20:14–16). There is little doubt that the State Department has an interest in accurately representing the identities of U.S. citizens to foreign nations. However, the only facet of identity at issue here is a passport applicant's sex or gender. Defendant has provided no explanation, let alone any evidence, of why the State Department has an important interest in verifying a transgender passport applicant's gender identity, nor a cogent explanation of why the Policy requiring a physician's certification increases the accuracy of issued passports. Assuming, *arguendo*, that Defendant has a substantial interest in verifying transgender applicants' gender identities, he has not shown why a doctor's certification substantially furthers the interest with respect to transgender applicants given that not all transgender persons receive or require physician treatment. (See Memorandum from Jean Tobin, Director of Policy for the National Center for Transgender Equality, Recommended Revisions to 7 FAM 1300 Appendix M, Gender Change, AR 87–89) (explaining that "[p]ermitting certifications from licensed non-physician providers is particularly important because many transgender people do not have regular access to a doctor — and those who do often find it much more difficult to discuss transgender-related issues with their doctor than with a mental health provider."). Therefore, as Defendant has failed to meet his burden to demonstrate that verifying transgender passport applicants' gender identities is an important government interest, the Court must grant Plaintiff summary judgment.

Given that Plaintiff has prevailed on his equal protection claim, the Court orders Defendant to review Plaintiff's passport application without requiring a physician's certification of Plaintiff's gender. If Plaintiff's application is otherwise sufficient under the relevant State Department regulations, Defendant shall issue Plaintiff a 10-year passport. As the Plaintiff has succeeded on his as-applied challenge, the Court declines to address whether the Policy is facially unconstitutional. ...

* * * *

3. Citizenship Claims in Cases of Assisted Reproductive Technology ("ART")

As discussed in *Digest 2019* at 8-9, the U.S. government appealed the district court decision in *Dvash-Banks. v. Pompeo*, holding that minor E.J. Dvash-Banks is a U.S. citizen even though he lacks a biological relationship with his U.S. citizen parent. *Dvash-Banks v. Pompeo*, No. 18-cv-00523 (C.D. Cal. Feb. 21, 2019). E.J. was conceived using a surrogate and sperm from one of his fathers, Elad Dvash-Banks, who is not a U.S. citizen. Elad and his husband, Andrew Dvash-Banks—who is a U.S. citizen—were recognized in Canada as E.J.'s legal parents. On October 9, 2020, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's decision based on binding circuit precedent. *E.J. D.-B. v. Pompeo*, 825 Fed. Appx. 479 (9th Cir.). The U.S. government filed a petition seeking *en banc* review on December 23, 2020. The U.S. brief is excerpted below (with

most footnotes omitted) and available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.**

The United States filed briefs in four other ART cases in federal district courts, two of which are referenced in the *Dvash-Banks* brief. The courts in *Mize v. Pompeo*, 482 F. Supp. 3d 1317 (N.D. Ga. 2020), and *Kiviti v. Pompeo*, 467 F. Supp. 3d 293 (D. Md. 2020), issued opinions in 2020 denying U.S. motions to dismiss and/or for summary judgment and awarding plaintiffs declarations of citizenship. In both cases, the courts found that the Department’s policy requiring a biological connection between a transmitting parent and the child did not comport with the plain reading of Section 301(c) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1401(c), but declined to enjoin the policy or make a finding that it violated the Equal Protection Clause. The Department has forgone appeal in those two cases. Two other cases remain pending as of the end of 2020: *Fielden v. Pompeo*, No. 20-00409 (D.D.C.), and *Blixt v. Pompeo*, No. 20-02102 (D.N.J.). The U.S. government coordinated its response to these cases so that the substantive arguments in the briefs are very similar to those raised in *Dvash-Banks*.

* * * *

I. SCALES AND SOLIS-ESPINOZA WERE INCORRECTLY DECIDED

A. The Statutory Text And Context, And Skidmore Deference, Support The Department’s Interpretation

1. Section 1401(g) confers citizenship on individuals “born ... of parents” who meet the statutory requirements. This Court has recognized that “the ‘born of ’ concept generally refers to a blood relationship.” *Marguet-Pillado*, 560 F.3d at 1083. And that characterization is supported by the definition of the word “of”—a word that “[i]ndicat[es] the thing, place, or person from which or whom something originates, comes, or is acquired or sought.” *Oxford English Dictionary*, <https://oed.com> (last visited Dec. 22, 2020) (definition III of “of, prep.”); see, e.g., *American Heritage Dictionary* 1221 (5th ed. 2016) (“[d]erived or coming from”). For a child to be “born ‘of ’ parents,” then, means he originates or is derived from those parents. *Mize v. Pompeo*, 2020 WL 5059253, at *12 (N.D. Ga. Aug. 27, 2020). A child obviously originates or is derived from his biological parents. Although district courts have concluded that a child *could* be deemed to originate or derive from parents who use ART, even without a biological relationship, see *Kiviti v. Pompeo*, 467 F. Supp. 3d 293, 308 (D. Md. 2020); *Mize*, 2020 WL 5059253, at *13, that is hardly the most plausible interpretation of “born of.” See *Mize*, 2020 WL 5059253, at *11-13 (adopting it only in light of constitutional avoidance concerns).

Section 1401(g)’s plural reference to “parents” further supports the inference that it requires a biological relationship. Not every child has two legal parents at birth, and that was true in 1952 when Congress enacted the “born ... of ” language. Immigration and Nationality Act (INA), Pub. L. No. 82-414, § 301(a)(7), (b), 66 Stat. 163, 236 (1952). But every child in 1952 had two biological parents. Thus, when Congress wrote the statute to assume every child would

** Editor’s note: On January 15, 2021, the U.S. Court of Appeals for the Ninth Circuit denied the petition for rehearing *en banc*.

be “born ... of” two parents, it was presumably referring to a biological relationship. Had Congress meant to refer to other types of parental relationships—such as a married couple’s legal parentage of a child conceived through the wife’s extramarital affair (*see infra* p. 13)—it would have written the statute differently, perhaps referring simply to a child whose parents were married.

The Second Circuit has interpreted the parallel language of 8 U.S.C. § 1401(c)—which confers citizenship on certain children “born outside of the United States ... of parents both of whom are citizens of the United States”—as requiring a biological relationship between the child and parents. In *Colaiani v. INS*, 490 F.3d 185 (2d Cir. 2007), the petitioner claimed citizenship under a predecessor to § 1401(c). One reason the claim failed was that the provision “pertains only to the acquisition of citizenship ‘at birth,’” and the petitioner had been adopted by U.S. citizens only later. *Id.* at 187; *see id.* at 186. But the court also rejected the argument that by following the word “born” with “the preposition ‘of,’ rather than ‘to,’ Congress implied that biological parentage is not necessary for a person to claim citizenship under” § 1401(c). 490 F.3d at 187. It regarded that argument as “contradicted by the plain language of the statute, which refers to persons ‘born ... of parents both of whom are citizens of the United States[.]’” *Id.* (emphasis in original).¹

2. The Department’s interpretation of § 1401(g)’s text is further supported by its context: the conferral of *jus sanguinis* citizenship. As noted, *jus sanguinis* literally means “right of blood,” and the requirement of a biological relationship between a child and the parent whose citizenship he seeks to claim is ingrained in “our traditions.” *Marguet-Pillado*, 560 F.3d at 1082. Congress could have chosen to depart from the historical doctrine in enacting § 1401(g). But given the historical backdrop, Congress would likely have spoken more clearly if that were its intention.

3. To the extent § 1401(g) remains ambiguous notwithstanding its text and context, a tiebreaking factor is the deference owed to the Department’s interpretation under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The *Skidmore* doctrine recognizes that agency interpretations lacking the force of law may warrant deference “given the ‘specialized experience and broader investigations and information’ available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires.” *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (citation omitted).

The Department’s consistent, longstanding interpretation reflects its “‘specialized experience’” and its appreciation of the need for “‘uniformity,’” *Mead*, 533 U.S. at 234. The Department has long been concerned about individuals fraudulently claiming citizenship on behalf of a child who is not theirs. In 2012, for example, the Department considered whether it could “interpret the INA to allow U.S. citizen parents to transmit U.S. citizenship to their children born abroad through ART in a broader range of circumstances,” but the Assistant Secretary of State for Consular Affairs explained to the Secretary that any such change would have “serious potential fraud implications” because consulates “regularly encounter people seeking to document children who are not theirs.” ER20-21. Citizenship fraud is not limited to the ART context, and a biological relationship requirement is not a failsafe means of preventing

¹ The Second Circuit later held in *Jaen v. Sessions*, 899 F.3d 182 (2d Cir. 2018), that § 1401(g) does not require a biological relationship, but it did so only by ignoring the “born ... of” language, incorrectly assuming that “the sole question” was whether the husband of a child’s mother was the child’s “parent” at birth. *Id.* at 185. Whether or not *Jaen*’s analysis of parentage was correct, *Jaen* is not inconsistent with *Colaiani*’s analysis of “born ... of.”

it. But because biological relationships can be objectively verified, such a requirement is a powerful way to prevent fraud. *See infra* pp. 15-16.

Nor is fraud the only relevant concern. If U.S. citizenship could be conferred through legal parentage alone, then foreign laws that recognize novel forms of parentage could potentially open the door to U.S. citizenship wider than Congress likely intended. For example, Ontario—where E.J. was born—automatically recognizes up to four intended parents designated in a surrogacy agreement, and allows courts to recognize more than four. Children’s Law Reform Act, R.S.O. 1990, c. C.12, §§ 10, 11, *available at* <https://www.ontario.ca/laws/statute/90c12>.

B. Contrary Arguments Are Unpersuasive

1. *Scales* relied on the fact that 8 U.S.C. § 1409(a), unlike § 1401(g), “does expressly require a blood relationship between a person claiming citizenship and a citizen father, if the person is born out of wedlock.” 232 F.3d at 1164. “If Congress had wanted to ensure the same about a person born in wedlock,” the Court opined, “it knew how to do so.” *Id.* Both *Solis-Espinoza* and the district court’s opinion here relied on the same inference. 401 F.3d at 1093; 2019 WL 911799, at *7.

But that inference is unwarranted. When Congress enacted § 1401(g)’s relevant language in 1952, there was no explicit biological-relationship requirement in § 1409(a)’s predecessor. *See* INA § 309(a), 66 Stat. at 238 (predecessor to § 1409(a), providing that § 1401(g)’s predecessor “shall apply as of the date of birth to a child born out of wedlock ... , if the paternity of such child is established while such child is under the age of twenty-one years by legitimation”). “[N]egative implications raised by disparate provisions are strongest’ when the provisions were ‘considered simultaneously when the language raising the implication was inserted.’” *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009). And here, Congress did not address § 1401(g)’s “born ... of” language when it later amended § 1409(a) to make the biological-relationship requirement explicit and heighten the threshold of proof to “clear and convincing evidence.” INA Amendments of 1986, Pub. L. No. 99-653, § 13, 100 Stat. 3655, 3657. Thus, one cannot infer anything about § 1401(g)’s “born ... of” language from Congress’s later clarification of the biological-relationship requirement in § 1409(a).

Congress did amend a *different* part of § 1401(g), to lower the physical-presence requirement, when it amended § 1409(a). *Id.* §§ 12-13, 100 Stat. at 3657. But that does not suggest Congress meant for § 1401(g) to require only a legal relationship, by contrast with § 1409(a)’s explicit biological-relationship requirement. Quite the opposite. By the time Congress amended the statute, the Department had long interpreted § 1401(g) to require a biological relationship, and “‘Congress is presumed to be aware of an administrative or judicial interpretation of a statute[.]’” *Chugach Mgmt. Servs. v. Jetnil*, 863 F.3d 1168, 1174 (9th Cir. 2017). If Congress disagreed with the Department’s interpretation of § 1401(g), it would surely have taken the opportunity—while amending § 1401(g) in another respect—to state clearly that legal parentage was sufficient under that provision. “It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the ‘congressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress.’” *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 846 (1986).

2. The district court also opined that “the presumption of legitimacy that applies when a child is born to married parents” is “codified in the INA” and “cannot be rebutted by evidence that the child does not have a biological tie to a U.S. citizen parent.” 2019 WL 911799, at *7. But that reasoning—as in *Jaen*, noted above (at 9 n.1)—ignores the text of § 1401(g). The

Department has not disputed in this case that Elad and Andrew are E.J.’s “parents,” but the statute requires more than a U.S. citizen parent who meets the residency requirement; it confers citizenship only on children “born ... of parents” who meet the requirements.

The traditional presumption of legitimacy has no bearing on that question, because as the Supreme Court explained in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the presumption is not a rule of evidence for the determination of a child’s biological father. It is “a substantive rule of law” providing that, “except in limited circumstances, [it is] irrelevant ... whether a child conceived during, and born into, an existing marriage was begotten by someone other than the husband.” *Id.* at 119 (plurality opinion). Whether or not that rule is relevant to determining a child’s “parents” for purposes of § 1401(g), it is irrelevant to determining whether the child was “born ... of” his parents, since that determination turns on precisely those biological facts that the presumption may render irrelevant to legal parentage.

3. Two district courts have determined that the biological-relationship requirement raises constitutional concerns, on the theory that the transmission of citizenship to a non-biological child is among “the constellation of benefits ... linked to marriage,” *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017) (per curiam) (quoting *Obergefell v. Hodges*, 576 U.S. 644, 670 (2015)). See *Mize*, 2020 WL 5059253, at *11; *Kiviti*, 467 F. Supp. 3d at 312-314.

But no U.S. citizen, whether married to someone of the same or the opposite sex, may transmit citizenship under § 1401 to a non-biological child. The Department’s interpretation treats the children of married same-sex couples exactly like those of married opposite-sex couples. If children are biologically related to both parents, they are “born ... of” their parents and eligible to acquire citizenship under § 1401 if the other requirements are satisfied. If not, they may acquire citizenship through a U.S. citizen father under § 1409(a) or mother under § 1409(c).

It is legally irrelevant that the children of opposite-sex couples more often have a biological relationship with both parents than the children of same-sex couples. Disparate effects of a facially neutral policy do not raise equal protection concerns. See, e.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Plaintiffs have not suggested—nor could they—that the Department adopted or reaffirmed the challenged policy “at least in part ‘because of,’” rather than “merely ‘in spite of,’” any disproportionate effect on children of same-sex couples, *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

4. Finally, the district court opined that the Department’s interpretation of § 1401(g) is not “consistent with the legislative history of the INA” because it undermines the goal “of keeping families of United States citizens and immigrants united.” 2019 WL 911799, at *8. But even if the objective of family unity could inform the construction of ambiguous statutory language, it is not implicated here. The law affords alternative paths to citizenship for children who, like E.J., (1) are born overseas with one U.S. citizen parent to whom they are not biologically related and one noncitizen parent to whom they are biologically related and (2) now reside in the United States.

Among other options, a child in that position can become a lawful permanent resident (LPR) of the United States through his relationship to the U.S. citizen parent, who qualifies (by marriage to the child’s biological parent) as the child’s stepparent for purposes of 8 U.S.C. § 1101(b)(1)(C). The noncitizen parent also qualifies to become an LPR, *id.* § 1151(b)(2)(A)(i), and can then qualify to become a U.S. citizen after residing in the United States for three years, *id.* § 1430(a). And once the noncitizen parent naturalizes, the child automatically acquires citizenship under the Child Citizenship Act if he “reside[s] in the United States in the legal and

physical custody of” that parent. *Id.* § 1431(a). The Department’s interpretation thus does not threaten the ability of Elad, Andrew, and their children to reside together in the United States.

II. EN BANC REVIEW IS WARRANTED

En banc review is warranted for two reasons. *First*, this issue is exceptionally important. As noted above, the Department is concerned that citizenship fraud will be harder to detect and prevent if citizenship can be claimed solely on the basis of legal relationships. In countries where legal documents can easily be falsified or fraudulently obtained, someone seeking U.S. citizenship for a child could acquire a certificate of marriage to a U.S. citizen and papers showing the U.S. citizen to be a legal parent of the child. If the applicant did not claim that the U.S. citizen was a biological parent of the child—for example, if he or she claimed to have conceived the child through an extramarital relationship—then DNA testing would not shed light on the truth of the asserted basis for citizenship. The consulate could investigate the veracity of the claimed marriage and parental relationship, but investigations consume time and resources and can be inconclusive. With a biological-relationship requirement, by contrast, citizenship eligibility can often be determined by a simple DNA test (together with evidence of the other requirements).

Second, this issue warrants the thorough consideration that *en banc* review can provide. Although the Court addressed § 1401(g) in *Scales* and *Solis-Espinoza*, its analysis in those cases fell short of meaningful engagement with the issues discussed above, likely because they were inadequately presented. *Scales* and *Solis-Espinoza* also arose in different circumstances (on petitions for review of removal orders), and neither case involved ART. And since those cases were decided, the volume of cases presenting this issue, or variations, has grown considerably. Similar cases have been and are likely to be brought both within and outside this Circuit. *See, e.g., Blixt v. Department of State*, No. 20-cv-2102 (D.N.J.) (pending case where, as here, child is not biologically related to U.S. citizen parent); *Fielden v. Pompeo*, No. 20-cv-409 (D.D.C.) (same).

* * * *

4. U.S. Passports Invalid for Travel to North Korea

As discussed in *Digest 2017* at 7, *Digest 2018* at 12, and *Digest 2019* at 9, U.S. passports were declared invalid for travel to, in, or through the Democratic People’s Republic of Korea (“DPRK”), pursuant to 22 CFR § 51.63(a)(3), since September 1, 2017. On August 18, 2020, the Secretary of State extended the restriction until August 31, 2021 unless extended or revoked. 85 Fed. Reg. 53,900 (Aug. 31, 2020).

B. IMMIGRATION AND VISAS

1. Nonreviewability

a. Bautista-Rosario v. Mnuchin

Plaintiffs, who were designated under Section 7031(c) of the Department’s annual appropriations act, challenge those designations under the Administrative Procedure Act (“APA”), the Due Process Clause of the Fifth Amendment, and the appropriations

statute itself, which requires reporting to Congress. *Bautista-Rosario et al. v. Mnuchin*, No. 20-cv-02782 (D.D.C.). See Chapter 16 for discussion of 7031(c) designations, which impose ineligibility for entry into the United States. On December 14, 2020, the United States filed its brief in support of its motion to dismiss all claims. Excerpts follow (with footnotes omitted) from the U.S. brief, which is available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

* * * *

I. Plaintiffs’ Challenges to Their Section 7031(c) Designations are not Justiciable

It is a fundamental separation-of-powers principle that the political branches’ decisions to exclude aliens abroad generally are not judicially reviewable. This principle bars any review of Plaintiffs’ challenge to their Section 7031(c) designations, as discussed more fully below.

“For more than a century,” the Supreme Court has consistently held that separation-of-powers principles firmly commit to Congress and the Executive “the admission and exclusion of foreign nationals.” *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) (citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)), *remanded*, *Hawaii v. Trump*, 898 F.3d 1266 (9th Cir. 2018). The Supreme Court “ha[s] long recognized the power to . . . exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” *Fiallo*, 430 U.S. at 792; *see Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (“For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.”). “The conditions of entry for every alien, . . . the right to terminate hospitality to aliens, [and] the grounds on which such determination shall be based” are “wholly outside the power of this Court to control.” *Fiallo*, 430 U.S. at 796 (internal citation omitted); *see also Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (“[A]ny policy toward aliens is vitally and intricately interwoven [in] . . . the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”); *Kerry v. Din*, 576 U.S. 86, 86-87 (2015) (“[T]his Court has consistently recognized its lack of judicial authority to substitute its political judgment for that of Congress with regard to the various distinctions in immigration policy.”) (citation and alterations omitted). The “plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established,” and “Congress has delegated [the] conditional exercise of this power to the Executive.” *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972). “[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.” *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). Absent such affirmative congressional authorization, judicial review of an alien’s exclusion is ordinarily unavailable.

A. Congress Has Expressly Foreclosed Judicial Review of Section 7031 Designations

Far from authorizing, Congress has declined to allow judicial review of decisions to deny the entry of aliens living abroad, including Section 7031(c) designations. Congress established a comprehensive statutory framework for judicial review of decisions concerning the ability of certain aliens physically present in the United States to enter or remain in this country. *See* 8

U.S.C. § 1252. But neither Section 1252 nor any other provision of the Immigration and Nationality Act provide[s] for judicial review of visa determinations pertaining to aliens physically outside this country. Indeed, Congress has not authorized judicial review of visa denials. *See, e.g.*, 6 U.S.C. § 236(f); *see id.* §§ 236(b)(1), (c)(1). Similarly, Congress has banned judicial review of visa revocations (subject to a narrow exception inapplicable to aliens abroad). *See* 8 U.S.C. § 1201(i). And when the Supreme Court held that aliens physically present in the United States—but not aliens abroad—could seek review of their exclusion orders under the APA, *see Brownell v. We Shung*, 352 U.S. 180, 184-86 (1956), Congress responded by abrogating that ruling. *See* Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 650, 651-653; *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1157-62 (D.C. Cir. 1999) (recounting history). The House Report accompanying the abrogating statute explained that APA suits would “give recognition to a fallacious doctrine that an alien has a ‘right’ to enter this country which he may litigate in the courts of the United States against the U.S. Government as a defendant.” H.R. Rep. No. 87-1086, at 33 (1961), *as reprinted in* 1961 U.S.C.C.A.N. 2950, 2977.

Given these fundamental and longstanding principles of nonreviewability espoused by the Supreme Court, as well as Congress’ disinclination to allow for judicial review, courts formulated the rule that the denial or revocation of a visa by a consular officer abroad “is not subject to judicial review . . . unless Congress says otherwise.” *Saavedra Bruno*, 197 F.3d at 1159. This “doctrine of consular nonreviewability,” *id.*, however, is just one manifestation of a broader principle of nonreviewability that merely reflects the context in which the principle most often arises—*i.e.*, challenges to decisions by consular officers adjudicating visa applications. But the principle underlying that doctrine applies regardless of the legal basis under which the Executive denies an alien entry into the United States.

B. Plaintiffs Cannot Challenge the Secretary’s 7031(c) Designations

This bar on judicial review of the political branches’ exclusion of aliens abroad forecloses Plaintiffs’ challenge to their Section 7031(c) designations. When the Secretary possesses credible information of an individual’s involvement in significant corruption, Congress has authorized the Secretary to “publicly or privately designate or identify” such an individual. *See* Section 7031(c). As a result, these individuals are ineligible for entry into the United States without regard to whether the individual has applied for a visa. *Id.* As detailed above, well-established Supreme Court precedent clearly dictates that such matters regarding an individual’s eligibility to enter this country should be left to the political branches, without judicial intervention. The principles that generally bar the courts from reviewing visa denials of individual consular officers similarly must be construed to bar review of decisions by the Secretary grounded in sensitive foreign affairs and national security considerations to, effectively, revoke or deny the visas of certain foreign corrupt government officials. It would be likewise counterintuitive to think that Congress intended to have Section 7031(c) designations reviewed by this Court, considering Congress’s silence on the matter and its general disinclination to authorize the review of decisions regarding an alien’s ability to enter this country. Thus, Plaintiffs should not be permitted to use the instant lawsuit to circumvent principles set out in Supreme Court precedent.

Another member of this Court recently reached an analogous conclusion, holding that it lacked the authority to consider a decision by the Secretary that would lead to the visa revocation of an alien present in the United States. *See Nkrumah v. Pompeo*, No. 20-CV-01892 (RJL), 2020 WL 6270754, *1 (D.D.C. Oct. 26, 2020). In *Nkrumah*, a Ghanaian citizen challenged the Department of State’s determination, pursuant to 22 U.S.C. § 288(d), that her presence in the

United States was not desirable, which would ultimately result in the revocation of her G-4 visa. *Id.* When assessing whether the plaintiff had demonstrated a likelihood of success on the merits for purposes of a request for a preliminary injunction, the Court determined that it could not assess the undesirability determination. *Id.* at *2. The Court explained that “the decision to admit or exclude a foreign national is a particularly sensitive area of Executive discretion,” and therefore concluded that it was “not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.” *Id.* (quoting *Saavedra Bruno*, 197 F.3d at 1159). As in *Nkrumah*, the Court should not second-guess a decision made by the Secretary—here, Bautista-Rosario’s involvement in significant corruption as a foreign government official—that could ultimately lead to the revocation or denial of a visa.

Thus, the Court should decline to consider the propriety of Plaintiffs’ Section 7031(c) designations.

II. Plaintiffs Cannot Use the APA as a Vehicle to Challenge Their Section 7031(c) Designations

Plaintiffs erroneously contend that Congress has authorized judicial review of their Section 7031(c) designations under the APA. ...

A. The Nature and Consequences of Plaintiffs’ Section 7031(c) Designations Preclude this Court’s Review

The APA does not apply “to the extent that . . . statutes preclude judicial review.” 5 U.S.C. § 701(a)(1). This determination is made “not only from [a statute’s] express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.” *Block v. Cnty. Nutrition Inst.*, 467 U.S. 340, 345 (1984). The Supreme Court reaffirmed the principles embraced in *Block*, acknowledging that the APA’s presumption of judicial review of agency action “may be overcome by inferences of intent drawn from the statutory scheme as a whole.” *Sackett v. EPA*, 566 U.S. 120, 128 (2012) (quoting *Block*, 467 U.S. at 349).

In contrast to the ordinary presumption that the APA provides for the district courts’ consideration of final agency actions, the D.C. Circuit determined, in a comparable context, that it could infer that the immigration laws precluded its judicial review. *See Saavedra Bruno*, 197 F.3d at 1162 (citing 5 U.S.C. § 701(a)(1)). In *Saavedra Bruno*, the D.C. Circuit held that it could not assess the propriety of the decision of a consular officer to deny a visa, even though Congress had not expressly stated that the district court’s review was foreclosed. *Id.* Indeed, Congress had no need to expressly say as much “[g]iven the historical background against which it has legislated over the years[.]” *Id.* The D.C. Circuit observed that Congress could “safely assume” that aliens could not challenge consular officers’ visa decisions in federal court “unless legislation specifically permitted such actions.” *Id.* And the D.C. Circuit went on to note that “[w]hen it comes to matters touching on national security or foreign affairs—and visa determinations are such matters—the presumption of review runs aground.” *Id.* (citation omitted). The Court should reach the same conclusion in this case. Congress has no need to explicitly state and could safely assume that this Court cannot review the Secretary’s decision to designate Plaintiffs under Section 7031(c), a decision that has the same practical consequence that the D.C. Circuit faced in *Saavedra Bruno*—the exclusion from the United States of non-resident aliens living abroad. As the *Saavedra Bruno* decision makes clear, the Secretary’s designation of Plaintiffs implicates the Executive’s national security and foreign policy prerogatives that overcome the presumption that the APA allows judicial review. Put another

way, the presumption of judicial review in this case, as in *Saavedra Bruno*, “is the opposite of what the APA normally supposes.” *Saavedra Bruno*, 197 F.3d at 1162.

Further, ... Section 7031(c) designations—the exclusion from the United States of corrupt foreign government officials—make APA review of the Secretary’s decision particularly misguided. *See Block*, 467 U.S. at 345. As discussed above, the Supreme Court has long recognized “the power to exclude aliens as inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government[.]” *Saavedra Bruno*, 197 F.3d at 1159 (internal quotations omitted) (quoting *The Chinese Exclusion Case (Ping v. United States)*, 130 U.S. 581, 609 (1889)); *see also Harisiades*, 342 U.S. at 588-89 (“[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.”). The Supreme Court recently emphasized that “[b]ecause 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.’” *Hawaii*, 138 S. Ct. at 2418-19 (citation omitted).

These well-established principles caution against misusing the APA to second-guess Plaintiffs’ Section 7031(c) designations. Based on credible information, the Secretary determined that Bautista-Rosario engages in significant corruption as a foreign government official. ... The APA is not a basis to challenge determinations that federal courts have consistently found should be left to the Executive.

The statutory scheme and relevant legislative history also show that the APA should not be a mechanism for Plaintiffs to challenge their Section 7031(c) designations. *See Block*, 467 U.S. at 345. Congress has consistently declined to allow judicial review of decisions to exclude aliens living abroad, which would be the precise result in the event the Court permits Plaintiffs’ lawsuit to proceed. While Congress allows judicial review of some immigration decisions for certain aliens physically present in the United States, *see* 8 U.S.C. § 1252, it has not authorized judicial review of such aliens’ visa denials, *see, e.g.*, 6 U.S.C. § 236(f), or visa revocations, 8 U.S.C. § 1201(i). And when the Supreme Court held that aliens physically present in this country could seek review of their exclusion orders under the APA, *see We Shung*, 352 U.S. at 184-86, Congress responded by abrogating the Court’s decision. *See Saavedra Bruno*, 197 F.3d at 1157-62 (recounting legislative history). Finally, Congress is well-aware of the long-standing principle of nonreviewability in this context, and by enacting Section 7031(c) without explicitly authorizing judicial review, it should be presumed Congress intended to exclude such review. This is especially true given that Congress has passed a version of this provision in every annual appropriations act for the Department of State since 2008, with substantive changes made in 2012, 2014, 2015, and 2017. Congress, however, has never altered the statute to allow for judicial review of the Secretary’s Section 7031 designations.

Section 7031(c) designations implicate fundamental issues at the intersection of national security, foreign policy, and immigration prerogatives that preclude judicial review under the APA. *See Saavedra Bruno*, 197 F.3d at 1160 (describing it as “unmistakable” that the immigration laws “preclude judicial review” of consular visa decisions).

B. Section 7031(c) Designations Constitute Agency Decisions Committed to the Department of State’s Discretion

Although the APA “embodies the basic presumption of judicial review,” ..., Plaintiffs “must first clear the hurdle” of 5 U.S.C. § 701(a)(2). *Heckler v. Chaney*, 470 U.S. 821, 828

(1985). Section 701(a)(2) precludes from judicial review any action that “is committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). An agency action is committed to agency discretion by law and thus not subject to APA review if “the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” *Heckler*, 470 U.S. at 830. Agency action is unreviewable in such a situation because “the courts have no legal norms pursuant to which to evaluate the challenged action, and thus no concrete limitations to impose on the agency’s exercise of discretion.” *Sierra Club v. Jackson*, 648 F.3d 848, 855 (D.C. Cir. 2011) (citation omitted). To determine whether a matter has been committed to agency discretion, the D.C. Circuit considers “the nature of the administrative action at issue,” as well as “the language and structure of the statute that supplies the applicable legal standards for reviewing that action.” *Id.* (citation omitted).

Here, both factors support the conclusion that the Secretary’s Section 7031(c) designations are committed to the agency’s unreviewable discretion. Section 7031(c)(1)(A) authorizes the Secretary to make a finding that “credible” information established an individual’s involvement in “significant corruption,” while Section 7031(c)(1)(B) affords the Secretary wide latitude to designate such an individual publicly or privately. Unlike the Secretary, the district courts lack the foreign affairs expertise and regional knowledge needed to properly assess the credibility of information about an alien’s possible involvement in corruption, or whether such corruption rises to the level that it may be deemed “significant.” Likewise, the district courts are not well-suited to question the Secretary’s decision about whether to make a designation public or private, a determination that necessitates careful consideration of foreign policy, political, and diplomatic variables. *Cf. Nkrumah*, 2020 WL 6270754, *3 (noting that the Secretary’s “undesirability” determination “touches at the heart of foreign policy, diplomatic relations, the war power, and other key Executive interests”). Further, Section 7031(c) neither provides guidance about what constitutes “credible” information nor defines “significant corruption.” And similarly, Section 7031(c) does not set forth a standard for the Secretary to follow when assessing whether a designation should be public or private, such as factors or considerations that can be weighed and evaluated. The district courts, therefore, are particularly ill-equipped to assess the propriety of Section 7031(c) determinations, and as such, these determinations should be left to the Secretary’s discretion without judicial interference.

III. Plaintiffs Lack Sufficient Contacts with the United States and Therefore Cannot Assert Constitutional Claims

“[N]on-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections.” *Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004); accord *Johnson v. Eisentrager*, 339 U.S. 763, 770-71 (1950). ...

IV. Plaintiffs have not Been Deprived of Their Life, Liberty, or Property

The procedural due process clause of the Fifth Amendment provides that individuals cannot have their “life, liberty, or property” deprived without due process of law. *See Williams v. District of Columbia*, No. 1:19-CV-01353 (CJN), 2020 WL 1332027, at *2 (D.D.C. Mar. 23, 2020), *aff’d*, No. 20-7037, 2020 WL 6038667 (D.C. Cir. Sept. 1, 2020). Therefore, “[t]he first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in ‘property’ or ‘liberty.’” *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 315 (D.C. Cir. 2014) (citation omitted). Only after Plaintiffs demonstrate a protected liberty interest should the district court consider whether the process violated their constitutional rights under the Fifth Amendment. *Id.*

Plaintiffs, however, have not alleged the deprivation of any such constitutionally protected interest. *See* Compl. ¶¶ 43-51. As mentioned above, Plaintiffs contend that the Secretary failed to provide them with sufficient notice about the basis for their Section 7031(c) designations, the consequences of which are that they are ineligible for entry into this country. *See* Section 7031(c)(1)(A). But nonresident aliens living abroad do not have a liberty interest in entering the United States such that they must be afforded due process before they can be denied entry. *See, e.g., Hawaii*, 138 S. Ct. at 2419 (“[F]oreign nationals seeking admission have no constitutional right to entry”); *Rafeedie v. INS*, 880 F.2d 506, 520 (D.C. Cir. 1989) (“Our starting point, therefore, is that an applicant for initial entry has no constitutionally cognizable liberty interest in being permitted to enter the United States.”) (citing *Kwong Hai Chew v. Colding*, 344 U.S. 590, 591-92 (1953)). Interpreting the Supreme Court’s decision in *Knauff*, the D.C. Circuit explained that “an initial entrant has no liberty (or other) interest in entering the United States, and thus has no constitutional right to any process in that context[.]” *Rafeedie*, 880 F.2d at 520; *see Doe v. Pompeo*, 451 F. Supp. 3d 100, 110 (D.D.C. 2020) (“[T]he Government can afford whatever process it wants to an initial entrant, including no process at all.”).

Therefore, Plaintiffs’ Fifth Amendment challenge must be dismissed because without the deprivation of a cognizable liberty interest, due process protections have not been implicated.

V. The APA Does Not Require the Department of State to Establish a Process for challenging Section 7031(c) Designations

Plaintiffs argue that the Department of State violated the APA, 5 U.S.C. § 552(a)(1), by not making public “the procedures available” to Plaintiffs by which they can seek reconsideration of their Section 7031(C) designations. Compl. ¶ 58; *see also id.* at ¶ 55 (faulting the Department of State for not identifying “available procedures” for Plaintiffs to challenge their designations). Plaintiffs’ argument fails for two reasons. First, Congress authorized the Department of State to designate foreign government officials who have been involved in significant corruption or a gross violation of human rights. *See* Section 7031(c)(1)(A). The statutory authority, however, neither requires nor contemplates the creation of a formal reconsideration process. *See generally id.* Second, 5 U.S.C. § 552(a)(1) does not require the affirmative action Plaintiffs envision. The APA provides that agencies “shall make available to the public” by publication in the Federal Register certain existing administrative information that is not publically available, such as “the nature and requirements of all formal and informal procedures *available*.” 5 U.S.C. § 552(a)(1)(B) (emphasis added); ...

Here, however, the Department of State has not established a reconsideration process for Section 7031(c) designations. The Department of State cannot describe in the Federal Register a process that does not exist, and thus, the APA requirements have not been triggered.

VI. The Department of State Published the Report Required by Section 7031(c)

Plaintiffs’ final claim fares no better. They assert that the Department of State failed to issue the report required by Section 7031(c)(4-6). *See* Compl. ¶¶ 59-61. Not so. The Department of State issued the report contemplated by Plaintiff on December 10, 2018. *See* U.S. Dep’t of State, Report to Congress on Anti-Kleptocracy and Human Rights Visa Restrictions – Bureau of International Narcotics and Law Enforcement Affairs (Dec. 10, 2018), *available at* <https://state.gov/report-to-congress-on-anti-kleptocracy-and-human-rights-visa-restrictions-2/>. ...

b. Nkrumah v. Pompeo

As referenced in the *Bautista-Rosario* brief, *supra*, the federal district court in *Nkrumah v. Pompeo*, No. 20-cv-01892 (D.D.C. Oct. 26, 2020), also found a State Department determination to be outside the court’s jurisdiction. On October 26, 2020, a federal district court for the District of Columbia denied plaintiff Nkrumah’s motion for a temporary restraining order and preliminary injunction barring the State Department from revoking her visa. The State Department had made a determination, pursuant to International Organization Immunities Act (“IOIA”) Section 288e(b), that the presence in the United States of Ms. Nkrumah, an individual entitled to benefits under the IOIA, was “not desirable.” Ms. Nkrumah is a citizen of Ghana who had been in the United States since 2007 pursuant to a G-4 visa granted based on her work at the World Bank. The State Department made the “undesirability” determination after an investigation revealed that Ms. Nkrumah had engaged in fraud related to the G-5 visa application for a domestic worker and participated in a scheme to underpay and overwork the G-5 visa holder. The court denied the motion and dismissed the case, finding that the “undesirability” determination was not subject to judicial scrutiny. Excerpts follow from the opinion.

* * * *

However, upon consideration of the parties’ briefing and argument, the relevant law, and the entire record, I am persuaded that the Court lacks jurisdiction to review plaintiff’s undesirability determination... Because the decision to admit or exclude a foreign national is a particularly sensitive area of Executive discretion, it is “not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.” *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999) (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950)). As a general matter, determinations regarding the issuance or withholding of visas are “not subject to judicial review, at least unless Congress says otherwise.” *Id.*

To date, plaintiff has failed to identify a statute authorizing judicial review of the Secretary of State’s determination that the continued presence of a foreign visa holder working for an international organization is not desirable. Indeed, it is not clear what “meaningful standard” would exist “against which to judge [the Secretary of State’s] exercise of discretion” in making this undesirability determination. *See Heckler v. Chaney*, 470 U.S. 821, 830 (1985). The Secretary’s power to make determinations of undesirability touches at the heart of foreign policy, diplomatic relations, the war power, and other key Executive interests. *See Saavedra Bruno*, 197 F.3d at 1159. It is also worth noting that this undesirability determination is not, in and of itself, a visa revocation, contrary to what plaintiff contends, *see* Compl. ¶¶ 15–18. Defendants confirm that even though the Secretary determined in June 2020 that plaintiff’s continued presence was undesirable, as of September 2020, plaintiff’s G-4 visa was still valid and had not been revoked. *See* Defs.’ Opp’n to Pl.’s Mot. for Prelim. Inj. (“Defs.’ Opp’n”), Ex. 2, Decl. of Tiffany Derentz ¶ 7 (Sept. 11, 2020) [Dkt. #16-2].

However, even if plaintiff's visa had been revoked, Congress firmly committed this type of substantive decision to the Secretary's discretion. Under 8 U.S.C. § 1201, the Secretary of State "may at any time, in his discretion, revoke" a visa that has been issued, and "[t]here shall be no means of judicial review ... of a revocation." 8 U.S.C. § 1201(f). Plaintiff protests that this Court has jurisdiction to review the undesirability determination pursuant to the Foreign Missions Act, 22 U.S.C. § 4301(a). Compl. ¶ 8; Pl.'s P.I. Mem. At 6. The Foreign Missions Act, however, provides for the operation of foreign missions and international organizations, including the privileges and immunities of members. *See* 22 U.S.C. § 4301(b) (declaring it the policy of the United States "to facilitate the secure and efficient operation in the United States of foreign missions and public international organizations ... and to assist in obtaining appropriate benefits, privileges, and immunities for those missions and organizations"). No provision in the Foreign Missions Act could be read to give the federal courts the power to review a determination to exclude an employee of an international organization from the United States.

Plaintiff's claims also assume that the procedures for revocation of a visa by a consular officer apply to her situation. Compl. ¶¶ 15–18. *See* 22 C.F.R. § 41.122(c) (providing notice requirements for revocation of visas). Unfortunately for plaintiff, they do not. As noted, plaintiff's visa had not yet been revoked as of September 2020. *See supra* p. 6. The U.S. Department of State determined that plaintiff's continued presence in the United States was "not desirable" pursuant to the International Organizations Immunities Act ("IOIA"), 22 U.S.C. § 288e. Under the IOIA, if the Secretary of State or his designee determines that the "continued presence" of an employee of an international organization is "not desirable," the Secretary of State need only inform the international organization of this determination. 22 U.S.C. § 288e. After the employee has been given "a reasonable length of time," he or she must depart the United States, and he or she ceases to be entitled to the IOIA's benefits, including a G-series visa. *See id.*

Plaintiff questions whether the undesirability determination at issue here was made by the Secretary of State or his designee under 22 U.S.C. § 288e, rather than by a consular officer. Pl.'s Reply at 5–7 [Dkt. #17]. Plaintiff notes that the June 29, 2020 letter was signed not by Secretary of State Michael R. Pompeo, but by Cliff Seagroves, the Principal Deputy Director of the U.S. Department of State's Office of Foreign Missions. *See* June 29, 2020 Letter at 1. Plaintiff thus demands that the U.S. Department of State and the Office of Foreign Missions "trace their claimed delegation of authority." Pl.'s Reply at 6. Unfortunately for plaintiff, defendants have sufficiently done so. Defendants make clear that Cliff Seagroves, as OFM Principal Deputy Director, was acting as the Secretary's designee in issuing the undesirability determination. Unless explicitly prohibited by law, the Secretary of State may delegate authority to perform any of the Secretary's functions to "officers and employees under the direction and supervision of the Secretary." 22 U.S.C. § 2651a(a)(4). The Secretary of State delegated authority to perform functions under the IOIA to the Deputy Secretary for Management and Resources, who delegated it to the Under Secretary for Management, who delegated it to the Director and Deputy Director of the Office of Foreign Missions. Plaintiff's request for limited discovery is unnecessary when this chain of delegations is available in the *Federal Register*. ...

* * * *

c. Consular Nonreviewability

Several cases were dismissed in 2020 by district courts on the basis of consular nonreviewability, a doctrine well-established by Supreme Court precedent such as *Kerry v. Din*, 576 U.S. ___, 135 S. Ct. 2128 (2015). See *Digest 2015* at 15-20. Examples include *Moreira v. Cissna*, 442 F. Supp. 3d 850 (E.D. Pa. 2020); *Baaghil et al. v. Miller et al.*, No. 19-11138 (E.D. Mich.); *Montenegro v. DHS*, No. 19-cv-02857 (C.D. Ca.). See also discussion, *infra*, of cases regarding Proclamations 10014 and 10052.

2. Diversity Visa Lottery

As discussed in *Digest 2019* at 14-16, the district court in *E.B. v. Department of State*, No. 19-cv-02856 (D.D.C.), a case concerning the annual Diversity Visa Program (“DV Program”), denied plaintiffs’ motion for a preliminary injunction. Plaintiffs brought a challenge under the Administrative Procedure Act (“APA”) to the interim final rule (“IFR”) requiring foreign nationals who wish to participate in the DV Program “visa lottery” to provide information from their valid, unexpired passport on the electronic lottery entry form. On October 23, 2020, the government filed its brief in opposition to plaintiffs’ motion for summary judgment. That brief is excerpted below and available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

* * * *

A. The State Department justifiably invoked the foreign affairs exception because the IFR involves a foreign affairs function of the United States.

Plaintiffs’ claim that the “foreign affairs exception does not apply to the [IFR] because the Rule does not ‘clearly and directly involve activities or actions characteristic to the conduct of international relations’” lacks merit. ...In promulgating the IFR, the State Department justifiably invoked the foreign affairs exception to notice and comment rulemaking procedures because the rule involves a foreign affairs function of the United States—it “pertains to [the DV Program] which serves as a clear tool of diplomacy and outreach to countries around the world.” 84 Fed. Reg. at 25,990.

The APA’s foreign affairs exception provides that a rule need not undergo notice and comment “to the extent that there is involved ... a military or foreign affairs function of the United States[.]” 5 U.S.C. § 553(a)(1). The foreign-affairs exception covers agency actions “linked intimately with the Government’s overall political agenda concerning relations with another country.” *Am. Ass’n of Exporters & Importers-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985). “The purpose of the [foreign affairs] exemption was to allow more cautious and sensitive consideration of those matters which so affect relations with other Governments that, for example, public rule-making provisions would provoke definitely undesirable international consequences.” *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 201 (2d Cir. 2010) (internal quotations and citations omitted). Further, based on the legislative history behind the exception, “it would seem clear that the

[foreign affairs] exception must be construed as applicable to most functions of the State Department[.]” Tom C. Clark, *Attorney General’s Manual on the Administrative Procedure Act* 27 (1947).

Here, the State Department properly invoked the exception and provided a reasoned explanation sufficient under the APA. Congress explicitly bestowed upon the Secretary of State the authority to administer the DV Program, and to “prescribe such regulations as may be necessary to carry out” his authority under the INA. *See* 8 U.S.C. §§ 1103(a)(1), 1104, 1153(c), 1154(a)(1)(I). Under this broad authority, in addition to achieving the goal of diversifying the immigrant population in the United States, the Department administers the DV Program “as an outreach tool, as its focus is on building relations with foreign populations around the world, particularly with diversity visa eligible countries.” 84 Fed. Reg. at 25,990. In testimony to Congress, former U.S. Ambassador Johnny Young explained how the DV Program impacted U.S. foreign policy and diplomatic efforts. *See* Safe for America Act: Hearing Before the Subcomm. on Immigration and Policy Enforcement, 112 Cong. 27 (2011), also available at <https://www.govinfo.gov/content/pkg/CHRG-112hhrg65602/html/CHRG-112hhrg65602.htm> or <https://www.hsdl.org/?abstract&did=713985> (last visited Oct. 22, 2020). Ambassador Young explained that the DV Program furthered the objective of showcasing the United States “as a place of unparalleled openness and opportunity” which is “crucial to the maintenance of U.S. and American leadership” around the world. *Id.* at 45. He also indicated that the DV Program serves “U.S. foreign policy interests” because it “generates goodwill and hope among millions across the globe ravaged by war, poverty, undemocratic regimes, and opacity in government.” *Id.* Ambassador Young further explained that “[t]hrough the diversity immigrant visa program, the United States makes a counterpoint to that reality, a chance at becoming an integral member of an open, democratic society that places a premium on hard work and opportunity.” *Id.* Because “[i]n fiscal year 2011 alone, there were 12.1 million qualified applicants to the diversity immigrant visa program,” he emphasized that “[f]rom a diplomacy standpoint, that is a powerful opportunity.” *Id.* at 46. Ambassador Young concluded that the DV Program “is an important facet of both our domestic and foreign policy objectives.” *Id.*

The State Department’s reasoning behind the IFR is consistent with this. As diversity visa-eligible countries qualify for a unique relationship with the United States under the INA based on the limited immigration of nationals of those countries to the United States, “the DV Program is an important public diplomacy tool for the Department of State, because it offers foreign nationals an opportunity to immigrate to the United States without having to qualify under a more targeted family-based or employment-based classification.” 84 Fed. Reg. at 25,990. The Department determined that “[t]his opportunity helps create allies and goodwill overseas, while simultaneously promoting U.S. foreign policy interests,” and concluded that “[a] program thus tailored to foster allies and goodwill overseas clearly qualifies as the exercise of diplomacy.” *Id.*

The State Department has invoked the foreign affairs exception in the promulgation of at least two prior DV Program rulemakings. *See* Visas: Documentation of Immigrants Under the Immigration and Nationality Act, as Amended, 73 Fed. Reg. 7670 (Feb. 11, 2008); Visas: Diversity Immigrants, 81 Fed. Reg. 63,694-95 (Sep. 16, 2016). In both instances, the Department indicated that the DV program rules involved a foreign affairs function of the United States and were necessary to reduce the opportunity for fraud. *See* 73 Fed. Reg. at 7670 (indicating that the Final Rule “involve[d] a foreign affairs function of the United States” and was necessary to “reduce the opportunity for fraud”); 81 Fed. Reg. at 63,694 (indicating that the Final Rule

“involve[d] a foreign affairs function of the United States” and was necessary to “reduce[] the ability for a third party to submit entries without an applicant’s knowledge,” and also “reduce[] the possibility of fraud, including fraud committed by criminal enterprises.”).

Case law also supports the Department’s invocation of the foreign affairs exception in the promulgation of a rule involving the interactions of the Department and foreign nationals involved in a visa process. In *Raoof v. Sullivan*, the Department promulgated a rule that subjected the spouses and children of J-1 nonimmigrant exchange visitors to the same 2-year foreign residency requirement that applies to the primary J-1 visa holder, which was challenged as violating APA notice and comment requirements. *See* 315 F. Supp. 3d 34, 43-44 (D.D.C. 2018). The court found that the foreign affairs exception applied because the rule “relates to the foreign affairs and diplomatic duties conferred upon the Secretary of State and the State Department.” *Id.* Here, *Raoof* is instructive because the IFR similarly “relates to the foreign affairs and diplomatic duties conferred upon the Secretary of State and the State Department,” *id.*, and the rule applies to the Department’s administration of the “important public diplomacy tool” that is the DV Program, which is based on the unique relationship between diversity visa-eligible countries and the United States, and “helps create allies and goodwill overseas, while simultaneously promoting U.S. foreign policy interests.” 84 Fed. Reg. at 25,990. Accordingly, the Court should follow *Raoof* and uphold the Department’s invocation of the foreign affairs exception in its promulgation of the IFR.

Plaintiffs also take issue with the fact that the State Department promulgated the IFR with the goal of reducing fraud in the DV Program application process. ...But their claims amount to nothing more than their disagreement with the State Department’s explanation within the IFR.

The State Department explained that the IFR was aimed at reducing fraud in the DV Program application process, because it “historically encountered significant numbers of fraudulent entries for the DV Program each year, including entries submitted by criminal enterprises on behalf of individuals without their knowledge.” 84 Fed. Reg. at 25,990. The Government Accountability Office (GAO) documented this history as far back as 2007. ...

The Department explained that the IFR is necessary because it had knowledge that individuals or entities that submit unauthorized DV Program entries “will often contact unwitting individuals whose identities were used on selected DV Program entries, inform them of the opportunity to apply for a diversity visa, and hold the entry information from the named petitioner in exchange for payment.” 84 Fed. Reg. at 25,990. The State Department reached these conclusions regarding potential unscrupulous activities and efforts to commit visa fraud based on information it received during its ongoing diplomatic interactions with diversity visa-eligible countries, during the Department’s exercise of its congressionally-mandated authority to administer the DV Program. Thus, opening the IFR to notice and comment—which would require the Department to elaborate on international law enforcement investigations and information exchanges conducted with different diversity visa eligible countries—would likely lead to “the public airing of matters that might enflame or embarrass relations with other countries.” *Zhang v. Slattery*, 55 F.3d 732, 744 (2d Cir. 1995) *superseded on other grounds by statute*, 8 U.S.C. § 1101(a)(42); *Cf.* 2007 GAO Report at 30 (indicating consular officers’ concerns that fraud investigations in Kiev would result in “less cooperation from local officials in Ukraine in future investigations.”). Disclosing information akin to “sensitive foreign intelligence,” and using a notice and comment period to “conduct and resolve a public debate over [how] some citizens of particular countries” may be engaging in efforts to defraud the DV lottery application process would undoubtedly result in “undesirable international consequences”

that would follow from notice and comment rulemaking. *Cf. Rajah v. Mukasey*, 544 F.3d 427, 437 (2d Cir. 2008).

Moreover, there would be undesirable international consequences if the IFR was subjected to a notice and comment period. Notably, Plaintiffs do not raise this argument in their summary judgment motion. The plain language of the statute, 5 U.S.C. § 553(a)(1), does not require the State Department to provide a such showing in the text of the rule. *See Rajah*, 544 F.3d at 437 (indicating that there is “no requirement that the rule itself state the undesirable consequences.”). Indeed, the court in *Raoof* reached this same conclusion. *See* 315 F. Supp. 3d at 43-44 (citing 37 Fed. Reg. 17,471 (Aug. 29, 1972) (indicating that the Department properly invoked the foreign affairs exception to its J-1 visa program rule because it “relates to the foreign affairs and diplomatic duties conferred upon the Secretary of State and the State Department,” without finding that the Department needed to demonstrate in the text of the rule itself that public rulemaking would not “clearly provoke definitely undesirable international consequences.”). Accordingly, the State Department was not required to explain in the text of the rule that there would be “undesirable international consequences” if the rule was subjected to a notice and comment period.

Thus, the State Department justifiably invoked the foreign affairs exception to notice and comment rulemaking procedures because the rule involves a foreign affairs function of the United States.

B. The Court’s decision in *Capital Area Immigrants’ Rights Coalition (CAIR)* does not support Plaintiffs’ claims.

Plaintiffs similarly rely on the Court’s decision in *CAIR* to argue that “[t]he foreign affairs exception applies only when a rule ‘clearly and directly involve[s] activities or actions characteristic to the conduct of international relations,’” and that the IFR “does not come close to meeting that standard and is—at best—indirectly related to the United States’ conduct of foreign affairs.” ... But *CAIR* does not provide Plaintiffs with the support they think it does.

To begin with, Plaintiffs claim that the IFR does not fit within the foreign affairs exception because the rule “does not implement an international agreement or regulate foreign diplomats in the United States.” ECF No. 38-1 at 18-19 (citing *CAIR*, 2020 WL 3542481, at *19). But the Court in *CAIR* did not limit application of the foreign affairs exception to only those two scenarios—implementing an international agreement or regulating foreign diplomats. Instead, the Court provided instances where the D.C. Circuit applied the foreign affairs exception in order to illustrate why the Court thought the rule in *CAIR* did not fit within the exception. *See CAIR*, 2020 WL 3542481 at *17, 19 (distinguishing one D.C. Circuit case and one Second Circuit case where the exception has been applied); *see also City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 175, 201-02 (2d Cir. 2010) (concluding that the foreign affairs exception may apply where the rule implemented a formal international agreement).

Plaintiffs also argue that the foreign affairs exception does not apply because “the Passport Rule does not implicate any particular country, or even a narrow subset of foreign nations.” ... The Court in *CAIR* did not determine that this was necessary, but even if it did, the IFR does implicate a narrow subset of foreign nations—diversity-visa eligible countries. Diversity visa-eligible countries qualify for a unique relationship with the United States under the INA based on the limited immigration of nationals of those countries to the United States. In fact, the Department administers the DV Program “as an outreach tool, as its focus is on building relations with foreign populations around the world, particularly with diversity visa eligible

countries.” 84 Fed. Reg. at 25,990. And, as the Department indicated, the DV Program is thus “an important public diplomacy tool” because it offers foreign nationals from those eligible countries “an opportunity to immigrate to the United States without having to qualify under a more targeted family-based or employment-based classification.” *Id.* Plaintiffs’ arguments to the contrary ignore this critical basis behind the creation of the DV Program.

Plaintiffs also assert that the IFR does not fit the foreign affairs exception because Defendants “do not claim that the Diversity Visa Program directly involves U.S. foreign policy.” ... But the Court in *CAIR* did not conclude that direct involvement with U.S. foreign policy is necessary. Rather “a ‘foreign affairs function’ encompasses activities or actions characteristic to the conduct of international relations,” and a rule that is covered by the foreign affairs function exception, “must clearly and directly involve activities or actions characteristic to the conduct of international relations.” *CAIR*, 2020 WL 3542481, at *18. The IFR satisfies these requirements—as the State Department described, “the DV Program is an important public diplomacy tool for the Department of State, because it offers foreign nationals an opportunity to immigrate to the United States without having to qualify under a more targeted family-based or employment-based classification,” that “[t]his opportunity helps create allies and goodwill overseas, while simultaneously promoting U.S. foreign policy interests” and that “[a] program thus tailored to foster allies and goodwill overseas clearly qualifies as the exercise of diplomacy.” 84 Fed. Reg. at 25,990; *see also* testimony of Ambassador Young, 112 Cong. 27 (2011) at 45 ...

Moreover, is also not evident that the Court’s determination in *CAIR*, which involved a rule by the Department of Homeland Security related to asylum procedures, is applicable in this case, which is about a State Department rule governing the DV Program.

Accordingly, the Court’s decision in *CAIR* does not support Plaintiffs’ claims. Rather, *CAIR* supports the position that the State Department’s IFR properly falls within the foreign affairs exception.

C. The State Department provided Plaintiffs with legally sufficient notice and an opportunity to respond.

To the extent Plaintiffs assert that the IFR is procedurally defective because the State Department failed to provide them notice and an opportunity to comment on the rule, ... they are wrong. The Department provided legally sufficient notice of the IFR to all interested parties by publishing it in the *Federal Register* and providing the public with a 30-day period to submit comments.

A rule’s publication in the *Federal Register* serves to provide the public with notice as a matter of law. 44 U.S.C. § 1507. Courts have held that “[p]ublication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance.” *See, e.g., Camp v. U.S. Bureau of Land Mgmt.*, 183 F.3d 1141, 1145 (9th Cir. 1999) (citing *Friends of Sierra Railroad, Inc. v. Interstate Commerce Commission*, 881 F.2d 663, 667-68 (9th Cir. 1989)). Moreover, this Court has already recognized this principle. *See E.B.*, 422 F. Supp. 3d at 90

Here, there is no dispute that on June 5, 2019, the Department published the IFR in the *Federal Register*. *See* 84 Fed. Reg. 25,989-91. The Department, therefore, provided “anyone subject to or affected” by the IFR—which includes both the Applicant and Family Plaintiffs—with legally sufficient notice of its publication. *Nat’l Ass’n of Mfrs.*, 717 F.3d at 953; 44 U.S.C. § 1507. Any claim by Plaintiffs to the contrary, therefore, is baseless. Moreover, to the extent that the Applicant Plaintiffs assert that their presence outside of the United States hindered their

ability to receive adequate notice, such an argument carries zero weight because the Department’s publication of the IFR in the *Federal Register* constituted “legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance.” *Camp*, 183 F.3d at 1145 (citation omitted). Thus, Plaintiffs’ physical location—whether inside or outside of the United States—carries no weight in the determination of whether the State Department complied with this well-established legal standard.

In addition to having legally sufficient notice of the IFR, Plaintiffs, just like *all other interested parties*, had an opportunity to submit comments to the rule. There is no dispute that the IFR indicated that the State Department would accept comments from the public during the IFR’s 30-day comment window, “up to July 5, 2019.” *See* 84 Fed. Reg. at 25,989. And, interested parties submitted 27 comments to the IFR. ... Plaintiffs did not submit any comments on the IFR during the comment window, and they do not, and cannot demonstrate that the Department somehow prevented them from making such submissions.

Accordingly, the State Department provided all interested parties—including Plaintiffs—with an opportunity to comment on the IFR for 30 days after the rule’s publication in the *Federal Register*. Plaintiffs’ claim that the State Department failed to provide them with an opportunity to submit comments to the IFR, therefore, is baseless.

D. The Court should not remedy a purported procedural defect with a *vacatur* order.

The Government reiterates that the State Department committed no APA violation here, because as detailed above, the Department justifiably invoked the foreign affairs exception to notice and comment rulemaking procedures because the rule involves a foreign affairs function of the United States. In the event, however, that the Court finds a purported procedural defect in the State Department’s IFR, due to the confusing situation that invalidation of the rule would cause stakeholders, and the unworkable application processing situation the agency immediately would face—as the application window for the FY2022 DV lottery is presently open through November 10, 2022—the appropriate course of action would be an order that holds any *vacatur* of the IFR in temporary abeyance while the agency proceeds with the proposed rescission of the IFR. Alternatively, the Government requests that the Court provide it with an opportunity to submit additional briefing on the issue of staying *vacatur*.

* * * *

3. *Cuthill v. Pompeo*

On January 9, 2020, the United States filed its brief on appeal in the U.S. Court of Appeals for the Second Circuit in *Cuthill v. Pompeo*, No. 19-3138 (2d. Cir.). The issue in the case is whether, under the Immigration and Nationality Act (“INA”), the unmarried adult child beneficiary of an immigrant petition should be considered under 21, and therefore eligible for an immediately available visa, because she was under 21 at the time the original petition was filed by her parent as a legal permanent resident (“LPR”). The district court held that consideration of the petition for the adult child in the case (Diaz) should have used her age at the time her parent (Cuthill) initially filed, before Cuthill naturalized, otherwise the petitioning parent’s choice to naturalize would have the “absurd result” of making the child of the naturalized U.S. citizen wait longer for a visa than the child of an LPR. Cuthill originally filed on behalf of Diaz in 2016 and the petition was approved in 2017 with Diaz classified in the F2A “preference” category as a minor child of an LPR. A visa was not immediately available for an F2A petition at that

time, so the petition was held, pending visa availability. In 2018, Cuthill naturalized and provided notification of her naturalization, asking that Diaz be reclassified as an immediate relative for whom an immigrant visa is immediately available. Diaz was reclassified in the F1 category—using her current age—as an adult daughter of a United States citizen. The U.S. brief argues that the Court of Appeals should reverse the district court because, under the plain language of the statute, Diaz belonged in the F1 “preference” category (adult daughter of a U.S. citizen) because she was over 21 on the date of her mother’s naturalization. Further, the brief explains, the district court erred in applying to this case provisions of the Child Status Protection Act (“CSPA”) which protect certain beneficiaries who were minors when their petitions were filed but aged-out because of administrative processing delays. The brief argues that the CSPA’s statutory age calculations are unrelated to the provisions applicable in this case. The brief is available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.***

4. Litigation regarding the EB-5 Immigrant Investor Program (*Wang*)

Plaintiffs in *Wang* are Chinese national EB-5 investors, who claimed State’s policy of counting derivatives toward the limit violates the Administrative Procedure Act (“APA”). *Wang v. Pompeo*, No. 18-cv-01732 (D.D.C.). Excerpts follow from the court’s opinion granting the U.S. motion to dismiss. Plaintiffs have appealed the dismissal.

* * * *

A. Statutory Scheme

1. Statutory Language and Context

In 1965 Congress passed the Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911, 912 (“the 1965 Act”). The 1965 Act amended § 203 of the INA by establishing seven preference categories for the total number of available immigrant visas and a worldwide numerical quota on immigrant visas. The eighth category was a catch-all provision, and the ninth applied to spouses and children: ...

The parties agree that the 1965 Act counted principals’ spouses and children against the cap. (Compl. ¶¶ 43–44; Defs. Br. at 21.) The use of the phrase “entitled to the same status, and the same order of consideration” in subsection 203(a)(9) accorded immigrants’ derivative spouses and children the ability to immigrate at the same time and in the same category as their principals and to use the same visa number available to the principal investor. For the next twenty-five years, in accordance with the 1965 Act, State counted derivative spouses and children towards the cap.

*** Editor’s note: On March 9, 2021 the U.S. Court of Appeals for the Second Circuit ruled to affirm the district court, finding that while neither side’s reading of the statute was in total harmony with the surrounding provisions, the “legislative history shows a clear desire by Congress to fix the age-out problem for all minor beneficiaries, and there is nothing to suggest that Congress intended to exclude beneficiaries like the plaintiff.” *Cuthill v. Blinken*, 990 F.3d 272 (2d. Cir. 2021).

In 1990, Congress passed the Immigration Act of 1990, which, among other things, reorganized the preference categories into three subsections: 1) family-based preferences in subsection 203(a), 2) employment-based preferences in subsection 203(b), and 3) a new category of “diversity” immigrants in subsection 203(c). *Id.* The 1990 Act added separate caps for family-based, employment-based, and diversity immigrants, but the three subsections continued to be subject to the overall cap in INA § 201. *Id.*

The 1990 Act also addressed the issue of principal immigrants’ spouses and children: ... INA § 203(d), 8 U.S.C. § 1153(d). This subsection allows derivative spouses and children to obtain visas through their principal and entitles them to the same status and order of consideration accorded the principal. In contrast to subsections (a)–(c), subsection (d) does not state that derivatives count toward the worldwide annual limit in § 201.

Plaintiffs contend that because subsection 203(d) does not specifically state that the worldwide cap applies to derivative spouses and children, then no annual limit applies to them. This reading ignores the history of the provision and its plain language. Subsection 203(d) of the INA, as amended by the 1990 Act, is virtually identical to subsection 203(a)(9) as it existed after the 1965 Act. As this court previously explained, Congress did not adopt this virtually identical language in a vacuum. When it replicated this language in the 1990 Act, Congress was aware that for twenty-five years State had interpreted subsection 203(a)(9) as amended by the 1965 Act to count derivatives against the caps. “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.” *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

If Congress had intended to repudiate State’s interpretation of the statute—with substantial immigration consequences—it would have done so clearly. *See Whitman v. American Trucking Ass’n, Inc.*, 531 U.S. 457, 468 (2001) (“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”). By retaining the language pertaining to derivatives from the 1965 Act, Congress signaled that it was not making a monumental shift in immigration law governing derivatives. As the Supreme Court stated in *Lorillard*, “where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.” 434 U.S. at 581.

Plaintiffs argue that the 1990 Act “fundamentally restructured the preference categories, and in so doing, brought spouses and children outside any capped preference category.” (Pls. Br. at 22.) They also point to technical amendments to the 1990 Act that incorporate references to the cap in other provisions, but not for subsection 203(d). (*Id.* at 27–28.) They argue that the lack of amendment shows that Congress meant to exempt derivatives from the annual caps. (*Id.*) But these technical amendments just as plausibly show the opposite: that Congress saw no need to correct subsection 203(d) because it already contained limits based on the longstanding interpretation of the 1965 Act. Thus, while Plaintiffs are correct that the 1990 Act modified the INA’s structure, they have failed to proffer any “evidence of any intent to repudiate the longstanding administrative construction.” *Haig v. Agee*, 453 U.S. 280, 297 (1981). In the absence of such evidence, the court concludes that when Congress amended the INA in 1990, using the same language as it used in 1965, it was adopting the “longstanding administrative construction,” *id.* at 298, of the provision for derivatives.

2. Statutory Conflicts

Plaintiffs also argue that reading § 203 to limit derivative visas conflicts with other parts of the INA and therefore violates the canon that a statute should be read as a “harmonious whole.” (Pls. Br. at 18 (quoting *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018)).) Plaintiffs arguments are unavailing.

i. “Same order of consideration”

Plaintiffs contend that the caps prevent State from giving derivatives “the same order of consideration” as the investor principal because when a derivative follows to join an investor, the derivative receives a different visa number, putting them out of the “same order.” (Pls. Br. at 18.) But State’s procedures for assigning visa numbers for derivatives who follow to join was the same under the 1965 Act. Plaintiffs again offer no “evidence of any intent to repudiate the longstanding administrative construction.” *Haig*, 453 U.S. at 297.

ii. Other references to EB-5 investors and their derivatives in the INA

Plaintiffs argue the statute creates a “categorical difference” between investors and their derivatives, which shows that the numerical limit does not apply to derivatives. (Pls. Br. at 16–17.) They point to the Regional Center Program as an example of the distinction and contend that the provision allocates the 3,000 visas to investors, while “separately provid[ing] spouses and children an opportunity to join them.” (Pls. Br. at 16.) The provision provides:

For purposes of the [regional center] program . . . the Secretary of State, together with the Secretary of Homeland Security, shall set aside 3,000 visas annually . . . to include such aliens as are eligible for admission under section 203(b)(5) of the Immigration and Nationality Act and this section, *as well as* spouses or children which are eligible, under the terms of the Immigration and Nationality Act, to accompany or follow to join such aliens.

8 U.S.C. § 1153 note (2012) (Immigration Program) (emphasis added). Plaintiffs misread the provision, which by its plain terms counts both investors “as well as” derivative spouses or children toward the 3,000 visa set-aside. (Indeed, Plaintiffs contended as much in their motion for preliminary injunction (ECF No. 2 (“Pls. Mot. for Prelim. Inj.”) at n.5).) Moreover, the provision contains no suggestion that derivatives do not count against the annual worldwide cap.

Plaintiffs further assert that counting derivatives toward the annual cap conflicts with the targeted employment area provision, which requires State to allot 3,000 EB-5 visas to immigrants investing in targeted employment areas. (Pls. Br. at 21 (citing INA¹ § 203(b)(5)(B)(i), 8 U.S.C. § 1153(b)(5)(B)(i)).) They argue that counting derivatives creates an “absurd result” wherein targeted employment area investments swallow “nearly all 10,000 visas” even though only 3,000 are allotted to them. (Pls. Br. at 21–22.) But Plaintiffs misunderstand the provision, which sets a floor, not a cap, on the number of investments in targeted employment areas. Moreover, most EB-5 investments are made in targeted employment areas. (ECF No. 45 (“Defs. Reply”) at 14 (citing EB-5 Immigrant Investor Program Modernization, 84 Fed. Reg. 35,750, 35,799 (July 24, 2019) (noting 96% of EB-5 investments are made in targeted employment areas)).) Indeed, every individual Plaintiff in this case is a targeted employment area investor or derivative of one. (Compl. ¶¶ 14–26.) Thus, there is no conflict between counting derivatives against the annual cap and the targeted employment area provision.

iii. Specific Exemptions and Inclusions

Both Plaintiffs and Defendants point to sections in the INA where Congress specifically exempted derivatives from or included derivatives in numerical limits. (Defs. Br. at 37 (citing 8 U.S.C. §§ 1101 (note), 1153 (note), 1157 (note), 1184(g)(2), (g)(8)(i), (g)(11)(C), (o)(3), (p)(2)(B), 1229c(a)(2)(C)); Pls. Br. at 24 (citing INA § 207(c)(2)).) The various citations show that the INA is not consistently drafted with language specifically exempting derivatives from or including derivatives in the numerical limits. Therefore, the court finds that, as discussed above, the longstanding interpretation in place before the 1990 Act provides the best reading of the provision, consistent with congressional intent.

iv. Country Caps

Plaintiffs argue that the country limits in subsection 202(a) are not actually limits, but rather a guarantee of proportionality among the countries. (Pls. Br. at 30.) This argument contradicts the very title of the provision, which sets “[n]umerical limitations on individual foreign states.” INA § 202, 8 U.S.C. § 1152.

Plaintiffs also contend that the country limits do not apply to derivatives because 202(a)(2) applies to immigrants who receive “visas made available . . . under subsections (a) and (b)” of § 203. INA § 202(a)(2), 8 U.S.C. § 1152(a)(2). But § 202 also provides rules for how to charge derivatives to particular foreign countries. *See* INA § 202(b), 8 U.S.C. § 1152(b). As this court previously explained in its Dec. 6, 2018 Memorandum Opinion, the rule for chargeability in subsection 202(b) necessarily presumes that derivatives are counted toward the per country cap; otherwise, the question of chargeability would be irrelevant. *See* INA § 202(b), 8 U.S.C. § 1152(b).

3. Legislative History

As the court noted in its Dec. 6, 2018 Memorandum Opinion, the legislative history of the 1990 Act further supports the conclusion that Congress intended to continue State’s twenty-five-year interpretation of the 1965 Act by counting derivatives towards the caps. Each chamber passed its own bill. The Senate’s version of INA § 203 included a subsection 203(c), which repeated the language on derivatives in the 1965 Act and applied it to each of the preference categories. Immigration Act of 1989, S. 358, 101st Cong. § 203(c) (as passed by Senate, July 13, 1989), 135 Cong. Rec. S8639-04, 1989 WL 181548. The House bill, however, took a different approach. Importantly, it explicitly exempted derivatives from the cap for employment-based immigrants. Section 101 of the House bill provided:

(b) ALIENS NOT SUBJECT TO NUMERICAL LIMITATIONS. The following aliens are not subject to the worldwide levels or numerical limitations of subsection (a): . . . (3) An alien who is provided immigrant status under section 203(d) as the spouse or child of an immigrant under section 203(b).

S. 358, 101st Cong. § 101 (as passed by House, Oct. 3, 1990), 136 Cong. Rec. H8712-05, 1990 WL 144626. Thus, the Senate version continued to count derivatives towards the cap while the House version explicitly excluded derivatives from the cap.

These conflicting approaches are also reflected in the different numerical cap proposals in the House and Senate bills. The Senate proposed 150,000 annual visas. Immigration Act of 1989, S. 358, 101st Cong. § 201(d) (as passed by Senate, July 13, 1989), 135 Cong. Rec. S8639-04, 1989 WL 181548. The House proposed 65,000 principals. If, as Defendants suggest, each principal brings one or two derivatives (Defs. Br. at 29–30) it appears that the two chambers

were considering similar annual total numbers of employment-based immigrants; the difference was in whether or not to count derivatives.

The Conference Committee incorporated the Senate's approach and rejected the House's language specifically exempting employment-based principals' spouses and children from the cap. The Conference Committee also set the employment-based cap at 140,000—just 10,000 fewer than the 150,000 initially proposed by the Senate. The Conference Report explained that the House's proposed cap was based solely on principals and did not include derivative spouses and children. H. Rep. 101-955, 136 Cong. Rec. H13203-01, H13236, 1990 WL 290409 (1990) ("The comparable House number for employment-based immigrants was 187,500, based on 75,000 principals. The House amendment allocated 65,000 employment-based visas during FY1991-96 and 75,000 thereafter (not including numerically exempt derivative spouses and children) . . ."). These references to the House's methodology, based on principals but not derivatives, show that the Committee intended to adopt a methodology for counting based on principals and derivatives. Thus, the court concludes that Congress was aware of, grappled with, and ultimately rejected the House's proposal to exclude derivatives from the annual cap. Although Plaintiffs point the court to various statements made by members of Congress suggesting that derivatives were excluded from the annual cap, these isolated floor statements carry little weight compared to the decisive language in the Conference Committee Report.

Therefore, the court finds that under § 203 of the INA, derivative spouses and children count toward the annual worldwide limit on employment-based visas. Accordingly, the court finds that Plaintiffs fail to state a claim for relief and will grant Defendants' motion to dismiss Counts I and II.

B. Notice and Comment

* * * *

Further, enactment of § 42.32 complied with APA notice-and-comment requirements. . . . State published an interim rule that listed EB-5 derivatives within Subpart D, titled "Immigrants Subject to Numerical Limitation."^[1] SEP. . . . This interim rule, 56 Fed. Reg. 49,675, issued on October 1, 1991, provided a 30-day public comment period. *Id.* ("Written comments must be received on or before October 31, 1991.") State finalized its rule in 1993 and noted that "Interim Rule 1491, published in the Federal Register at 56 FR 49675, October 1, 1991, invited interested persons to submit comments concerning the amendments therein. No comments were received." Final Rule, *Visas: Documentation of Immigrants Under the Immigration and Nationality Act, as Amended; Numerical Limitations*, 58 Fed. Reg. 48,446, 48,447 (Sept. 16, 1993). The "Interim Rule's regulations" from 1991 were "adopted without changes," *id.*, in September 1993. Therefore, the court finds the agency complied with the APA's notice-and-comment rulemaking requirements.

Accordingly, the court will grant Defendants' motion to dismiss Count III.

* * * *

5. Visa Regulations and Restrictions

a. *Measures in response to the COVID-19 pandemic*

(1) *Measures suspending and limiting entry due to risk of transmission*

Proclamation 9984 of January 31, 2020, effective February 2, 2020, suspended the entry of aliens who were physically present within the People's Republic of China during the 14-day period preceding their entry or attempted entry into the United States, with limited exceptions. 85 Fed. Reg. 6709 (Feb. 5, 2020). Sections 1 and 2 of Proclamation 9984 are excerpted below. The United States subsequently applied a similar suspension on entry with respect to: the Islamic Republic of Iran (Proclamation 9992 of February 29, 2020, 85 Fed. Reg. 12,855 (Mar. 4, 2020)); the 26 European states comprising the Schengen Area (Proclamation 9993 of March 11, 2020, 85 Fed. Reg. 15,045 (Mar. 16, 2020)); the United Kingdom (excluding overseas territories outside of Europe) and Ireland (Proclamation 9996 of March 14, 2020, 85 Fed. Reg. 15,341 (March 18, 2020)),^{****} Brazil (Proclamation 10041 of May 24, 2020, 85 Fed. Reg. 31,933 (May 28, 2020) amended on May 25, 2020, by Proclamation 10042, 85 Fed. Reg. 32,291 (May 28, 2020)).

* * * *

Section 1. *Suspension and Limitation on Entry.* The entry into the United States, as immigrants or nonimmigrants, of all aliens who were physically present within the People's Republic of China, excluding the Special Administrative Regions of Hong Kong and Macau, during the 14-day period preceding their entry or attempted entry into the United States is hereby suspended and limited subject to section 2 of this proclamation.

Sec. 2. *Scope of Suspension and Limitation on Entry.*^{[L][SEP]}(a) Section 1 of this proclamation shall not apply to:

- (i) any lawful permanent resident of the United States;
- (ii) any alien who is the spouse of a U.S. citizen or lawful permanent resident;
- (iii) any alien who is the parent or legal guardian of a U.S. citizen or lawful permanent resident, provided that the U.S. citizen or lawful permanent resident is unmarried and under the age of 21;
- (iv) any alien who is the sibling of a U.S. citizen or lawful permanent resident, provided that both are unmarried and under the age of 21;
- (v) any alien who is the child, foster child, or ward of a U.S. citizen or lawful permanent resident, or who is a prospective adoptee seeking to enter the United States pursuant to the IR-4 or IH-4 visa classifications;
- (vi) any alien traveling at the invitation of the United States Government for a purpose related to containment or mitigation of the virus;

^{****} Editor's note: Proclamation 9996 was superseded by a 2021 proclamation including the Schengen Area countries and others.

(vii) any alien traveling as a nonimmigrant under section 101(a)(15)(C) or (D) of the INA, 8 U.S.C. 1101(a)(15)(C) or (D), as a crewmember or any alien otherwise traveling to the United States as air or sea crew;

(viii) any alien seeking entry into or transiting the United States pursuant to an A-1, A-2, C-2, C-3 (as a foreign government official or immediate family member of an official), G-1, G-2, G-3, G-4, NATO-1 through NATO-4, or NATO-6 visa;

(ix) any alien whose entry would not pose a significant risk of introducing, transmitting, or spreading the virus, as determined by the CDC Director, or his designee;

(x) any alien whose entry would further important United States law enforcement objectives, as determined by the Secretary of State, the Secretary of Homeland Security, or their respective designees based on a recommendation of the Attorney General or his designee; or

(xi) any alien whose entry would be in the national interest, as determined by the Secretary of State, the Secretary of Homeland Security, or their designees.^[SEP]

(b) Nothing in this proclamation shall be construed to affect any individual's eligibility for asylum, withholding of removal, or protection under the regulations issued pursuant to the legislation implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, consistent with the laws and regulations of the United States.

* * * *

The U.S. government has responded to multiple legal challenges to these regional COVID proclamations. In *Milligan v. Pompeo*, No. 20-cv-02631 (D.D.C.), plaintiffs are couples seeking K1 fiancé visas, alleging unreasonable delay in the processing of K1 visas. On November 19, 2020, the district court for the District of Columbia preliminarily enjoined the Department from relying on INA 212(f) restrictions as either a reason not to schedule K1 applications or a legal basis to refuse K1 applications under the regional COVID presidential proclamations. *Milligan v. Pompeo*, 502 F. Supp. 3d 302 (D.D.C.). In response to the court order, the Department issued guidance on November 25, 2020, instructing posts worldwide to schedule the named plaintiffs for interview regardless of whether they are subject to a regional presidential proclamation.*

In *Tate v. Pompeo*, No. 20-cv-03249, also in D.C. district court, plaintiffs are "O" nonimmigrant visa applicants, a category for individuals with extraordinary ability, who allege the Department is unlawfully applying the COVID regional proclamations as a basis for visa refusal and/or the Department has otherwise unlawfully delayed adjudication of their visa applications. The U.S. government filed its brief in opposition to plaintiffs' motion for a preliminary injunction on December 18, 2020.**

* Editor's note: The U.S. government filed a notice of appeal on January 15, 2021. The court stayed the case on January 13, 2021.

** Editor's Note: On January 17, 2021, the court enjoined the Department from applying the COVID regional proclamations as a basis for suspending the adjudication of the named plaintiffs' applications or as a legal basis for visa refusal and ordered the Department to provide monthly status reports on the progress in plaintiffs' cases.

(2) *Measures limiting entry due to risk to the U.S. labor market*

Proclamation 10014 of April 22, 2020 (“Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak”) suspended the entry of aliens as immigrants for 60 days, subject to certain exceptions. 85 Fed. Reg. 23,441 (Apr. 27, 2020). Proclamation 10052 of June 22, 2020 extended the suspension on immigration until December 31, 2020. 85 Fed. Reg. 38,263 (June 25, 2020).***

Several cases arose in 2020 challenging Proclamations 10014 and 10052, as well as the Department’s implementation of 212(f) proclamations as a basis for visa refusal, and the Department’s guidance on consular services during the COVID-19 pandemic. Some courts hearing these legal challenges enjoined implementation of the proclamations as to certain plaintiffs.

In *Gomez et al. v. Trump*, multiple cases challenging the lawfulness of Presidential Proclamations 10014 and 10052 and their implementation were consolidated. On September 4, 2020, the district court for the District of Columbia ordered the Department to expedite the adjudication of fiscal year 2020 diversity visa (“DV-2020”) applications by September 30, 2020, and issue visas to otherwise eligible applicants notwithstanding Proclamation 10014. The court summarized its holding as follows:

...[T]he court grants in part and denies in part Plaintiffs’ motions for preliminary relief. Specifically, the court rejects Plaintiffs’ statutory and constitutional challenges to the Proclamations, but holds that Plaintiffs are substantially likely to succeed on their claims that (1) the State Department’s policy of not reviewing and adjudicating non-exempt visas is not in accordance with law, is in excess of statutory authority, and is arbitrary and capricious; (2) the State Department’s non-processing of 2020 diversity visa applications constitutes agency action unreasonably delayed; and (3) the State Department’s exclusion of 2020 diversity visa applications from its guidance on mission critical services is arbitrary and capricious. The court further concludes that the DV-2020 Plaintiffs have met the additional requirements for preliminary injunctive relief pursuant to the court’s equitable authority and 5 U.S.C. § 705, but the Non-DV Plaintiffs in *Gomez* have not. In light of the foregoing, the court denies without prejudice the pending class certification motions as they pertain to the putative diversity visa classes, and defers ruling on the *Gomez* Plaintiffs’ motion for class certification as it pertains to the other four putative subclasses of Non-DV Plaintiffs.

Gomez et al v. Trump, 485 F. Supp. 3d 145 (D.D.C. 2020). As to the doctrine of consular nonreviewability, the court reasoned that it did not apply because plaintiffs were not

*** Editor’s Note: Proclamation 10014 was rescinded on February 24, 2021. See <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/24/a-proclamation-on-revoking-proclamation-10014/>. Rescission moots most of the pending legal challenges discussed herein.

challenging any actual determination, but rather the “refusal to review and adjudicate their pending visa applications or issue or reissue a visa due to the Proclamations.”

In *Young v. Trump*, No. 20-cv-07183, challenging Proclamation 10014 and its implementation, as well as Department policies prioritizing visa services during the pandemic, the district court in the Northern District of California granted plaintiffs’ motion for a preliminary injunction on December 11, 2020. ****

In *Anunciato v. Trump*, No. 20-cv-07869, also in the Northern District of California, the plaintiffs are petitioners and beneficiaries of family- and employment-based immigrant preference categories, as well as diversity visa lottery selectees. Plaintiffs seek to enjoin Proclamations 10014 and 10052 as unlawfully exceeding the President’s authority, and to enjoin the Department’s implementation of those proclamations, issued pursuant to INA 212(f), as violations of the APA. Plaintiffs also are seeking class certification.

In *National Association of Manufacturers v. DHS*, No. 20-cv-04887, also filed in the Northern District of California, plaintiffs are business associations and an approved J-1 exchange visitor sponsor organization that allege that Presidential Proclamation 10052 is an unlawful exercise of the President’s INA 212(f) authority. On October 1, 2020, the district court preliminarily enjoined Proclamation 10052 as to the named plaintiffs and, for the associations, their members. *Nat’l Ass’n of Mfrs.*, 491 F. Supp. 3d 549 (N.D. Cal.). The government has appealed to the Ninth Circuit.

(3) *Travel restrictions applicable at U.S. ports of entry*

On March 24, 2020, the United States temporarily limited the travel of individuals from Canada and individuals from Mexico into the United States at land ports of entry (and ferry services) along the U.S.-Canada and U.S.-Mexico borders to “essential travel.” 85 Fed. Reg. 16,548 (Mar. 24, 2020) (Canada); 85 Fed. Reg. 16,547 (Mar. 24, 2020) (Mexico). The measures were initially imposed for 30 days but were subsequently extended each month for an additional 30 days in April (85 Fed. Reg. 22,352 (Apr. 22, 2020) (Canada) and 85 Fed. Reg. 22,353 (Apr. 22, 2020) (Mexico)); May (85 Fed. Reg. 31,059 (May 22, 2020) (Canada) and 85 Fed. Reg. 31,057 (May 22, 2020) (Mexico)); June (85 Fed. Reg. 37,744 (June 24, 2020) (Canada) and 85 Fed. Reg. 37,745 (June 24, 2020) (Mexico)); July (85 Fed. Reg. 44,185 (July 22, 2020) (Canada) and 85 Fed. Reg. 44,183 (July 22, 2020) (Mexico)); August (85 Fed. Reg. 51,634 (Aug. 21, 2020) (Canada) and 85 Fed. Reg. 51,633 (Aug. 21, 2020) (Mexico)); September (85 Fed. Reg. 59,670 (Sept. 23, 2020) (Canada) and 85 Fed. Reg. 59,669 (Sept. 23, 2020) (Mexico)); October (85 Fed. Reg. 67,276 (Oct. 22, 2020) (Canada) and 85 Fed. Reg. 67,275 (Oct. 22, 2020) (Mexico)); November (85 Fed. Reg. 74,603 (Nov. 23, 2020) (Canada) and 85 Fed. Reg. 74,604 (Nov. 23, 2020) (Mexico)); December (85 Fed. Reg. 83,432 (Dec. 22, 2020) (Canada) and 85 Fed. Reg. 83,433 (Dec. 22, 2020) (Mexico)).

**** Editor’s note: In response to a motion for clarification, the court ordered on January 5, 2021 that all plaintiffs must be scheduled for visa interviews within 30 days.

(4) *Visa sanctions for countries failing to accept return of aliens*

On April 10, 2020, the President issued a memorandum on visa sanctions with respect to governments of countries that deny or unreasonably delay accepting the return of aliens if such denial or delay is impeding operations of the Department of Homeland Security necessary to respond to the ongoing pandemic caused by SARS-CoV-2. The memorandum is available at <https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-visa-sanctions/>.

b. Proclamation 9645

(1) *Proclamation 9983*

In Proclamation 9983 of January 31, 2020, the President expanded the restrictions applied in Proclamation 9645 to suspend entry into the United States for nationals of six additional countries: Burma (Myanmar), Eritrea, Kyrgyzstan, Nigeria, Sudan, and Tanzania. 85 Fed. Reg. 6699 (Feb. 5, 2020). For background on Proclamation 9645, see *Digest 2017* at 22-27.

(2) *Litigation*

As discussed in *Digest 2019* at 20-24, several courts considered challenges to the application of the waiver provision in Proclamation 9645. *Najafi v. Pompeo*, No. 19-cv-05782 (N.D. Cal.) was dismissed on March 5, 2020. Excerpts follow from the court's decision. *Darchini v. Pompeo*, No. 19-cv-01417 (C.D. Cal.), referenced in the opinion in *Najafi*, was likewise dismissed on March 18, 2020. And *Zafarmand v. Pompeo*, No. 20-cv-00803 (N.D. Cal.) was dismissed on December 9, 2020.

* * * *

A. APA Claim Based on Unreasonable Delay

Defendants argue that Plaintiffs' APA claim based on unreasonable delay is not judicially reviewable. (Defs.' Mot. to Dismiss at 10.) As an initial matter, Defendants contend there is no enforceable right in PP 9645 itself because PP 9645 expressly states that it "is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person." PP 9645 § 9(c).

Multiple courts have rejected this argument, explaining that Plaintiffs seek enforcement not through PP 9645, but through the APA. *E.g.*, *Darchini v. Pompeo*, Case No. SACV 19-1417 JVS (DFMx), 2019 WL 7195621, at *4 (C.D. Cal. Dec. 3, 2019); *Emami v. Nielsen*, 365 F. Supp. 3d 1009, 1019 (N.D. Cal. 2019). Likewise, this Court previously found that PP 9645 is subject to

judicial review. (Prelim. Inj. Order at 7.) While “the APA does not expressly allow review of the President’s actions,” the Ninth Circuit has found that “under certain circumstances, Executive Orders, with specific statutory foundation, are treated as agency action and reviewed under the APA.” *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992); *City of Carmel-by-the-Sea v. United States Dep’t of Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997). Because PP 9645 was issued pursuant to the Immigration and Nationality Act (“INA”) § 212(f), 8 U.S.C. § 1182, it is subject to judicial review. (Prelim. Inj. Order at 7; see also *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018); *Motaghedi v. Pompeo*, 19-cv-1466-LJO-SKO, 2020 WL 207155, at *6 (E.D. Cal. Jan. 7, 2020).

In the alternative, Defendants argue that this APA claim fails because there is no objective standard in PP 9645 regarding the timing of waiver adjudications. (Defs.’ Mot. to Dismiss at 11-13.) The Court agrees. As explained in *City of Carmel-by-the-Sea*, executive orders are reviewable under the APA when they have “specific statutory foundation” and “law to apply,” i.e. objective standards. 123 F.3d at 1166. With respect to timing, however, Plaintiffs fail to identify an objective standard within the executive order itself. Thus, this claim is not reviewable under the APA. See *Darchini*, 2019 WL 7195621, at *5.

Instead, Plaintiffs point to other cases which have found that PP 9645’s lack of a timing requirement does not preclude review of an APA claim based on unreasonable delay. (Pls.’ Opp’n at 7-8.) Those courts reasoned that “[t]he absence of any standard upon which to frame a timing requirement is not unusual in APA unreasonable delay cases,” and that the courts could apply the TRAC factors. *Motaghedi v. Pompeo*, 19-cv-1466-LJO-SKO, 2020 WL 207155, at *6 (E.D. Cal. Jan. 7, 2020); see also *Thomas v. Pompeo*, 19-cv-1050 (ESH) 2020 WL 601788, at *6 (D.D.C. Feb. 7, 2020); *Moghaddam v. Pompeo*, -- F. Supp. 3d --, 2020 WL 364839, at *8 (D.D.C. Jan. 22, 2020). These cases, however, did not consider *City of Carmel-by-the-Sea*, which applies specifically to when an executive order is reviewable under the APA. See *City of Carmel-by-the-Sea*, 123 F.3d at 1166. Per the Ninth Circuit’s guidance in *City of Carmel-by-the-Sea*, an executive order is not reviewable except under “certain circumstances,” including that “there is ‘law to apply.’” *Id.*; see also *W. Watersheds v. BLM*, 629 F. Supp. 2d 951, 962 (D. Ariz. 2009). Thus, while a typical APA claim based on agency actions taken pursuant to a statute may not require an objective standard, that does not appear to be the case for APA claims based on agency actions taken pursuant to an executive order.

In the alternative, Plaintiff argues that there is law to apply because other courts have “weighed in on the issue” of whether “180 days is an unreasonable amount of time for Defendants to delay a PP 9645 waiver adjudication.” (Pls.’ Opp’n at 10.) As *City of Carmel-by-the-Sea* makes clear, however, the executive order itself must set the objective standards. 123 F.3d at 1166.

Accordingly, the Court finds that because Plaintiffs have failed to identify an objective standard in PP 9645 as to timing, Plaintiffs’ APA claim based on unreasonable delay must be dismissed with prejudice.

B. APA Claim Based on Usurpation of Consular Officer Authority

Next, Defendants argue that Plaintiffs’ APA claim based on usurpation of consular officer authority must be dismissed because Plaintiffs fail to state a claim. (Defs.’ Mot. to Dismiss at 13.)

First, Defendants contend that “Plaintiffs have failed to plead with sufficiency facts connecting this alleged unlawful policy with unreasonable delay.” (Defs.’ Mot. to Dismiss at 14.) As Plaintiffs correctly point out, however, Plaintiffs’ APA claim is premised on whether giving

authority to non-consular officers is a violation of PP 9645, regardless of the injury it causes. (See Pls.’ Opp’n at 13.) Thus, Plaintiffs need not plead a connection between the alleged usurpation of consular officer authority and delay in order to establish that Defendants’ implementation of PP 9645 is unlawful. While the Court previously denied Plaintiffs’ motion for a preliminary injunction because Plaintiffs failed to establish that connection, that was because Plaintiffs sought injunctive relief tied to such a delay. Here, at the pleading stage, Plaintiffs’ claim does not require unreasonable delay in order to survive.

Plaintiffs, however, must plead an injury caused by the usurpation of consular officer authority in order to have standing to bring this claim. As alleged, however, Plaintiffs have not sufficiently established that connection. At the hearing, Plaintiffs pointed to declarations that had been submitted in support of the prior motion for a preliminary injunction, but such information is not in the complaint. Accordingly, the Court dismisses this claim to allow Plaintiffs to plead injury sufficient to establish standing.

Additionally, Defendants contend that Plaintiffs fail to state a claim because requiring participation and concurrence from consular management is not contrary to PP 9645. (Defs.’ Mot. to Dismiss at 18-19.) Defendants note that PP 9645 does not define “consular officer,” but that the INA’s definition would encompass consular management. (*Id.* at 19.) Specifically, 8 U.S.C. § 1101(a)(9) defines “consular officer” as: “any consular, diplomatic, or other officer or employee of the United States designated under regulations prescribed under authority contained in this chapter, for the purpose of issuing immigrant or nonimmigrant visas or . . . for the purpose of adjudicating nationality.”

Plaintiffs do not respond to this argument in their opposition. Other courts, however, have dismissed similar usurpation claims by relying on § 1101(a)(9). E.g., *Darchini*, 2019 WL 7195621, at *5; *Motaghedi*, 2020 WL 207155, at *14. At the hearing, Plaintiffs stated that there were non-government entities who were also required to concur in waiver decisions. Plaintiffs have not alleged such facts in the operative complaint, although the Court observes that at least one other court has found similar allegations to be sufficient to survive a motion to dismiss. See *Motaghedi v. Pompeo*, 19-cv-1466-LJO-SKO, 2020 WL 489198, at *13 (E.D. Cal. Jan. 30, 2020).

Accordingly, the Court dismisses this claim with leave to amend.

C. Procedural Due Process

The Fifth Amendment provides: “No person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V. “To bring a successful procedural due process claim, a plaintiff must point to (1) the deprivation of a constitutionally protected liberty or property interest, and (2) the denial of adequate procedural protections.” *Gebhardt v. Nielsen*, 879 F.3d 980, 988 (9th Cir. 2018) (internal quotation omitted).

The Court finds that Plaintiffs have failed to identify a protected liberty or property interest. As an initial matter, Plaintiffs fail to respond to Defendants’ argument that Beneficiary Plaintiffs may not bring a due process claim under the Fifth Amendment. (See Defs.’ Mot. To Dismiss at 20.) At the hearing, Plaintiffs agreed that the law did not support their position.

In their opposition, Plaintiffs point generally to the “infringement of fundamental rights to property, to life, to family integrity and security, and to freedom from discrimination with respect to their fundamental rights.” (Pls.’ Opp’n at 23.) As the *Motaghedi* court found regarding this same argument, “Plaintiffs’ allegations are too conclusory to state a plausible claim.” *Motaghedi v. Pompeo*, 19-cv-1466-LJO-SKO, 2020 WL 489198, at *14 (E.D. Cal. Jan. 30, 2020).

Further, with respect to “family integrity and security,” the Court observes that the Ninth Circuit has found that this right does not create “a fundamental right to reside in the United States simply because other members of his family are citizens or lawful permanent residents.” *Moralez-Izquierdo v. Dep’t of Homeland Sec.*, 600 F.3d 1076, 1091 (9th Cir. 2010), overruled in part on other grounds by *Garfias-Rodriguez v. Holder*, 702 F.3d 504 (9th Cir. 2012) (*en banc*); see also *Gebhardt v. Nielsen*, 879 F.3d 980, 988 (9th Cir. 2018); *S.A. v. Trump*, 363 F. Supp. 3d 1048, 1091 (N.D. Cal. 2018) (“the Ninth Circuit [has] held that the general right to familial companionship cannot form the basis of a due-process claim for a plaintiff in the United States challenging a government decision not to admit non-citizen family members located outside the United States”).

Likewise, to the extent Beneficiary Plaintiffs are relying on the right to show that Beneficiary Plaintiffs are eligible for visas, Plaintiffs cite no authority in support. (See Pls.’ Opp’n at 22; Compl. ¶ 197.) Rather, it appears that Beneficiary Plaintiffs, “as . . . unadmitted and nonresident alien[s], ha[ve] no constitutional right of entry to this country as a nonimmigrant or otherwise.” *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972); see also *Kerry v. Din*, 135 S. Ct. 2128, 2131 (2015) (“an unadmitted and nonresident alien . . . has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission”).

Finally, Plaintiff invites the Court to consider “the extreme amount of money that Defendants’ actions and inactions are costing Plaintiffs,” but cites no authority in support that this would support a procedural due process claim. (Pls.’ Opp’n at 23.)

Accordingly, the Court dismisses this claim with leave to amend as to Petitioner Plaintiffs. The Court dismisses this claim without leave to amend as to Beneficiary Plaintiffs, as Plaintiffs conceded at the hearing that the law does not support Beneficiary Plaintiffs bringing a due process claim.

D. Mandamus

The writ of mandamus is “intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty.” *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). Because the Court has found that Plaintiffs have not adequately alleged a claim, including identifying any actions that the agency must take, the mandamus claim must be dismissed as well. See *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004); *Dibdan v. Pompeo*, Case No. 19-cv-881 (CRC), 2020 WL 224517, at *7 (D.D.C. Jan. 15, 2020); *Darchini*, 2019 WL 7195621, at *6.

* * * *

Additional cases challenging the application of the Proclamation 9645 waiver provision in federal district court in the District of Columbia were also dismissed in 2020. On February 11, 2020, the court in *Bagherian v. Pompeo*, 442 F. Supp. 3d 87 (D.D.C.), dismissed the case. On May 3, 2020, the court in *Jafari v. Pompeo*, 459 F. Supp. 3d 69 (D.D.C.), dismissed the case. Excerpts follow from the opinion in *Jafari*.

* * * *

As a preliminary matter, plaintiffs attempt to argue that although Ms. Akhyani's underlying visa application was denied, her entire visa application technically remains open because her waiver request is still being adjudicated. This argument fundamentally misunderstands the application process. The government already denied Ms. Akhyani's underlying visa application on October 29, 2018 due to the Proclamation. Although that denial triggers the application process for obtaining a waiver of the Proclamation, that waiver request is separate from the underlying visa application. If the President wanted to make the waiver request process part of the underlying visa application, he could have written the Proclamation so as to have the agency wait to make any determination about the underlying application until it had also processed the waiver request. Instead, however, it is only necessary to go through the waiver process if one's underlying visa application is first denied. The Court thus finds that Ms. Akhyani's underlying visa application is distinct from her waiver application. While plaintiffs explain in their opposition that they only challenge the visa application as a whole because they believe that the entire process is still open due to the waiver, a liberal reading of the Complaint could suggest that the underlying application is also being challenged. Therefore, each of the government's arguments about why this case should be dismissed must be separated into two categories: (i) the underlying visa application; and (ii) the waiver process. The Court finds that the doctrine of consular nonreviewability clearly bars review of the underlying visa application but does not bar review of the government's ongoing adjudication of the waiver request. Although the doctrine of consular nonreviewability does not bar review of the waiver request, plaintiffs have still failed to state a legally cognizable claim in regards to the waiver request under the APA or any other statute, meaning that the entire case must be dismissed.

I. DOCTRINE OF CONSULAR NONREVIEWABILITY

The doctrine of consular nonreviewability recognizes that Congress has empowered consular officers with the exclusive authority to review a proper application for a visa when made overseas. *See* 8 U.S.C. §§ 1104(a), 1201(a), 1201(g). The Supreme Court clearly upheld the President's statutory authority to issue the Proclamation under 8 U.S.C. § 1182(f). *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018) (holding that the statute's "plain language . . . grants the President broad discretion to suspend the entry of aliens into the United States . . . based on his findings . . . that entry of the covered aliens would be detrimental to the national interest"). Because the underlying Proclamation is valid, the question becomes whether the doctrine of consular nonreviewability prevents the Court from reviewing decisions made pursuant to that Proclamation. The D.C. Circuit has explained the doctrine of consular nonreviewability as follows:

In view of the political nature of visa determinations and of the lack of any statute expressly authorizing judicial review of consular officers' actions, courts have applied what has become known as the doctrine of consular nonreviewability. The doctrine holds that a consular official's decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise.

Saavedra Bruno v. Albright, 197 F.3d 1153, 1159 (D.C. Cir. 1999).

In *Mostofi v. Napolitano*, this Court dismissed a similar case based on the doctrine of consular nonreviewability. 841 F. Supp. 2d 208, 209 (D.D.C. 2012). In both cases, a consular officer abroad refused the plaintiff's visa application and reviewed the plaintiff's eligibility for a waiver. In *Mostofi*, the consular officer was located outside the U.S. in Australia, just as the

consular officer in this case was located outside the U.S. in Canada. Like Ms. Akhyani, the person seeking a visa was an Iranian citizen. The Court determined that the consular officer's final decision with regards to the visa application was not reviewable under this doctrine. The same is true in this case with respect to Ms. Akhyani's underlying visa application—Congress has not expressly authorized judicial review of consular officers' visa determinations in this context, and thus the doctrine of consular nonreviewability prevents this Court from reviewing the government's denial of Ms. Akhyani's underlying visa application.

The government argues that the doctrine of consular nonreviewability applies not only to the underlying denial of Ms. Akhyani's visa application, but also to any allegations of unreasonable delay in its adjudication of her waiver application. The cases that the government cites in support of this argument, however, all involve *final* visa decisions. See ECF No. 10 at 10-11 (listing cases). As explained above, the doctrine of consular nonreviewability clearly applies to final visa determinations, but it does not apply to challenges regarding decisions that are not yet final. The consular nonreviewability doctrine "is not triggered until a consular officer has made a *decision* with respect to a particular visa application." *Nine Iraqi Allies v. Kerry*, 168 F. Supp. 3d 268, 290 (D.D.C. 2016). This is because a nonfinal decision is not an exercise of the government's "prerogative to grant or deny applications." *Id.* at 290-91. By defendants' own admission, Ms. Akhyani's waiver application is still in "administrative processing," meaning that no final decision has been made. Therefore, the doctrine of consular nonreviewability has not yet been triggered.

II. APA

Defendants argue that regardless of whether the doctrine of consular nonreviewability applies, plaintiffs have failed to state a cognizable claim under the APA, and thus this case must be dismissed under Rule 12(b)(6). The APA does not provide a valid cause of action if another statute precludes judicial review through its "express language, . . . the structure of the statutory scheme, its objectives, its legislative history, [or] the nature of the administrative action involved." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984); see 5 U.S.C. § 701(a)(1). The APA also preserves "other limitations on judicial review" that predated the APA, including the doctrine of consular nonreviewability. *Saavedra Bruno*, 197 F.3d at 1158.

Congress has made it clear that aliens cannot seek review of their exclusion orders under the APA. When the Supreme Court ruled that aliens could seek judicial review of exclusion orders under the APA if they were physically present in the United States (but not if they were physically outside of the United States), see *Brownell v. Tom We Shung*, 352 U.S. 180, 184-86 (1956), Congress responded by passing a statute barring judicial review of exclusion orders under the APA regardless of an alien's physical location, see Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 650, 651-53. The accompanying House Report explained that APA suits would "give recognition to a fallacious doctrine that an alien has a 'right' to enter this country which he [or she] may litigate in the courts of the United States[.]" H.R. Rep. No. 87-1086, at 33 (1961). Congress has also expressly foreclosed judicial review of visa revocations. 8 U.S.C. § 1201(i). Essentially, Congress has been clear on numerous occasions that it does not want courts reviewing agencies' visa determinations.

The APA's ban on judicial review extends beyond instances where such review has been expressly or impliedly prohibited. The APA also specifically exempts from judicial review "agency action [that] is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). In this case, there is no separate statute giving an applicant the right to a waiver or the right to have a waiver application adjudicated in a certain manner. Instead, waivers are governed solely by the

Proclamation. The APA “does not expressly allow review of the President’s actions,” *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992), and “there is no private right of action to enforce obligations imposed on executive branch officials by executive orders.” *Chai v. Carroll*, 48 F.3d 1331, 1338 (4th Cir. 1995). Put another way, the Supreme Court made clear in *Trump v. Hawaii* that the President had the authority to issue this Proclamation under 8 U.S.C. § 1182(f), and the President was under no obligation to allow for waivers at all, as no separate statute or regulation requires waivers. The logical inference is that any right to have a waiver request adjudicated in a specific manner must be found in the Proclamation itself. The Proclamation, however, makes it abundantly clear that it does not create “any right or benefit, substantive or procedural” against the government. 82 Fed. Reg. at 45172, § 9(c). This means that plaintiffs have no right to have the waiver adjudicated in any specific amount of time, and thus plaintiffs have failed to state a legally cognizable claim. The Proclamation commits the waiver process to the agency’s discretion, and it does not impose on the agency any timing requirements for adjudicating a waiver request, meaning that there would be no judicially manageable standard for the Court to apply in determining whether the government has engaged in an unreasonable delay. Under the APA, a plaintiff may not seek judicial review if the court “would have no meaningful standard against which to judge the agency’s exercise of discretion.” *Heckler v. Cheney*, 470 U.S. 821, 830 (1985).

Plaintiffs nonetheless argue in their opposition that the Court does have a standard by which to judge whether there has been an unreasonable delay: the TRAC factors. In *Telecommunications Research & Action Center v. FCC*, the D.C. Circuit set forth factors to use in determining whether an administrative delay is unreasonable. 750 F.2d 70, 77-78 (D.C. Cir. 1984). Those factors are: (1) the time agencies take to make decisions must be governed by a “rule of reason;” (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling of a statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that the agency action is “unreasonably delayed.” *Id.* at 79-80.

For the reasons already explained, however, the Proclamation itself governs defendants’ handling of the waiver request, meaning that the TRAC factors are irrelevant here due to the Proclamation’s express refusal to create any substantive or procedural rights. Moreover, even if the TRAC factors did apply, plaintiffs still could not demonstrate that the government has engaged in unreasonable delay. The third waiver requirement involves complex and high-stakes considerations regarding national security. There are thousands of waiver applications pending, and it does not matter how many of those applications are ahead of or behind Ms. Akhyani’s—the Proclamation has entrusted to the agency an important determination regarding national security, and the TRAC factors would account for the gravity of that decision. It is thus not for the Court to tell the agency that a year and a half is too long for a waiver request to remain pending, nor is it the Court’s place to tell agency how to prioritize its thousands of pending applications. Plaintiffs seem to forget that Ms. Akhyani has no right to a waiver; instead, it is her responsibility to prove that she deserves a waiver. There is no statute requiring the government to adjudicate waiver requests in a certain order or within a certain amount of time, and thus no “rule of reason” has been violated. Therefore, even if the TRAC factors did apply to the waiver

request, plaintiffs have not set forth sufficient evidence to demonstrate that defendants have engaged in an unreasonable delay, and plaintiffs' claim would still fail as a matter of law.

As previously explained, Ms. Akhyani's underlying visa application is distinct from her waiver request. Therefore, plaintiffs' reliance on 5 U.S.C. § 555(b) (requiring the agency to make a decision within a "reasonable time") and 22 C.F.R. § 42.81(a) (requiring the consular officer to "either issue or refuse the visa" once the application is completed) is misplaced—the consular officer in this case already met those requirements by denying Ms. Akhyani's underlying visa application in October of 2018. Any claim with respect to the underlying visa application itself is thus moot, as the government already made a final decision about that application. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (explaining that a case is moot when "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome"). Ms. Akhyani's open waiver request is separate from her initial visa request and thus is not moot (but for the reasons explained above, there are no judicially manageable standards by which the Court can assess the government's handling of that waiver request).

It should also be noted that plaintiffs' requested relief—a writ of mandamus—is an "extraordinary remedy" that is only appropriate "to compel the performance of a *clear nondiscretionary* duty." *Pittson Coal Grp. v. Sebben*, 488 U.S. 105, 121 (1988) (emphasis added). Because plaintiffs have no clear legal entitlement to a waiver or to have the waiver request adjudicated within any specific timeframe, there is no "clear and nondiscretionary duty" that can give rise to the writ of mandamus that plaintiffs seek. This would be true even if the Court were to find that the TRAC factors applied, as those factors involve a great deal of discretion as well as the balancing of different interests; the TRAC factors thus do not impose the kind of "clear and nondiscretionary duty" required for a Court to issue a writ of mandamus in this case. Similarly, even if the APA provisions and regulations that plaintiffs cite did apply to the waiver request, they fail to impose a clear and precise duty worthy of a writ of mandamus for the same reasons that they fail to create a judicially manageable standard of review. When "there is no clear and compelling duty under the statute" requiring the government to act, the Court may not issue a writ of mandamus and must dismiss the action. *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005). Therefore, even when construing the allegations liberally, plaintiffs have failed to make a legally cognizable claim that would entitle them to a writ of mandamus, meaning that the Court must dismiss the case with prejudice.

* * * *

(3) International Refugee Assistance Project ("IRAP") v. Trump

In the *IRAP* case, multiple plaintiffs—including organizations (such as IRAP) and U.S. citizens and residents seeking visas for their relatives from Iran, Syria, Yemen, and Somalia—challenged Presidential Proclamation 9645 as unconstitutional. *See Digest 2018* at 21-37; *Digest 2019* at 24-27. After remand from the U.S. Supreme Court, the district court again would have allowed some of the claims to proceed. Excerpts follow from the opinion of the U.S. Court of Appeals for the Fourth Circuit, which reversed the district court, and remanded with instructions to dismiss the case. *IRAP v. Trump*, 961 F.3d. 635 (4th Cir. 2020).

* * * *

Proclamation 9645 restricts the entry of foreign nationals from specified countries, giving reasons for doing so that are related to national security, and it makes no reference to religion. In their complaints, the plaintiffs nonetheless claimed that “[t]he Proclamation [was] irrational [as] a national-security measure and [was] inexplicable by anything but animus toward Muslims,” in violation of the Establishment Clause and other clauses of the Constitution. To make their claims, they relied heavily on statements against Muslims made by the President and his advisers both before and after he was elected. Taking the complaints’ factual allegations as true and in the light most favorable to the plaintiffs at the motion to dismiss stage, the district court concluded that the plaintiffs had sufficiently alleged that the Proclamation “was motivated only by an illegitimate hostility to Muslims” and therefore that they had stated plausible claims for relief. *IRAP*, 373 F. Supp. 3d at 674.

For its primary argument on appeal, the government contends that the district court’s decision “cannot be squared with *Hawaii*,” which “is binding here and forecloses [the] plaintiffs’ constitutional claims.” In *Hawaii*, the Supreme Court reversed a preliminary injunction entered against enforcement of Proclamation 9645, holding on virtually the same facts as alleged in the complaints here that “the Government ha[d] set forth a sufficient national security justification to survive rational basis review” and therefore that the “plaintiffs ha[d] not demonstrated a likelihood of success on the merits of their [Establishment Clause] claim.” 138 S. Ct. at 2423. The government argues that instead of following the Supreme Court’s “controlling” decision, the district court “rel[ied] upon, and credit[ed], precisely the same arguments that the Supreme Court rejected in *Hawaii*.” And, according to the government, “[t]he district court also fundamentally misunderstood the legal standard for applying rational-basis review at the motion to dismiss stage,” as revealed by its “call for a ‘more fulsome’ record” and its focus on the President’s actual motivations for issuing the Proclamation. Finally, the government contends that the Supreme Court’s decision in *Hawaii* “strongly suggest[ed] that the Proclamation should more properly be analyzed under *Mandel* rather than rational-basis review.” In *Mandel*, the Supreme Court held that the Executive’s exercise of delegated power to bar a foreign national’s entry should be reviewed only as to “whether the Executive gave a ‘facially legitimate and bona fide’ reason for its action.” *Hawaii*, 138 S. Ct. at 2419 (quoting *Mandel*, 408 U.S. at 769, 92 S.Ct. 2576). And under that standard, the government reasons, there is no doubt that Proclamation 9645 “survives that more deferential standard.”

The plaintiffs contend that the district court correctly concluded that resolution of the government’s motion to dismiss was not controlled by *Hawaii*, arguing that the difference in outcomes between *Hawaii* and the decision below follows from “the different standards applicable to preliminary-injunction and motion-to-dismiss rulings.” According to the plaintiffs, “the Supreme Court [in reversing the entry of a preliminary injunction] did not determine the ultimate merits of the *Hawaii* plaintiffs’ constitutional claim — it instead ruled only that there was not a sufficient likelihood of success on the merits to warrant preliminary injunctive relief.” Moreover, the plaintiffs argue, the Supreme Court reached this decision “by weighing the limited evidence in a record created solely of publicly available evidence and without discovery.” Accordingly, they conclude, “*Hawaii* does not foreclose” their constitutional claims, and the district court correctly “applied the well-established standard for deciding motions to dismiss” in

holding that they had “plausibly allege[d] that the Proclamation does not rationally further a legitimate state interest” and instead “that the *only* rational explanation for the Proclamation is anti-Muslim animus.” (Emphasis added).

...Here, there are two standards that may govern the plaintiffs’ claims that Proclamation 9645’s restrictions on the entry of foreign nationals from specified countries violates their constitutional rights — the *Mandel* standard, on the one hand, and the rational basis standard, on the other. While important differences exist between the two standards, they are both “highly constrained” forms of judicial review, *Hawaii*, 138 S. Ct. at 2420, and our application of either standard leads to the same result.

A. *Mandel* standard

Addressing Proclamation 9645 in the face of the same allegation of anti-Muslim animus that is raised here, the Supreme Court in *Hawaii* stated that the issue “is not whether to denounce the statements” of the President and his advisers. 138 S. Ct. at 2418. “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.” *Id.* And in answering that question, the Court recognized that, under its longstanding precedent, the President’s statements would not factor into the analysis to the extent that “the Executive gave a ‘facially legitimate and bona fide’ reason for its action.” *Id.* at 2419 (quoting *Mandel*, 408 U.S. at 769, 92 S.Ct. 2576). This is so, the Court explained, because “the authority of the political branches over admission” means that when the Executive provides a “ ‘facially legitimate and bona fide reason’ ” for its action in denying entry to foreign nationals, “ ‘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.* (quoting *Mandel*, 408 U.S. at 770, 92 S.Ct. 2576). Thus, judicial review of such Executive action must be exceedingly narrow and “highly constrained.” *Id.* at 2420.

“For more than a century,” the Supreme 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.’ ” *Hawaii*, 138 S. Ct. at 2418 ... The Supreme Court invoked and relied on these longstanding principles of immigration jurisprudence in *Mandel*.

In *Mandel*, a Belgian journalist and author, Ernest Mandel, was denied a nonimmigrant visa to enter the United States to participate in and speak at a series of academic conferences...

Despite the Supreme Court’s recognition of the professors’ First Amendment rights and the fact that Mandel’s exclusion implicated those rights, *see Mandel*, 408 U.S. at 762–65, 92 S.Ct. 2576, the Court held that Mandel’s exclusion was lawful, *see id.* at 769–70, 92 S.Ct. 2576. It explained that, based on “ancient principles of the international law of nation-states,” Congress could categorically bar those who advocated Communism from entry, noting that “the power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers — a power to be exercised exclusively by the political branches of government.” *Id.* at 765, 92 S.Ct. 2576 (cleaned up). And significantly, with respect to the plaintiffs’ constitutional challenge to the Attorney General’s denial of a waiver, the Court forbade judges from interfering with the Executive’s “facially legitimate and bona fide” exercise of its immigration authority. *Id.* at 770, 92 S.Ct. 2576. Specifically, the Court held that “when the Executive exercises ... power [delegated by Congress to admit or exclude foreign nationals] 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 First Amendment interests*” of U.S. citizens. *Id.* (emphasis

added).

Since its decision in *Mandel*, the Court has consistently “reaffirmed and applied its deferential standard of review across different contexts and constitutional claims.” *Hawaii*, 138 S. Ct. at 2419. ...

Likewise, in *Kerry v. Din*, 576 U.S. 86, 135 S. Ct. 2128, 192 L.Ed.2d 183 (2015), ... Justice Kennedy concluded that the case was “control[led]” by “[t]he reasoning and the holding in *Mandel*.” *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring in the judgment). He explained that “respect for the political branches’ broad power over the creation and administration of the immigration system” meant that, because the government had provided Din with a facially legitimate and bona fide reason for its action, Din had no viable constitutional claim. *Id.* at 2141.

And most recently, of course, the Court in *Hawaii* not only confirmed *Mandel*’s continuing vitality but also its applicability in assessing the constitutionality of the very Proclamation that is before us. *See, e.g.*, 138 S. Ct. at 2419 (rejecting “[t]he principal dissent[’s] suggest[ion] that *Mandel* has no bearing on this case” and emphasizing that “*Mandel*’s narrow standard of review ‘has particular force’ in admission and immigration cases that overlap with ‘the area of national security’ ” (quoting *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring in the judgment))). Moreover, the Court noted that under the *Mandel* standard, the analysis of Proclamation 9645 would end once a court concluded that the Proclamation, *on its face*, provided reasons that were “facially legitimate and bona fide.” *Hawaii*, 138 S. Ct. at 2420. And the Court so concluded, finding that “[t]he Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices.” *Id.* at 2421.

Even were it not for this conclusion by the Supreme Court, we would determine independently that Proclamation 9645 does indeed provide on its face legitimate and bona fide reasons for its entry restrictions. The Proclamation itself states that, following a comprehensive, global review, the eight countries selected for some form of entry restriction were found to have inadequate practices for providing information to U.S. immigration officials or to otherwise present a heightened risk of terrorism. The Proclamation also states that, in the judgment of the President of the United States, country-specific 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 counterterrorism objectives” of the United States. Procl. § 1(h)(i). These are most certainly “facially legitimate and bona fide” reasons within the meaning of *Mandel*, and our review could end with that conclusion. *See Hawaii*, 138 S. Ct. at 2420.

The *Hawaii* Court’s analysis of Proclamation 9645 did not, however, end with a facial analysis of the Proclamation under *Mandel*, even though the Court indicated that it could have. This was because, as the Court explained, the government had suggested “that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order.” *Hawaii*, 138 S. Ct. at 2420. The Court accommodated that suggestion, stating, “For our purposes today we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review.” *Id.* But in doing so, the Court in no way undermined the conclusion that *Mandel* provides the applicable standard.

In the decision before us, the district court agreed that *Mandel* was controlling. Nonetheless, it failed to apply its standard of review properly, moving past the face of the Proclamation to consider in its analysis external statements made by the President. The district

court stated that *Hawaii* “does not instruct courts to disregard these statements or any public pronouncements of a President.” *IRAP*, 373 F. Supp. 3d at 672. But the Court’s extensive discussion of *Mandel* in *Hawaii* indicates just the opposite. *See, e.g., Hawaii*, 138 S. Ct. at 2420 (recognizing that a “conventional application of *Mandel*” would “ask[] only whether the policy is facially legitimate and bona fide” (emphasis added)).

As the Supreme Court did, however, we too will proceed beyond consideration of only the facially stated purposes of Proclamation 9645 and determine whether the plaintiffs have alleged plausible constitutional claims under the rational basis standard of review.

B. Rational basis standard

Under the rational basis standard, the plaintiffs’ claims challenging the constitutionality of Proclamation 9645 must fail if the Proclamation is even “plausibly related to the Government’s stated objective to protect the country and improve vetting processes” — *i.e.*, if, despite the President’s statements, the policy “can reasonably be understood to result from a justification independent of unconstitutional grounds.” *Hawaii*, 138 S. Ct. at 2420.... The Proclamation must be afforded “a strong presumption of validity,” and “those attacking the rationality of the [policy] have the burden to negative *every conceivable basis* which might support it.” *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 314–15, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) (emphasis added) (cleaned up). Moreover, under the deferential standard, it is “entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction *actually motivated*” the decisionmaker. *Id.* at 315, 113 S.Ct. 2096 (emphasis added). When the rational basis review standard is applicable, the Supreme Court, as the Court observed in *Hawaii*, “hardly ever strikes down a policy as illegitimate.” 138 S. Ct. at 2420.

Applying the rational basis standard of review to the Proclamation that is before us, the *Hawaii* Court concluded, in no uncertain terms, that “[t]he Proclamation does not fit [the] pattern” established by the handful of cases where a challenged policy did not survive rational basis review. 138 S. Ct. at 2420. “It cannot be said,” the Court concluded, “that it is impossible to discern a relationship” between Proclamation 9645 and “legitimate state interests,” nor can it be said “that the policy is inexplicable by anything but animus.” *Id.* at 2420–21 (cleaned up). Rather, “there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from [the] religious hostility” that the plaintiffs allege here as the Proclamation’s only plausible basis. *Id.* The Supreme Court gave a number of reasons for this conclusion.

First, “[t]he Proclamation is expressly premised on legitimate purposes” — *i.e.*, “preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices” — and its “text says nothing about religion.” *Hawaii*, 138 S. Ct. at 2421. ...

Second, the Proclamation “reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies.” *Hawaii*, 138 S. Ct. at 2421. ...

Third, and “[m]ore fundamentally,” the Court addressed the plaintiffs’ suggestion “that the policy [was] overbroad and d[id] little to serve national security interests.” *Hawaii*, 138 S. Ct. at 2421. It responded, “[W]e cannot substitute our own assessment for the Executive’s predictive judgments on such matters.” *Id.* ...

Fourth, the Court rejected the argument — specifically echoed by the plaintiffs here — that “Congress ha[d] already erected a statutory scheme that fulfills the President’s stated concern about deficient vetting.” *Hawaii*, 138 S. Ct. at 2422 n.6 (cleaned up). It explained that “[n]either the existing inadmissibility grounds nor the narrow Visa Waiver Program address the

failure of certain high-risk countries to provide a minimum baseline of reliable information.” *Id.*

And *fifth*, the Court pointed to “[t]hree additional features of the entry policy [as] support[ing] the Government’s claim of a legitimate national security interest.” *Hawaii*, 138 S. Ct. at 2422. “First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries — Iraq, Sudan, and Chad — ha[d] been removed from the list of covered countries,” and the Proclamation “establishe[d] an ongoing process” to determine whether the restrictions on the remaining countries should be terminated. *Id.* “Second, for those countries that remain subject to entry restrictions, the Proclamation include[d] significant exceptions for various categories of foreign nationals,” “permit[ting] nationals from nearly every covered country to travel to the United States on a variety of nonimmigrant visas.” *Id.* And “[t]hird, the Proclamation create[d] a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants.” *Id.*

Based on these reasons, the Court concluded that, despite the religious hostility of certain external statements, “*the Government ha[d] set forth a sufficient national security justification to survive rational basis review.*” *Hawaii*, 138 S. Ct. at 2423 (emphasis added). And every reason that the *Hawaii* Court gave to reach its conclusion applies here. Yet, despite the Supreme Court’s clear and unambiguous conclusion about the justification for Proclamation 9645, the district court in this case concluded that the plaintiffs had plausibly alleged that the same Proclamation reflected *no* legitimate purpose. In doing so, it erred as a matter of law. Therefore, even to the extent that the plaintiffs’ constitutional claims are subject to rational basis review, rather than the *Mandel* standard, the district court should have dismissed them for failing to state a claim to relief that is plausible on its face.

* * * *

At bottom, in view of the Supreme Court’s conclusions with respect to Proclamation 9645 in *Hawaii*, we conclude that the plaintiffs’ constitutional claims in this case lack the plausibility necessary to survive the government’s motion to dismiss under Rule 12(b)(6). Accordingly, we reverse the district court’s order of May 2, 2019, denying the government’s motion to dismiss the constitutional claims and remand with instructions to dismiss the plaintiffs’ complaints with prejudice.

* * * *

c. Restrictions on nonimmigrant visas likely to support PRC military technology

On May 29, 2020, President Trump issued Proclamation 10043 (“Suspension of Entry as Nonimmigrants of Certain Students and Researchers From the People’s Republic of China”), aimed at limiting People’s Liberation Army’s (“PLA”) exploitation of U.S. nonimmigrant student and researcher visa programs to support a PRC entity that implements and supports the Chinese Communist Party’s (CCP) “military-civil fusion” strategy by acquiring American technology and intellectual property from U.S. academic institution and research facilities for Chinese military use. 85 Fed. Reg. 34,353 (June 4, 2020). The June 1, 2020 State Department press statement about the proclamation is available at <https://2017-2021.state.gov/u-s-limits-the-peoples-liberation-armys-ability->

[to-use-nonimmigrant-visa-programs-to-illicitly-acquire-u-s-technologies-and-intellectual-property/](#) and includes the following:

The President's proclamation suspends the entry into the United States of any People's Republic of China national seeking to enter the United States pursuant to an F or J visa to study or conduct research in the United States, except for a student seeking to pursue undergraduate study, where the individual's academic or research activities are likely to support a PRC entity that implements and supports the Chinese Communist Party's (CCP) "military-civil fusion" strategy. Our actions last Friday are a direct consequence of PRC government strategies and policies that exploit the access of some of China's brightest graduate students and researchers, in targeted fields, to divert and steal sensitive technologies and intellectual property from U.S. institutions, taking undue advantage of our open and collaborative academic and research environment. This action will help safeguard U.S. national and economic security interests and the productivity and security of the U.S. research enterprise.

On June 2, 2020, senior State Department officials provided a special briefing on the proclamation aimed at limiting the illicit acquisition of U.S. technologies and intellectual property by PRC students. The briefing is available at <https://2017-2021.state.gov/briefing-with-senior-state-department-officials-on-u-s-limiting-the-peoples-liberation-armys-ability-to-use-nonimmigrant-visa-programs-to-illicitly-acquire-u-s-technologies-an/>.

d. *Changes to visa regulations regarding birth tourism*

On January 23, 2020, the State Department announced changes to U.S. visa regulations regarding birth tourism. See special briefing by State Department officials, available at <https://2017-2021.state.gov/state-department-officials-on-changes-to-u-s-visa-regulations-regarding-birth-tourism/>. Excerpts follow from the briefing.

Effective January 24th, the Department of State is amending its B non-immigrant visa regulations to address what is commonly referred to as birth tourism. The B visitor visa category is for a temporary visit for business or pleasure. The updated regulation will establish that pleasure excludes travel for the primary purpose of obtaining United States citizenship for a child by giving birth to the child in the United States. Under this amended regulation, consular officers overseas would deny any B visa application from an applicant whom the consular officer has reason to believe is traveling for that primary purpose of giving birth in the United States to obtain U.S. citizenship for the child.

This change is intended to address the national security and law enforcement concerns associated with birth tourism. The final rule also codifies a requirement that B visa applicants who seek medical treatment in the United States must demonstrate to the satisfaction of the consular officer their

arrangements for such treatment and establish their ability to pay all costs associated with such treatment.

e. *Other visa restrictions*

(1) *Reciprocal Access to Tibet Act*

On July 7, 2020, Secretary Pompeo announced visa restrictions on PRC government and Chinese Communist Party officials determined to be “substantially involved in the formulation or execution of policies related to access for foreigners to Tibetan areas,” pursuant to the Reciprocal Access to Tibet Act of 2018. July 7, 2020 press statement, available at <https://2017-2021.state.gov/implementing-visa-restrictions-under-the-reciprocal-access-to-tibet-act/>. Secretary Pompeo’s press statement further explains:

...Beijing has continued systematically to obstruct travel to the Tibetan Autonomous Region (TAR) and other Tibetan areas by U.S. diplomats and other officials, journalists, and tourists, while PRC officials and other citizens enjoy far greater access to the United States.

...Access to Tibetan areas is increasingly vital to regional stability, given the PRC’s human rights abuses there, as well as Beijing’s failure to prevent environmental degradation near the headwaters of Asia’s major rivers.

The United States will continue to work to advance the sustainable economic development, environmental conservation, and humanitarian conditions of Tibetan communities within the People’s Republic of China and abroad. We also remain committed to supporting meaningful autonomy for Tibetans, respect for their fundamental and unalienable human rights, and the preservation of their unique religious, cultural, and linguistic identity. In the spirit of true reciprocity, we will work closely with the U.S. Congress to ensure U.S. citizens have full access to all areas of the People’s Republic of China, including the TAR and other Tibetan areas.

(2) *INA § 212(a)(3)(c) visa restrictions*

See Chapter 16 for discussion of visa restrictions under section 212(a)(3)(c) of the INA.

f. *Proclamation 9945: Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System*

As discussed in *Digest 2019* at 29, Presidential Proclamation 9945 (“P.P. 9945”) on the “Suspension of Entry of Immigrants Who Will Financially Burden the United States Healthcare System,” was subject to a nationwide temporary restraining order issued by the U.S. District Court for the District of Oregon. *Doe v. Trump*, 418 F.Supp.3d 573 (D. Or. 2019). On May 4, 2020, the U.S. Court of Appeals for the Ninth Circuit denied the

government's motion for a stay pending appeal of the district court's preliminary injunction. *Doe v. Trump*, 957 F.3d 1050 (9th Cir.).

g. Visa Ineligibility on Public Charge Grounds

In January and February of 2020, the U.S. Supreme Court issued orders staying preliminary injunctions that had been issued by several district courts hearing challenges to regulations regarding visa eligibility determinations based on the likelihood the alien would become a public charge. The new rule (both from the State Department and Department of Homeland Security) regarding public charge determinations took effect February 24, 2020.

On July 29, 2020, the U.S. District Court for the Southern District of New York, in *State of New York, et al. v. DHS, et al.* and *Make the Road NY et al. v. Cuccinelli, et al.*, ("New York"), enjoined the Department of Homeland Security ("DHS") from enforcing the public charge rule during a declared national health emergency (the COVID-19 outbreak). 475 F. Supp. 3d 208 (S.D.N.Y. 2020). On August 12, 2020, the U.S. Court of Appeals for the Second Circuit temporarily stayed the district court's injunction in all states other than those within the Second Circuit (New York, Connecticut and Vermont). *New York*, No. 20-2537 (2d. Cir.). On September 11, 2020, the Second Circuit granted a full stay of the district court's injunction pending appeal. *New York*, 974 F.3d 210 (2d Cir. 2020). DHS resumed implementing the public charge final rule nationwide after the September 11, 2020 Second Circuit order. See U.S. Citizen and Immigration Services webpage, "Injunction of the Inadmissibility on Public Charge Grounds Final Rule," at <https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/injunction-of-the-inadmissibility-on-public-charge-grounds-final-rule>.

7. Removals and Repatriations

The Department of State works closely with DHS 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. Countries that are recalcitrant in accepting the return of their nationals subject to removal may be subject to "discontinuance" of visa issuance as a penalty under Section 243(d) of the INA.

On January 17, 2020, INA 243(d) sanctions were lifted for Ghana, and visa processing returned to the normal procedures. See U.S. Embassy in Ghana press release, available at <https://gh.usembassy.gov/statement-on-the-end-of-u-s-non-immigrant-visa-restrictions-in-ghana/>.

In 2020, Section 243(d) sanctions were applied to Burundi and Ethiopia based on their governments' denial or unreasonable delay in accepting nationals subject to removal from the United States. See U.S. Immigration and Customs Enforcement, "Visa Sanctions Against Two Countries Pursuant to Section 243(d) of the Immigration and Nationality Act," available at <https://www.ice.gov/visasanctions>.

C. ASYLUM, REFUGEE, AND MIGRANT 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 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; *Digest 2017* at 33–37; *Digest 2018* at 38–44 and *Digest 2019* at 31–32. In 2020, the United States extended TPS designations for Yemen, Somalia and South Sudan.

a. Yemen

On March 2, 2020, DHS provided notice of an 18-month extension of the designation of Yemen, through September 3, 2021. 85 Fed. Reg. 12,313 (Mar. 2, 2020). The extension is based on the determination that the ongoing armed conflict and extraordinary and temporary conditions supporting Yemen’s TPS designation continue to exist. *Id.*

b. Somalia

On March 11, 2020, DHS provided notice of an 18-month extension of the designation of Somalia for TPS for 18 months, through September 17, 2021. 85 Fed. Reg. 14,229 (Mar. 11, 2020). The extension is based on the determination that the ongoing armed conflict and extraordinary and temporary conditions supporting Somalia’s TPS designation remain. *Id.*

c. South Sudan

On November 2, 2020, DHS provided notice of an 18-month extension of the designation of South Sudan for TPS for 18 months, through May 2, 2022. 85 Fed. Reg. 69,344 (Nov. 2, 2020). The extension is based on the determination that the ongoing

armed conflict and extraordinary and temporary conditions supporting South Sudan’s TPS designation continue to exist. *Id.* Consistent with court orders, DHS also continued the work authorization for TPS beneficiaries from all the countries whose TPS terminations are subject to litigation.

d. Ramos v. Nielsen and other litigation

As discussed in *Digest 2018* at 40-44 and *Digest 2019* at 32, several U.S. courts enjoined the termination of TPS for Sudan, Nicaragua, Nepal, Haiti, and El Salvador. On September 14, 2020, the majority of a panel of the U.S. Court of Appeals for the Ninth Circuit vacated the preliminary injunction and remanded in *Ramos v. Wolf*, 975 F.3d 872 (9th Cir.). Plaintiffs are petitioning for rehearing *en banc*, and the preliminary injunction remains in effect pending the resolution of appeals. On December 9, 2020, DHS announced that El Salvador, Haiti, Nicaragua and Sudan TPS benefits continue through October 4, 2021, based on the preliminary injunction in *Ramos*. 85 Fed. Reg. 79,208 (Dec. 9, 2020). DHS also announced continuation of benefits under the Haiti TPS designation, based on the preliminary injunction in *Saget et al. v. Trump et al.*, 375 F. Supp. 3d 280 (S.D.N.Y. 2019). *Id.* And TPS for Honduras and Nepal continues based on the stay of proceedings in *Bhattarai et al. v. Nielsen et al.*, No. 19-cv-00731 (N.D. Cal. March 12, 2019). *Id.* Excerpts follow from the majority opinion of the Ninth Circuit Court of Appeals in *Ramos*.

* * * *

On appeal, the Government’s arguments focus only on Plaintiffs’ likelihood of success on the merits, arguing that Plaintiffs fail to meet this prong of the preliminary injunction standard because (1) their APA claim is not reviewable under the TPS statute, but even if it were, the claim would fail on the merits, and (2) their EPC likewise fails, even under the “serious questions” standard. We address each of these issues in turn. We review for an abuse of discretion the district court’s decision to grant a preliminary injunction. *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1204 (9th Cir. 2000). Within this inquiry, we review the district court’s legal conclusions de novo and its factual findings for clear error. *Hernandez v. Sessions*, 872 F.3d 976, 987 (9th Cir. 2017).

III. A.

We consider first whether Plaintiffs’ claims are reviewable in light of 8 U.S.C. § 1254a(b)(5)(A), which states: “There is no judicial review of any determination of the [Secretary of Homeland Security] with respect to the designation, or termination or extension of a designation, of a foreign state under this subsection.” To answer this question, we must first determine the type of claims that this provision precludes from judicial review, and then determine whether Plaintiffs’ particular claims fall within the scope of this statutory bar.

* * * *

Under section 1254a, the Secretary's discretion to make TPS determinations, while not without check, is undoubtedly broad and unique in nature. To begin, the authority to designate a foreign country for TPS is vested solely with the Secretary "after consultation with the appropriate agencies of the Government." 8 U.S.C. § 1254a(b)(1). And when it comes to designating a country for TPS, the Secretary "may" do so if she finds that the country has been stricken by a natural disaster, armed conflict, or other "extraordinary and temporary conditions in the foreign state." 8 U.S.C. § 1254a(b). The word "may" indicates that, even if the Secretary finds one of these three requisite criteria is met, she retains the discretion *not* to designate a country for TPS. In contrast, once a country has been designated for TPS, the Secretary "shall" periodically review the country conditions and "shall" terminate TPS if she finds the requisite criteria are no longer met. These provisions, taken together, indicate a legislative intent to limit the designation, redesignation, and extension of TPS by requiring both periodic review as well as termination when those conditions are no longer met. Thus, to the extent the TPS statute places constraints on the Secretary's discretion, it does so in favor of limiting unwarranted designations or extensions of TPS.

Moreover, designations of TPS directly concern the status of "any foreign state (or any part of such foreign state)", *see id.*, rather than that of any individual, even if such designation ultimately benefits individual nationals of the designated foreign states. ... Here, the TPS statute does not provide any formal avenue or administrative process for foreign citizens to "apply" for TPS designation of their countries. Rather, the decision to designate any foreign country for TPS begins and ends with the Secretary, so long as certain limited statutory criteria are met. ...

The TPS statute also does not dictate any substantive guidelines or restrictions on the manner by which the Secretary may reach her TPS determinations, other than setting forth the three possible findings that the Secretary must make before designating a country for TPS. *See* 8 U.S.C. § 1254a(b)(1). Nor does the statute set forth or define the "conditions in the foreign state" that the Secretary must consider in her periodic review, or how she should weigh these conditions. *See id.* § 1254a(b)(1). Read in the context of these provisions, section 1254a(b)(5)(A) makes clear that the Secretary's discretion to consider and weigh various conditions in a foreign country in reaching her TPS determinations is not only broad, but unreviewable. In other words, the statute not only sets forth very few legal parameters on what the Secretary must consider in designating, extending, or terminating TPS for a foreign country, but also expressly bars judicial review over these determinations. Logically then, section 1254a(b)(5)(A) generally precludes courts from inquiring into the underlying considerations and reasoning employed by the Secretary in reaching her country-specific TPS determinations.

In short, the TPS statute precludes review of non-constitutional claims that fundamentally attack the Secretary's specific TPS determinations, as well as the substance of her discretionary analysis in reaching those determinations. But, as *McNary* instructs us, where a court "lacks jurisdiction over a challenge to the agency's 'actions' or 'conduct' 'in adjudicating a specific individual claim,'" it may still have "jurisdiction over 'a broad challenge' to the agency's 'procedures' or 'practices.'" *City of Rialto v. W. Coast Loading Corp.*, 581 F.3d 865, 875 (9th Cir. 2009) (quoting *Mace v. Skinner*, 34 F.3d 854, 858–59 (9th Cir. 1994)). To the extent a claim purports to challenge an agency "pattern or practice" rather than a specific TPS determination, we may review it only if the challenged "pattern or practice" is indeed collateral to, and distinct from, the specific TPS decisions and their underlying rationale, which the statute shields from judicial scrutiny.

The scope of section 1254a's bar on judicial review does not change even in the context of the APA, which codifies the "basic presumption of judicial review" over agency action. *Abbott Labs.*, 387 U.S. at 140. Indeed, the APA by its own provisions does not apply where "statutes preclude judicial review" or where the "agency action" challenged is "committed to agency discretion by law." 5 U.S.C. § 701(a)(1), (2). Accordingly, where a claim challenges an agency action over which the TPS statute precludes judicial review, or which the TPS statute has committed to agency discretion, the APA cannot be invoked as an independent basis for affording judicial review. For instance, an allegation that the Secretary reached certain TPS determinations in an "arbitrary and capricious" manner would not be reviewable under section 1254a. Although such a claim raises a cognizable violation of the APA, it also directly attacks the Secretary's specific TPS determinations, rather than a broad agency pattern or practice, and is thereby shielded from judicial review by the TPS statute. With these principles in mind, we turn next to whether Plaintiffs' APA claim qualifies as a reviewable challenge to a collateral agency practice or policy under the TPS statute.

2. Plaintiffs' APA Claim

In assessing whether Plaintiffs' APA claim raises a reviewable challenge to a collateral agency "pattern or practice" rather than a challenge to specific TPS determinations barred by section 1254a, we are guided by several considerations. ...

...[M]any of these factors lean in favor of concluding that the claim is not reviewable. For one, Plaintiffs' APA claim does not challenge any agency procedure or regulation. "True procedural challenges confront an agency's methods or procedures and do not depend on the facts of any given individual agency action." *City of Rialto*, 581 F.3d at 876. In alleging that the Secretary has violated the APA by no longer considering intervening events in the TPS terminations at issue, Plaintiffs essentially raise a substantive challenge to the Secretary's underlying analysis in reaching those specific decisions. Their claim also largely depends on a review and comparison of the substantive merits of the Secretary's specific TPS terminations, which is generally barred by section 1254a. Moreover, the consideration of "intervening events" in a TPS determination is a task squarely within the agency's "special expertise" and "institutional competence" and which section 1254a commits to the Secretary's discretion. And insofar as Plaintiffs' request declaratory and injunctive relief in setting aside the TPS terminations, they appear to seek direct relief from the challenged decisions, rather than collateral relief from an allegedly unlawful agency practice.

Plaintiffs, however, insist that their APA claim does not challenge the specific TPS determinations, but "goes to the agency's underlying practice" and does not "seek to establish that a particular country must remain designated[.]" They characterize their APA claim as a challenge to an "arbitrary and capricious" change in a broad agency practice: specifically, they allege that the agency, without explanation, adopted a new practice of refusing to consider intervening events in its TPS extension determinations, and that this practice is unlawful under the APA. Despite this characterization, we find that Plaintiffs' claim is not reviewable under section 1254a. As we have reiterated several times before, "the phrase 'pattern and practice' is not an automatic shortcut to federal court jurisdiction." *Gebhardt*, 879 F.3d at 987 (citing *City of Rialto v. W. Coast Loading Corp.*, 581 F.3d at 872). In other words, Plaintiffs cannot obtain judicial review over what is essentially an unreviewable challenge to specific TPS terminations by simply couching their claim as a collateral "pattern or practice" challenge. "No matter how a plaintiff characterizes an argument, we can review a claim in this context only if it challenges a genuinely collateral action." *Id.*

Our analysis of section 1254a dictates that a claim challenging the Secretary’s failure to “consider intervening events”—or even her failure to adequately explain why the agency is no longer considering intervening events when it did so in the past—is essentially an attack on the substantive considerations underlying the Secretary’s specific TPS determinations, over which the statute prohibits judicial review. Nothing in the language of the TPS statute requires the Secretary to consider intervening events prior to terminating TPS, or to explain her failure to do so. In fact, the statute is entirely silent as to the specific types of events or factors the Secretary must consider in reaching her TPS determinations. As far as the TPS statute is concerned, the decision whether to consider intervening events when making TPS determinations appears to be fully within the Secretary’s discretion. Thus, even presuming that DHS adopted a new practice of refusing to consider intervening events, as Plaintiffs allege, the TPS statute provides no legal basis to challenge such an action.

Instead, the alleged illegality of the agency action here is based solely on the APA and its requirement that agencies not “arbitrarily and capriciously” depart from past practice. *See* 5 U.S.C. § 706(2)(A); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–14 (2009). To review Plaintiffs’ claim, we must accept that—even though the TPS statute affords the Secretary full discretion as to whether she considers intervening events (or any other factors) when making her TPS determinations—the APA’s prohibition on “arbitrary and capricious” changes in practice may nonetheless require her to consider intervening events if prior Secretaries did so before her, and to explain herself if she chooses to depart from this “practice.” We must also presuppose that—even though section 1254a precludes us from reviewing the Secretary’s TPS determinations and her underlying considerations—the APA may independently form the basis of a justiciable challenge and thereby allow such a claim to elude the statute’s judicial review bar. This cannot be so. As we have noted, the APA cannot be used as the sole basis for conferring justiciability over what would otherwise be unreviewable claim. To conclude otherwise would render section 1254a(b)(5)(A) virtually meaningless and would contradict the APA’s express language on the limits of the statute’s applicability. *See* 5 U.S.C. § 701(a) (“This chapter applies ... except to the extent that— (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.”). Because Plaintiffs’ APA claim alleges an “arbitrary and capricious” change in agency practice that is otherwise committed to the Secretary’s discretion under the TPS statute and, at its core, challenges only the Secretary’s specific TPS determinations, we find that it is unreviewable.

* * * *

We elect to address Plaintiffs’ APA claim as they present it—a challenge to the agency’s new and unexplained practice of refusing to consider intervening events in its TPS decisions. Because such a claim fundamentally attacks the Secretary’s specific TPS determinations, we find that it is barred from review by section 1254a. Given that Plaintiffs may not raise their APA claim as a matter of law, the claim cannot serve as a basis for the preliminary injunction and we need not consider its likelihood of success on the merits.

B.

The remaining issue is whether Plaintiffs have raised serious questions to the merits of their [equal protection claim or] EPC claim so as to warrant the issuance of the preliminary injunction.

1. Applicable Legal Standard for Plaintiffs' EPC Claim

The Government argues that, in light of *Trump v. Hawaii*, the district court erred by applying the standard from *Arlington Heights* to Plaintiffs' EPC claim. In *Trump v. Hawaii*, the Supreme Court applied the rational basis review standard in upholding an executive order suspending the entry of aliens into the United States against an EPC challenge based on alleged animus by the President. The Court prefaced its reliance on the deferential standard with a discussion of cases that "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.'" *Trump*, 138 S. Ct. at 2418 (citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)). Thus, the deferential standard of review applied in *Trump v. Hawaii* turned primarily on the Court's recognition of the fundamental authority of the executive branch to manage our nation's foreign policy and national security affairs without judicial interference. *See id.* at 2419 ("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." (citation omitted)).

Here, the executive's administration of the TPS program, which provides widescale, nationality-based humanitarian harbor for foreign citizens, also involves foreign policy and national security implications, albeit to a lesser extent than the executive order suspending the entry of foreign nationals in *Trump v. Hawaii*. The former involves the implementation of a congressionally created program subject to certain statutory guidelines, while the latter falls squarely in the core realm of executive power to make foreign policy decisions. As the Supreme Court has recognized, "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Accordingly, the level of deference that courts owe to the President in his executive decision to exclude foreign nationals who have not yet entered the United States may be greater than the deference to an agency in its administration of a humanitarian relief program established by Congress for foreign nationals who have lawfully resided in the United States for some time.

For similar reasons, we declined to apply the *Trump v. Hawaii* standard in favor of the *Arlington Heights* standard in our review of an equal protection challenge to the administration's rescission of the Deferred Action for Childhood Arrivals (DACA) program. *See Regents of the Univ. of Cal. v. DHS*, 908 F.3d 476, 519–20 (9th Cir. 2018), *rev'd in part, vacated in part*, 140 S. Ct. 1891 (2020) (distinguishing *Trump v. Hawaii* "in several potentially important respects, including the physical location of the plaintiffs within the geographic United States, the lack of national security justification for the challenged government action, and the nature of the constitutional claim raised." (citation omitted)). The Supreme Court, in its review of the same EPC claim on appeal, also applied the *Arlington Heights* standard. *See Regents*, 140 S. Ct. at 1915–16. Given the similarities between the EPC claim in this case and *Regents*, we reject the Government's contention that *Trump v. Hawaii*'s standard of review should apply in this case. We therefore review Plaintiffs' likelihood of success on their EPC claim under the *Arlington Heights* standard.

2. Merits of the EPC Claim

Under *Arlington Heights*, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 429 U.S. at 265. However, a plaintiff asserting an equal protection claim need not "prove that the challenged action rested solely on

racially discriminatory purposes” or even that racial discrimination was “the ‘dominant’ or ‘primary’” purpose. *Id.* Rather, Plaintiffs need only show that racial discrimination was at least “a motivating factor” for the challenged TPS terminations in order to prevail on their equal protection claim. *Id.* at 265–66 (“When there is a proof that a discriminatory purpose has been a motivating factor in the decision, th[e] judicial deference [that courts normally afford legislators and administrators] is no longer justified.”). “Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Id.* at 266. Factors to consider in this inquiry include: the “impact of the official action” and whether it “bears more heavily on one race than another”; the “historical background of the decision” and whether it “reveals a series of official actions taken for invidious purposes”; the “specific sequence of events leading up the challenged decision” and whether it departs procedurally or substantively from normal practice; and the “legislative or administrative history” and what it reveals about the purpose of the official action. *Id.* at 266–68 (citations omitted).

Applying this standard, we conclude that Plaintiffs fail to present even “serious questions” on the merits of their claim that the Secretaries’ TPS terminations were improperly influenced by the President’s “animus against non-white, non-European immigrants.” The Supreme Court recently rejected a similar equal protection claim in *Regents* that the administration’s decision to rescind DACA was motivated by racial animus under *Arlington Heights*. There, the Court held that none of the points raised by the plaintiffs—*i.e.*, the “disparate impact of the rescission on Latinos from Mexico,” “the unusual history behind the rescission,” and “pre- and post-election statements by President Trump”—“either singly or in concert, establishes a plausible equal protection claim.” *Id.*

Here, Plaintiffs’ EPC claim fails predominantly due to the glaring lack of evidence tying the President’s alleged discriminatory intent to the specific TPS terminations—such as evidence that the President personally sought to influence the TPS terminations, or that any administration officials involved in the TPS decision-making process were themselves motivated by animus against “non-white, non-European” countries. While the district court’s findings that President Trump expressed racial animus against “non-white, non-European” immigrants, and that the White House influenced the TPS termination decisions, are supported by record evidence, the district court cites no evidence linking the President’s animus to the TPS terminations. Rather, the district court makes this leap by relying on what appears to be a “cat’s paw” theory of liability—wherein the discriminatory motive of one governmental actor may be coupled with the act of another to impose liability on the government. We doubt that the “cat’s paw” doctrine of employer liability in discrimination cases can be transposed to this particular context. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 418 (2011) (noting that, while “the answer is not so clear,” one agency law treatise “suggests that the malicious mental state of one agent cannot generally be combined with the harmful action of another agent to hold the principal liable for a tort that requires both.” (citing Restatement (Second) of Agency §275, Illustration 4 (1957))). Plaintiffs argue that this court has employed the “cat’s paw” doctrine in several employment discrimination cases involving government actors, but do not provide any case where such a theory of liability has been extended to governmental decisions in the foreign policy and national security realm.

Moreover, while the record contains substantial evidence that White House officials sought to influence the Secretaries’ TPS decisions, and that the Secretaries sought and acted to conform their TPS decisions to the President’s immigration policy, we find these facts neither

unusual nor improper. It is expected—perhaps even critical to the functioning of government—for executive officials to conform their decisions to the administration’s policies. The mere fact that the White House exerted pressure on the Secretaries’ TPS decisions does not in itself support the conclusion that the President’s alleged racial animus was a motivating factor in the TPS decisions.

Nor do we find that an inference of racial animus behind the TPS terminations is any stronger when the evidence of White House pressure on DHS is joined by evidence of the President’s expressed animus towards “non-white, non-European” countries and ethnicities. While we do not condone the offensive and disparaging nature of the President’s remarks, we find it instructive that these statements occurred primarily in contexts removed from and unrelated to TPS policy or decisions. *See Regents*, 140 S. Ct. at 1916 (finding that the “President’s critical statements about Latinos,” which were “remote in time and made in unrelated contexts . . . do not qualify as ‘contemporary statements’ probative of the decision at issue.”). Here, the only “contemporary statement” might be the President’s comments at the January 11, 2018 meeting with lawmakers, during which TPS terminations were discussed; however, the influence of these remarks on the actual decisions to terminate TPS is belied by the fact that the meeting occurred three days *after* the TPS termination notices for Haiti and El Salvador issued. Without evidence that the President’s statements played any role in the TPS decision-making process, the statements alone do not demonstrate that the President’s purported racial animus was a motivating factor for the TPS terminations. *See Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1261 (9th Cir. 2016) (holding that “offensive quotes about Mexican nationals attributed to Sherriff Arpaio” that did “not mention” the policy in question did not “lead to any inference” that the policy “was promulgated to discriminate against Mexican nationals”).

As *Arlington Heights* instructs us, circumstantial evidence may be sufficient to prove a discriminatory intent claim. Even so, we find that the circumstantial evidence here do not help Plaintiffs much. First, there is no indication that the impact of the TPS terminations bear more heavily on “non-white, non-European” countries. The district court concluded otherwise by finding that “it affects those populations exclusively.” While the four countries at issue in this case are “non-European” with predominantly “non-white” populations, the same is true for the four other countries whose TPS designations were extended by the Trump Administration during the same period. In fact, virtually every country that has been designated for TPS since its inception has been “non-European” (with the exception of Bosnia and the Province of Kosovo) and most have majority “non-white” populations. Under the district court’s logic, almost any TPS termination in the history of the program would bear “more heavily” on “non-white, non-European” populations and thereby give rise to a potential equal protection claim. This cannot be the case, as the Supreme Court recently pointed out in rejecting the disparate impact argument in *Regents*. 140 S. Ct. at 1915 (“[B]ecause Latinos make up a large share of the unauthorized alien population, one would expect them to make up an outsized share of recipients of any cross-cutting immigration relief program. Were this fact sufficient to state a claim, virtually any generally applicable immigration policy could be challenged on equal protection grounds.”).

Nor does the historical background of the TPS terminations reveal “a series of official actions taken for invidious purposes” or otherwise indicate a racially discriminatory purpose behind the TPS terminations. The district court found that the specific sequence of events leading up to the TPS terminations were “irregular and suggestive of a predetermined outcome not based on an objective assessment,” particularly based on the “repackaging” of the decision memos by

higher-level DHS employees. But even accepting that the agency made its decisions with a predetermined objective to terminate TPS, there is still no evidentiary support for the conclusion that this overarching goal was motivated by racial animus. Instead, the record indicates that any desire to terminate TPS was motivated by the administration's immigration policy, with its emphasis on a "merit-based entry" system, its focus on America's economic and national security interests, and its view on the limitations of TPS and the program's seeming overextension by prior administrations. As to the evidence that higher agency officials "repackaged" the TPS decision memoranda and overruled the recommendations of lower-level employees, this seems to be a commonplace aspect of how agencies often operate that, without more, does not demonstrate discriminatory animus. See *Wisconsin v. City of New York*, 517 U.S. 1, 23 (1996) ("[T]he mere fact that the Secretary's decision overruled the views of some of his subordinates is by itself of no moment in any judicial review of his decision."); *St. Marks Place Hous. Co. v. HUD*, 610 F.3d 75, 83 (D.C. Cir. 2010) (noting that the "[S]ecretary, like all agency heads, usually makes decisions after consulting subordinates, and those subordinates often have different views").

In sum, Plaintiffs fail in their burden of showing a likelihood of success, or even serious questions, on the merits of their claim that racial animus toward "non-white, non-European" populations was a motivating factor in the TPS terminations.

IV.

We hold that the district court abused its discretion in issuing the preliminary injunction on two grounds. First, the district court committed legal error when it deemed Plaintiffs' APA claim reviewable, despite 8 U.S.C. §1254a's bar to judicial review of challenges to the Secretary's TPS determinations. Plaintiffs assert, and the district court accepted, that their claim is reviewable because they challenge only the agency's new practice of refusing to consider "intervening events" in its TPS extension determinations. However, under the TPS statute, the Secretary possesses full and unreviewable discretion as to whether to consider intervening events in making a TPS determination. Plaintiffs' attempt to rely on the APA to invoke justiciability over what would otherwise be an unreviewable challenge to specific TPS determinations, constitutes an impermissible circumvention of 8 U.S.C. § 1254a(b)(5)(A). Accordingly, the district court did not have jurisdiction to review Plaintiffs' APA claim.

Second, the district court also abused its discretion in concluding that Plaintiffs present at least serious questions going to the merits of their EPC claim. The district court found that the DHS Secretaries were influenced by President Trump and/or the White House in their TPS decision-making, and that President Trump had expressed animus against non-white, non-European immigrants. However, without any evidence linking them, these two factual findings alone cannot support a finding of discriminatory purpose for the TPS terminations. Based on our review of the evidence, we find that Plaintiffs do not meet their burden of showing a likelihood of success, or even serious questions, on the merits of their EPC claim.

* * * *

2. Deferred Enhanced Departure

On March 30, 2020, the President issued a memorandum further extending the wind-down period for Liberian “Deferred Enforced Departure” (“DED”) beneficiaries by an additional 12 months, through January 10, 2021. 85 Fed. Reg. 18,849 (Apr. 2, 2020). See *Digest 2019* at 32-33 for discussion of the 2019 memorandum extending the wind-down period. Excerpts below from the 2020 memorandum explain the reasoning for the extension.

On December 20, 2019, I signed the National Defense Authorization Act for Fiscal Year 2020 (Public Law 116–92) (NDAA), which included as section 7611, the Liberian Refugee Immigration Fairness (LRIF) provision. The LRIF provision provides certain Liberians, including those who have been continuously present in the United States since November 20, 2014, as well as their spouses and children who meet the criteria of the provision, the ability to apply to adjust their status to that of United States lawful permanent resident (LPR). Eligible Liberian nationals have until December 20, 2020, to apply for adjustment of status under the LRIF provision.

The LRIF provision, however, did not provide for continued employment authorization past the expiration of the existing DED wind-down period. Once the DED wind-down period expires, most covered Liberians will have no basis upon which to renew or maintain employment authorization before applying to adjust their status.

I have, therefore, determined that it is in the foreign policy interests of the United States to extend the DED wind-down period for current Liberian DED beneficiaries through January 10, 2021, to facilitate uninterrupted work authorization for those currently in the United States under DED who are eligible to apply for LPR status under the LRIF provision.

As part of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182, enacted December 27, 2020, Congress amended the LRIF provision to allow eligible Liberian nationals an additional year to apply for adjustment of status.

3. Refugee Admissions and Resettlement

On September 30, 2020 the U.S. Departments of State, Homeland Security, and Health and Human Services, submitted the President’s annual Report to Congress on Proposed Refugee Admissions for Fiscal Year 2021. The report is available at <https://2017-2021.state.gov/reports/report-to-congress-on-proposed-refugee-admissions-for-fy-2021/>. On October 27, 2020, President Trump signed the Presidential Determination on Refugee Admissions for Fiscal Year 2021, providing for resettlement of up to 15,000 refugees. 85 Fed. Reg. 71,219 (Nov. 6, 2020).

As discussed in *Digest 2019* at 34, Executive Order 13888 created a process for seeking consent from state and local governments to refugee resettlement in their

localities. To implement the Order, the U.S. Department of State issued a Notice of Funding Opportunity for Fiscal Year 2020 (“Notice”), requiring resettlement agencies seek consent from localities to resettle refugees in their jurisdictions.

On January 15, 2020, a federal district court judge issued a preliminary injunction in a lawsuit brought against the Department of State and other U.S. government agencies, challenging implementation of E.O. 13888 and the Notice, enjoining their enforcement. *HIAS, Inc. v. Trump*, 415 F.Supp.3d 669 (D. Md. 2020). On March 24, 2020, the U.S. government filed its brief on appeal in *HIAS, Inc. v. Trump*, No. 20-1160, in the U.S. Court of Appeals for the Fourth Circuit. Excerpts follow from the U.S. brief.*

* * * *

I. Plaintiffs Are Not Likely To Succeed On The Merits Of Their Challenges Because The Order And The Notice Are Lawful

A. The Order And The Notice Are Consistent With The Refugee Act And Separation-Of-Powers Principles

1. The Refugee Act places a premium on close coordination and consultation between the federal government, resettlement agencies, and state and local governments regarding the intended distribution of refugees before their placement in those states and localities. 8 U.S.C. § 1522(a)(2)(A). Congress, in a series of amendments to the Refugee Act, made changes to further the goal of obtaining and giving weight to the views of states and localities on resettlement. ...

In its current form, the Act requires quarterly consultation meetings between the federal government, resettlement agencies, and state and local governments to develop placement policies and strategies. 8 U.S.C. § 1522(a)(2)(A)-(C). And it directs that “[w]ith respect to the location of placement of refugees within a State, the Federal [government] shall, consistent with such policies and strategies and to the maximum extent possible, take into account recommendations of the State.” *Id.* § 1522(a)(2)(D).

It is common ground that the statute does not thereby give states or localities a veto power over resettlement decisions. Instead, the consultation requirements exist to “ensure [the] input [of states and localities] into the process and to improve their resettlement planning capacity.” H.R. Rep. 99-132, 1985 WL 25949, at *19. Thus, the federal government may resettle refugees in states or localities that object to resettlement, provided that it engages in the required consultation under § 1522(a)(2)(A) and takes into account the preferences of states to the maximum extent possible under § 1522(a)(2)(D). Equally clearly, however, the statute does not require the federal government to resettle refugees without regard to the views of states or localities. The statute does not prescribe the means by which the federal government may take into account their views. Nor does it proscribe the federal government from directing resettlement agencies, who are required by law to participate in consultations with states and localities, to obtain the views of those states and localities in writing.

* Editor’s note: This Fourth Circuit issued its opinion on January 8, 2021, ruling that the district court did not abuse its discretion in issuing the preliminary injunction.

2. Consistent with the Act, the Order and Notice seek to advance consultation and coordination with states and localities while reserving the ultimate resettlement decisions to the federal government. Section 2(a) of the Order directs the Secretary of State to develop and implement a process to determine prior to resettlement whether the State and locality both consent in writing to the resettlement of refugees within the relevant State and locality. JA 48. For nonconsenting states or localities, the Order permits the resettlement of refugees there if “the Secretary of State concludes, following consultation with the Secretary of Health and Human Services and the Secretary of Homeland Security, that failing to resettle refugees within that State or locality would be inconsistent with the policies and strategies established under 8 U.S.C. § 1522(a)(2)(B) and (C) or other applicable law.” *Id.* The Order thus underscores the requirement to consider the views of the states “to the maximum extent possible,” 8 U.S.C. § 1522(a)(2)(D), while also making clear that the Secretary is not bound by a state’s objections when acceding to its view would be inconsistent with the policies and strategies established under the Act.

It should go without saying that the President has full authority to direct the Secretary to ensure that the views of state and local governments are given maximum weight consistent with the policies and strategies of the Act. Directing the Secretary how to consider the views of states and localities is well within the President’s powers to regulate the “residence of aliens in the United States or the several states,” *Toll v. Moreno*, 458 U.S. 1, 11 (1982), and to supervise “those [subordinate executive officials] executing the laws,” *see Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (internal quotation marks omitted). Nothing in the Order directs the Secretary to ignore a statutory requirement. On the contrary, the Order makes clear that the “order shall be implemented consistent with applicable law” and that “[n]othing in this order shall be construed to impair or otherwise affect ... the authority granted by law to an executive department or agency, or the head thereof.” JA 49 (emphasis added); *see Building & Constr. Trades Dep’t, AFL-CIO v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002) (concluding that Executive Order language directing subordinates to administer federally funded projects “[t]o the extent permitted by law” explicitly “instruct[ed] the agency to follow the law”).

The Notice similarly accords with the Act’s direction to take into account the preferences of states and localities when resettling refugees by requiring refugee resettlement agencies to confirm those preferences in writing. Seeking the consent of a state before proposing resettlement falls well within the statutory requirement of consultation with these governmental entities. *See* 8 U.S.C. § 1522(a)(2)(A)-(C). There can be little doubt that during previous consultations with resettlement agencies, states and localities have been free to voice concerns or preferences about the placement of refugees within their borders. The Notice merely provides a clear mechanism for states and localities to do so. ... Thus, neither the Order nor the Notice prohibits the Government from complying with its statutory obligations under the Refugee Act to take into account the factors described in 8 U.S.C. § 1522(a)(2)(A)-(C), including the proportion of refugees and comparable entrants in the population in the area, and the availability of employment opportunities, among other things. Rather, the Government will, consistent with the Refugee Act, continue to take those factors into account when evaluating applications submitted in response to the Notice and in making resettlement decisions. *See id.*

3. The district court nevertheless concluded that plaintiffs were likely to succeed in showing that the Order and Notice conflict with the requirements of the Refugee Act. In arriving at this conclusion, the court accepted plaintiffs’ premise that the Order and Notice make “the resettlement of refugees wholly contingent upon the consents of State or Local Governments,”

thereby giving states and localities an impermissible “veto” over resettlement decisions. JA 448. The court’s premise is manifestly incorrect.

Neither the Order nor the Notice permits state or local governments to veto resettlement decisions, which lie solely with the federal government. To the contrary, as discussed above, both the Order and Notice make clear that consents will be considered to the maximum extent permitted by law. The Order and Notice therefore explicitly leave room for the Secretary to settle refugees in areas where either the state or locality objects. Far from providing states or localities with a “veto,” the Order ensures that the final decision regarding where to resettle refugees remains in the hands of the federal government.

For similar reasons, the court erred by concluding that the Order and Notice violate the Constitution by vesting in states powers assigned exclusively to the federal government. “The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government.” *Truax v. Raich*, 239 U.S. 33, 42 (1915); *see also Toll*, 458 U.S. at 11 (recognizing that the Constitution allocates to the Federal Government the exclusive authority to regulate the “admission, naturalization, and residence of aliens in the United States or the several states”). Consistent with this authority, the Order and Notice recognize that the State Department, in consultation with the President, retains the authority to resettle refugees in non-consenting states. The Order and Notice therefore do not make dispositive the views of states or localities in any way that would affect the constitutional separation of powers between the federal government and the states. Indeed, as far as the constitutional separation-of-powers is concerned, even if a federal statute authorized the federal government to give states or localities an absolute “veto,” that still would reflect the federal government’s *choice* of how to exercise *its* plenary authority over the admission and placement of refugees. *Cf. Currin v. Wallace*, 306 U.S. 1, 17-18 (1939) (rejecting a nondelegation challenge to the Tobacco Inspection Act, which had effectively given private parties a veto over government action). Rather than identify a separation-of-powers problem with the Order and the Notice, the district court created one by second-guessing the Executive Branch’s judgment about the regulation of refugee resettlement. *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

The district court’s other reasons for concluding that the Order and Notice violate the Refugee Act also reflect misunderstandings of the Order and Notice as well as the Act itself. The court concluded that the Order “definitely appears to undermine” the consultation process envisioned by the Act because “[a]s to States or Local Governments that refuse to give written consents, there will be no consultation, no meetings with the Resettlement Agencies.” JA 443-44. But seeking the consent of state and local government is consistent with the plain meaning of the Act’s consultation requirement, which simply requires asking for views. ...

The district court finally erred in declaring that the Order and Notice created a “state-by-state, locality-by-locality approach” to resettlement that conflicts with the Act’s purpose of “provid[ing] comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted.” JA 445; Refugee Act of 1980 § 101(b). This statement of purpose addresses uniform *provisions* for resettlement; nothing in the Act requires refugees to be resettled uniformly throughout the country. Indeed, any such suggestion would be irreconcilable with the weight the statute gives to the views of individual states.

B. The Order And The Notice Do Not Violate The Administrative Procedure Act.

The district court also erred in holding that the Order and Notice are arbitrary and capricious under 5 U.S.C. § 706(2) of the APA. Although the district court correctly recognized that the APA does not apply to the President, JA 437-38 (citing *Franklin v.*

Massachusetts, 505 U.S. 788 (1992)), it did not limit its analysis to reviewing the agency's discretionary actions in implementing the Order. Instead, the district court reviewed the Order as if it was a rule issued by an agency simply because it, like virtually all Executive Orders, is implemented by an agency, and concluded that the Order may "fairly be characterized as 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'" because "among other things ... it 'entirely fails to consider an important aspect of the problem.'" JA 449 (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)). But the agency does not act arbitrarily and capriciously when it directly implements the requirements of an order of the President that is not itself subject to the APA's procedural requirements. See *Franklin*, 505 U.S. at 800-01.

The district court's criticisms are particularly wide of the mark because the Order in fact states its reasoning clearly. The Order noted that in recent years "[s]ome States and localities ... have viewed existing consultation [requirements] as insufficient," and that there was therefore "a need for closer coordination and a more clearly defined role for State and local governments in the refugee resettlement process." JA 47. It explained that increased coordination would "identify the best environments for refugees" and "be respectful of those communities that may not be able to accommodate refugee resettlement." *Id.* And it offered a commonsense explanation for why the views of state and local governments specifically ought to be considered more closely: "State and local governments are best positioned to know the resources and capacities they may or may not have available to devote to sustainable resettlement, which maximizes the likelihood refugees placed in the area will become self-sufficient and free from long-term dependence on public assistance." *Id.* Even if this reasoned explanation were subject to APA review, a court would not have been permitted to second-guess it. See *Department of Commerce v. New York*, 139 S. Ct. 2551, 2570-71 (2019) (holding that the district court "improperly substituted its judgment for that of the agency" and explaining that, once the Secretary of Commerce "gave reasons for his chosen course of action," it was not the court's place to "second-guess[]" the Secretary's decision by asking whether it was "'the best one possible' or even 'better than the alternatives'").

The Notice likewise sets forth the State Department's reasoning, explaining that the agency seeks "strong environments to support resettlement and speedy integration, and regard[s] state and local consent for resettlement activity as important evidence of such strength." JA 53. It was entirely reasonable for the State Department to conclude that this goal would be better achieved by obtaining the views of state and local governments at as early a point in the process as possible.

The district court mistakenly concluded that the State Department failed to consider what the court deemed a host of relevant factors in promulgating the Notice. These included consideration of (1) why the statutory policy of consultation with resettlement agencies should be modified, (2) how secondary migration might be handled, (3) the extent that bias might affect the willingness of states or localities to consent to refugee resettlement, (4) what defines "local government," (5) any alleged reliance interests of resettlement agencies and state and local governments, (6) the effect of the Order and Notice on families fostering refugee children, or (7) how the Order might affect "investments" made by some states and localities in reliance on the presence of refugees. JA 452. The court's analysis is unsustainable. Only the concerns regarding consultation, bias, and reliance interests appear to bear on the question of consent. But, as explained above, the Order and Notice did not disrupt the Act's consultation requirements. Moreover, the agency plainly was not required to form generalizations about the extent (if any)

that impermissible bias might underlie possible state decisions regarding participation in the resettlement program. Assuming that such a consideration were ever to prove relevant, it might surface in determining whether to resettle refugees in a state notwithstanding its objections. But even then, the Notice, like the Order, contains safety valves should consents be withheld: ...The court thus plainly erred in facially invalidating the Notice and Order as arbitrary and capricious under the APA.

II. The Remaining Preliminary Injunction Factors Also Weigh Against An Injunction.

“A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter*, 555 U.S. at 24. To obtain an injunction, a plaintiff must demonstrate the imminent irreparable injury is likely in the absence of an injunction.

Plaintiffs have not met this burden. The harms plaintiffs allege are the administrative inconvenience of obtaining written consents from states and localities with whom they are already required by law to regularly consult. Any required changes to the plaintiff organizations’ administrative efforts in connection with obtaining funding in a future year due to the Order and Notice fall far short of irreparable injury. ... Moreover, any alleged injuries flowing from the requirement that plaintiffs themselves bear the burden of obtaining consents from states and localities are refuted by the ease with which plaintiffs were able to obtain consents prior to the court’s injunction and the sheer number of states and localities that consented: 42 states and 132 localities consented to resettlement as of January 15, 2020.

At a minimum, any injuries to the plaintiffs are significantly outweighed by the harms to the government and the public interest (which merge here, *see Nken v. Holder*, 556 U.S. 418, 435 (2009)). The injunction prevents the State Department from giving effect to a Presidential determination that the views of state and local governments should be given the maximum possible weight consistent with law. In doing so, the injunction subordinates the views of the federal government on refugee resettlement—a question committed to the exclusive judgment of the political branches—to the contrary views of the district court. The federal government will thus be irreparably harmed if the Order and Notice cannot go into effect.

* * * *

4. Rohingya Refugees

On December 10, 2020, the State Department issued a statement conveying the U.S. position on the Government of Bangladesh’s plans to relocate Rohingya refugees, including the already completed relocation of 2,642 refugees to the island, Bhasan Char. The U.S. statement, available at <https://2017-2021.state.gov/u-s-position-on-relocation-of-rohingya-refugees-to-bhasan-char>, includes the following:

The United States concurs with the UN that any such relocations must be fully voluntary and based on informed consent without pressure or coercion.

Bangladesh has stated that Rohingya refugees may return to camps on the mainland if they choose. The United States calls on the Government of Bangladesh to adhere to this commitment and demonstrate respect for the human rights of refugees relocated to Bhasan Char, including freedom of

movement, by facilitating refugees' ability to move to and from Cox's Bazar. Refugees on Bhasan Char should have access to livelihoods and basic services, such as education and health care.

5. Migration Protection Protocols ("MPP")

As discussed in *Digest 2019* at 37-38 and *Digest 2018* at 46-47, the Trump Administration's Migrant Protection Protocols ("MPP"), direct (with some exceptions) that individuals arriving in the United States from Mexico—illegally or without proper documentation—be returned to Mexico for the duration of their immigration proceedings. The United States government appealed the nationwide injunction of the MPP imposed by the district court in *Innovation Law Lab* in the U.S. Court of Appeals for the Ninth Circuit. A motions panel stayed the nationwide injunction in 2019. On February 28, 2020, the Ninth Circuit issued its decision on the merits, restoring the nationwide injunction based on a finding of likelihood of success on the merits. Excerpts follow from the opinion. *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir.). The Trump administration filed a petition for a writ of certiorari in the case in the U.S. Supreme Court. *Wolf v. Innovation Law Lab*, No. 19-1212. The Supreme Court granted the petition for certiorari on October 19, 2020.**

* * * *

Plaintiffs challenge two aspects of the MPP. First, they challenge the requirement that asylum seekers return to Mexico and wait there while their applications for asylum are adjudicated. They contend that this requirement is inconsistent with the INA, as amended in 1996 by the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). Second, in the alternative, they challenge the failure of asylum officers to ask asylum seekers whether they fear being returned to Mexico. They contend that this failure is inconsistent with our treaty-based non-refoulement obligations. They contend, further, that with respect to non-refoulement, the MPP should have been adopted only after notice-and-comment rulemaking.

We address these challenges in turn. We conclude that plaintiffs have shown a likelihood of success on their claim that the return-to-Mexico requirement of the MPP is inconsistent with 8 U.S.C. § 1225(b). We further conclude that plaintiffs have shown a likelihood of success on their claim that the MPP does not comply with our treaty-based non-refoulement obligations codified at 8 U.S.C. § 1231(b). We do not reach the question whether they have shown a likelihood of success on their claim that the anti-refoulement aspect of the MPP should have been adopted through notice-and-comment rulemaking.

1. Return to Mexico

The essential feature of the MPP is that non-Mexican asylum seekers who arrive at a port of entry along the United States' southern border must be returned to Mexico to wait while their asylum applications are adjudicated. Plaintiffs contend that the requirement that they wait in

** Editor's note: On February 3, 2021, the Supreme Court granted the U.S. government's motion (consented to by respondents) to hold further briefing in abeyance and remove the case from the February 2021 argument calendar due to the new administration's decision to suspend new enrollments in the MPP, pending further review.

Mexico is inconsistent with 8 U.S.C. § 1225(b). The government contends, to the contrary, that the MPP is consistent with § 1225(b).

* * * *

There are two categories of “applicants for admission” under § 1225. § 1225(a). First, there are applicants described in § 1225(b)(1). Second, there are applicants described in § 1225(b)(2).

Applicants described in § 1225(b)(1) are inadmissible based on either of two grounds, both of which relate to their documents or lack thereof. Applicants described in § 1225(b)(2) are in an entirely separate category. In the words of the statute, they are “other aliens.” § 1225(b)(2) (heading). Put differently, again in the words of the statute, § (b)(2) applicants are applicants “to whom paragraph [(b)](1)” does not apply. § 1225(b)(2)(B)(ii). That is, § (b)(1) applicants are those who are inadmissible on either of the two grounds specified in that subsection. Section (b)(2) applicants are all other inadmissible applicants.

Section (b)(1) applicants are more numerous than § (b)(2) applicants, but § (b)(2) is a broader category in the sense that § (b)(2) applicants are inadmissible on more grounds than § (b)(1) applicants. Inadmissible applicants under § (b)(1) are aliens traveling with fraudulent documents (§ 1182(a)(6)(C)) or no documents (§ 1182(a)(7)). By contrast, inadmissible applicants under § (b)(2) include, inter alia, aliens with “a communicable disease of public health significance” or who are “drug abuser[s] or addict[s]” (§ 1182(a)(1)(A)(i), (iv)); aliens who have “committed . . . a crime involving moral turpitude” or who have “violat[ed] . . . any law or regulation . . . relating to a controlled substance” (§ 1182(a)(2)(A)(i)); aliens who “seek to enter the United States . . . to violate any law of the United States relating to espionage or sabotage,” or who have “engaged in a terrorist activity” (§ 1182(a)(3)(A), (B)); aliens who are “likely . . . to become a public charge” (§ 1182(a)(4)(A)); and aliens who are alien “smugglers” (§ 1182(a)(6)(E)).

The Supreme Court recently distinguished § (b)(1) and § (b)(2) applicants, stating unambiguously that they fall into two separate categories:

[A]pplicants for admission fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2). Section 1225(b)(1) applies to aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation. . . . Section 1225(b)(2) is broader. It serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1).
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Jennings v. Rodriguez, 138 S. Ct. 830, 837 (2018) (emphasis added) (citations omitted).

Even more recently, the Attorney General of the United States, through the Board of Immigration Appeals, drew the same distinction and briefly described the procedures applicable to the two categories:

Under section 235 of the Act [8 U.S.C. § 1225], all aliens “arriv[ing] in the United States” or “present in the United States [without having] been admitted” are considered “applicants for admission,” who “shall be inspected by immigration officers.” INA § 235(a)(1), (3). [8 U.S.C. § 1225(a)(1), (3).] In most cases, those inspections yield one

of three outcomes. First, if an alien is “clearly and beyond a doubt entitled to be admitted,” he will be permitted to enter, or remain in, the country without further proceedings. *Id.* § 235(b)(2)(A). [8 U.S.C. § 1225(b)(2)(A).] Second, if the alien is not clearly admissible, then, generally, he will be placed in “proceeding[s] under section 240 [8 U.S.C. § 1229a]” of the Act—that is, full removal proceedings. *Id.* Third, if the alien is inadmissible on one of two specified grounds and meets certain additional criteria, DHS may place him in either expedited or full proceedings. *Id.* § 235(b)(1)(A)(i) [8 U.S.C. § 1225(b)(1)(A)(i)]; see *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 524 (BIA 2011).

Matter of M-S-, 27 I. & N. Dec. 509, 510 (BIA April 16, 2019).

The procedures specific to the two categories of applicants are outlined in their respective subsections. To some extent, the statutorily prescribed procedures are the same for both categories. If a § (b)(1) applicant passes his or her credible fear interview, he or she will be placed in regular removal proceedings under 8 U.S.C. § 1229a. See 8 C.F.R. § 208.30(f). A § (b)(1) applicant may also be placed directly into regular removal proceedings under § 1229a at the discretion of the Government. See *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 522 (BIA 2011). A § (b)(2) applicant who is “not clearly and beyond a doubt entitled to be admitted” is automatically placed in regular removal proceedings under § 1229a. See § 1225(b)(2)(A).

Both § (b)(1) and § (b)(2) applicants can thus be placed in regular removal proceedings under § 1229a, though by different routes. But the fact that an applicant is in removal proceedings under § 1229a does not change his or her underlying category. A § (b)(1) applicant does not become a § (b)(2) applicant, or vice versa, by virtue of being placed in a removal proceeding under § 1229a.

However, the statutory procedures for the two categories are not identical. Some of the procedures are exclusive to one category or the other. For example, if a § (b)(1) applicant fails to pass his or her credible fear interview, he or she may be removed in an expedited proceeding without a regular removal proceeding under § 1229a. See § 1225(b)(1)(A), (B). There is no comparable procedure specified in § (b)(2) for expedited removal of a § (b)(2) applicant. Further, in some circumstances a § (b)(2) applicant may be “returned” to a “territory contiguous to the United States” pending his or her regular removal proceeding under § 1229a. See § 1225(b)(2)(C). There is no comparable “return” procedure specified in § 1225(b)(1) for a § (b)(1) applicant.

The statutory question posed by the MPP is whether a § (b)(1) applicant may be “returned” to a contiguous territory under § 1225(b)(2)(C). That is, may a § (b)(1) applicant be subjected to a procedure specified for a § (b)(2) applicant? A plain-meaning reading of § 1225(b)—as well as the Government’s longstanding and consistent practice up until now—tell us that the answer is “no.”

There is nothing in § 1225(b)(1) to indicate that a § (b)(1) applicant may be “returned” under § 1225(b)(2)(C). Section (b)(1)(A)(i) tells us with respect to § (b)(1) applicants that an “officer shall order the alien removed . . . without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution.” Section (b)(1)(A)(ii) tells us that § (b)(1) applicants who indicate an intention to apply for asylum or a fear of persecution “shall” be referred by the immigration officer to an “asylum officer” for an interview. The remainder of § 1225(b)(1) specifies what happens to a § (b)(1) applicant depending on the determination of the asylum officer—either expedited removal or detention pending further consideration. § 1225(b)(1)(B)(ii)–(iii). There is nothing in § 1225(b)(1) stating,

or even suggesting, that a § (b)(1) applicant is subject to the “return” procedure of § 1225(b)(2)(C).

Nor is there anything in § 1225(b)(2) to indicate that a § (b)(1) applicant may be “returned” under § 1225(b)(2)(C). Taking § 1225(b)(2) subparagraph by subparagraph, it provides as follows. Subparagraph (A) tells us that unless a § (b)(2) applicant is “clearly and beyond a doubt entitled to be admitted,” she or he “shall be detained” for a removal proceeding under § 1229a. § 1225(b)(2)(A). Subparagraph (A) is “[s]ubject to subparagraphs (B) and (C).” *Id.* Subparagraph (B) tells us that subparagraph (A) does not apply to three categories of aliens—“crew[m]en,” § (b)(1) applicants, and “stowaway[s].” § 1225(b)(2)(B). Finally, subparagraph (C) tells us that a § (b)(2) applicant who arrives “on land . . . from a foreign territory contiguous to the United States,” instead of being “detained” under subparagraph (A) pending his or her removal proceeding under § 1229a, may be “returned” to that contiguous territory pending that proceeding. § 1225(b)(2)(C). Section (b)(1) applicants are mentioned only once in § 1225(b)(2), in subparagraph (B)(ii). That subparagraph specifies that subparagraph (A)—which automatically entitles § (b)(2) applicants to regular removal proceedings under § 1229a—does not apply to § (b)(1) applicants.

The “return-to-a-contiguous-territory” provision of § 1225(b)(2)(C) is thus available only for § (b)(2) applicants. There is no plausible way to read the statute otherwise. Under a plain-meaning reading of the text, as well as the Government’s longstanding and consistent practice, the statutory authority upon which the Government now relies simply does not exist.

The Government nonetheless contends that § (b)(2)(C) authorizes the return to Mexico not only of § (b)(2) applicants, but also of § (b)(1) applicants. The Government makes essentially three arguments in support of this contention. None is persuasive.

First, the Government argues that § (b)(1) applicants are a subset of § (b)(2) applicants. Blue Brief at 35. Under the Government’s argument, there are § (b)(1) applicants, defined in § (b)(1), and there are § (b)(2) applicants, defined as all applicants, including § (b)(2) and § (b)(1) applicants. The Government argues that DHS, in its discretion, can therefore apply the procedures specified in § (b)(2) to a § (b)(1) applicant. That is, as stated in its brief, the Government has “discretion to make the initial ‘determin[ation]’ whether to apply section 1225(b)(1) or section 1225(b)(2) to a given alien.” Blue Brief at 30.

The Government’s argument ignores the statutory text, the Supreme Court’s opinion in *Jennings*, and the opinion of its own Attorney General in *Matter of M-S-*. The text of § 1225(b) tells us that § (b)(1) and § (b)(2) are separate and non-overlapping categories. In *Jennings*, the Supreme Court told us explicitly that § (b)(1) and § (b)(2) applicants fall into separate and non-overlapping categories. In *Matter of M-S-*, the Attorney General wrote that applicants are subject to different procedures depending on whether they are § (b)(1) or § (b)(2) applicants.

Second, the Government argues that § (b)(2)(B)(ii) allows DHS, in its discretion, to “apply” to a § (b)(1) applicant either procedures described in § (b)(1) or those described in § (b)(2). The Government’s second argument is necessitated by its first. To understand the Government’s second argument, one must keep in mind that § (b)(2)(A) automatically entitles a § (b)(2) applicant to a regular removal hearing under § 1229a. But we know from § (b)(1) that not all § (b)(1) applicants are entitled to a removal hearing under § 1229a. Having argued that § (b)(2) applicants include not only § (b)(2) but also § (b)(1) applicants, the Government needs some way to avoid giving regular removal proceedings to all § (b)(1) applicants. The best the Government can do is to rely on § (b)(2)(B)(ii), which provides: “Subparagraph (A) shall not apply to an alien . . . to whom paragraph [(b)](1) applies.” § 1225(b)(2)(B)(ii) (emphasis added).

The Government thus argues that § (b)(2)(B)(ii) allows DHS, in its discretion, to “apply,” or not apply, § (b)(2)(A) to a § (b)(1) applicant.

The Government misreads § (b)(2)(B)(ii). Subparagraph (B) tells us, “Subparagraph (A) shall not apply to an alien — (i) who is a crewman, (ii) to whom paragraph [(b)](1) applies, or (iii) who is a stowaway.” The function of § (b)(2)(B)(ii) is to make sure that we understand that the automatic entitlement to a regular removal hearing under § 1229a, specified in § (b)(2)(A) for a § (b)(2) applicant, does not apply to a § (b)(1) applicant. However, the Government argues that § (b)(2)(B)(ii) authorizes the Government to perform an act. That act is to “apply” the expedited removal procedures of § (b)(1) to some of the aliens under § (b)(2), as the Government defines § (b)(2) applicants.

There is a fatal syntactical problem with the Government’s argument. “Apply” is used twice in the same sentence in § (b)(2)(B)(ii). The first time the word is used, in the lead-in to the section, it refers to the application of a statutory section (“Subparagraph (A) shall not apply”). The second time the word is used, it is used in the same manner, again referring to the application of a statutory section (“to whom paragraph [(b)](1) applies”). When the word is used the first time, it tells us that subparagraph (A) shall not apply. When the word is used the second time, it tells us to whom subparagraph (A) shall not apply: it does not apply to applicants to whom § (b)(1) applies. The word is used in the same manner both times to refer to the application of subparagraph (A). The word is not used the first time to refer to the application of a subparagraph (A), and the second time to an action by DHS.

The Government’s third argument is based on the supposed culpability of § (b)(1) applicants. We know from § (b)(2)(A) that § (b)(2) applicants are automatically entitled to full removal proceedings under § 1229a. However, § (b)(2) applicants may be returned to Mexico under § (b)(2)(C) to await the outcome of their removal hearing under § 1229a. It makes sense for the Government, in its discretion, to require some § (b)(2) applicants to remain in Mexico while their asylum applications are adjudicated, for some § (b)(2) applicants are extremely undesirable applicants. As discussed above, § (b)(2) applicants include spies, terrorists, alien smugglers, and drug traffickers.

When the Government was before the motions panel in this case, it argued that § (b)(1) applicants are more culpable than § (b)(2) applicants and therefore deserve to be forced to wait in Mexico while their asylum applications are being adjudicated. In its argument to the motions panel, the Government compared § (b)(1) and § (b)(2) applicants, characterizing § (b)(2) applicants as “less-culpable arriving aliens.” The Government argued that returning § (b)(2), but not § (b)(1), applicants to a contiguous territory would have “the perverse effect of privileging aliens who attempt to obtain entry to the United States by fraud . . . over aliens who follow our laws.”

The Government had it exactly backwards. Section (b)(1) applicants are those who are “inadmissible under section 1182(a)(6)(C) or 1182(a)(7)” of Title 8. These two sections describe applicants who are inadmissible because they lack required documents rather than because they have a criminal history or otherwise pose a danger to the United States. Section 1182(a)(6)(C), entitled “Misrepresentation,” covers, *inter alia*, aliens using fraudulent documents. That is, it covers aliens who travel under false documents and who, once they arrive at the border or enter the country, apply for asylum. Section 1182(a)(7), entitled “Documentation requirements,” covers aliens traveling without documents. In short, § (b)(1) applies to bona fide asylum applicants, who commonly have fraudulent documents or no documents at all. Indeed, for many such applicants, fraudulent documents are their only means of fleeing persecution, even death, in

their own countries. The structure of § (b)(1), which contains detailed provisions for processing asylum seekers, demonstrates that Congress recognized that § (b)(1) applicants may have valid asylum claims and should therefore receive the procedures specified in § (b)(1).

In its argument to our merits panel, the Government made a version of the same argument it had made earlier to the motions panel. . . .

We need not look far to discern Congress's motivation in authorizing return of § (b)(2) applicants but not § (b)(1) applicants. Section (b)(2)(C) was added to IIRIRA late in the drafting process, in the wake of *Matter of Sanchez-Avila*, 21 I. & N. Dec. 444 (BIA 1996). Sanchez-Avila was a Mexican national who applied for entry as a "resident alien commuter" but who was charged with being inadmissible due to his "involvement with controlled substances." *Id.* at 445. See 8 U.S.C. § 1182(a)(2)(A)(i) (§ (b)(2) applicants include aliens who have "violat[ed] . . . any law or regulation . . . relating to a controlled substance"). In order to prevent aliens like Sanchez-Avila from staying in the United States during the pendency of their guaranteed regular removal proceeding under § 1229a, as they would otherwise have a right to do under § (b)(2)(A), Congress added § 1225(b)(2)(C). Congress had specifically in mind undesirable § (b)(2) applicants like Sanchez-Avila. It did not have in mind bona fide asylum seekers under § (b)(1).

We therefore conclude that plaintiffs have shown a likelihood of success on the merits of their claim that the MPP is inconsistent with 8 U.S.C. § 1225(b).

2. Refoulement

Plaintiffs claim that the MPP is invalid in part, either because it violates the United States' treaty-based anti-refoulement obligations, codified at 8 U.S.C. § 1231(b)(3)(A), or because, with respect to refoulement, the MPP was improperly adopted without notice-and-comment rulemaking. Our holding that plaintiffs are likely to succeed on their claim that the MPP is invalid in its entirety because it is inconsistent with § 1225(b) makes it unnecessary to decide plaintiffs' second claim. We nonetheless address it as an alternative ground, under which we hold the MPP invalid in part.

Refoulement occurs when a government returns aliens to a country where their lives or liberty will be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion. The United States is obliged by treaty and implementing statute, as described below, to protect against refoulement of aliens arriving at our borders.

Paragraph one of Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, entitled, "Prohibition of expulsion or return ('refoulement')," provides:

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The United States is not a party to the 1951 Convention, but in 1968 we acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967. *INS v. Stevic*, 467 U.S. 407, 416 (1984). "The Protocol bound parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees." *Id.* Twelve years later, Congress passed the Refugee Act of 1980, implementing our obligations under the 1967 Protocol. "If one thing is clear from the legislative history of the . . . entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." *INS v.*

Cardoza-Fonseca, 480 U.S. 421, 436 (1987). The 1980 Act included, among other things, a provision designed to implement Article 33 of the 1951 Convention. After recounting the history behind 8 U.S.C. § 1253(h)(1), part of the 1980 Act, the Supreme Court characterized that section as “parallel[ing] Article 33,” the anti-refoulement provision of the 1951 Convention. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999).

Section 1253(h)(1) provided, in relevant part, “The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien’s life or freedom would be threatened in such country on account of race, religion, nationality, membership of a particular social group, or political opinion.” *Id.* at 419 (emphasis added). The current version is § 1231(b)(3)(A): “[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” (Emphasis added.) The words “deport or return” in the 1980 version of the section were replaced in 1996 by “remove” as part of a general statutory revision under IIRIRA. Throughout IIRIRA, “removal” became the new all-purpose word, encompassing “deportation,” “exclusion,” and “return” in the earlier statute. See, e.g., *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162 (9th Cir. 2005) (“IIRIRA eliminated the distinction between deportation and exclusion proceedings, replacing them with a new, consolidated category—‘removal.’”).

Plaintiffs point out several features of the MPP that, in their view, provide insufficient protection against refoulement.

First, under the MPP, to stay in the United States during the pendency of removal proceedings under § 1229a, the asylum seeker must show that it is “more likely than not” that he or she will be persecuted in Mexico. More-likely-than-not is a high standard, ordinarily applied only after an alien has had a regular removal hearing under § 1229a. By contrast, the standard ordinarily applied in screening interviews with asylum officers at the border is much lower. Aliens subject to expedited removal need only establish a “credible fear” in order to remain in the United States pending a hearing under § 1229a. §§ 1225(b)(1)(A)(ii), 1225(b)(1)(B)(ii). Credible fear requires only that the alien show a “significant possibility” of persecution. § 1225(b)(1)(B)(v).

Second, under the MPP, an asylum seeker is not entitled to advance notice of, and time to prepare for, the hearing with the asylum officer; to advance notice of the criteria the asylum officer will use; to the assistance of a lawyer during the hearing; or to any review of the asylum officer’s determination. By contrast, an asylum seeker in a removal proceeding under § 1229a is entitled to advance notice of the hearing with sufficient time to prepare; to advance notice of the precise charge or charges on which removal is sought; to the assistance of a lawyer; to an appeal to the Board of Immigration Appeals; and to a subsequent petition for review to the court of appeals.

Third, an asylum officer acting under the MPP does not ask an asylum seeker whether he or she fears returning to Mexico. Instead, asylum seekers must volunteer, without any prompting, that they fear returning. By contrast, under existing regulations, an asylum officer conducting a credible fear interview is directed “to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture.” 8 C.F.R. § 208.30(d). The asylum officer is specifically directed to “determine that the alien has an understanding of the credible fear determination process.” § 208.30(d)(2).

The Government disagrees with plaintiffs based on two arguments. The Government first argues briefly that § 1231(b)(3)(A) does not encompass a general anti-refoulement obligation. It argues that the protection provided by § 1231(b)(3)(A) applies to aliens only after they have been ordered removed to their home country at the conclusion of a regular removal proceeding under § 1229a. It writes:

Section 1231(b)(3) codifies a form of protection from *removal* that is available only *after* an alien is adjudged removable. See 8 U.S.C. § 1231(b)(3); 8 C.F.R. 1208.16(a). Aliens subject to MPP do not receive a final order of removal to their home country when they are returned (temporarily) to Mexico, and so there is no reason why the same procedures would apply

Blue Brief at 41 (emphasis in original).

The Government reads § 1231(b)(3)(A) too narrowly. Section 1231(b)(3)(A) does indeed apply to regular removal proceedings under § 1229a, as evidenced, for example, by 8 C.F.R. § 1208.16(a) (discussing, *inter alia*, the role of the Immigration Judge). But its application is not limited to such proceedings. As described above, and as recognized by the Supreme Court, Congress intended § 1253(h)(1), and § 1231(b)(3)(A) as its recodified successor, to “parallel” Article 33 of the 1951 Convention. *Aguirre-Aguirre*, 526 U.S. at 427. Article 33 is a general anti-refoulement provision, applicable whenever an alien might be returned to a country where his or her life or freedom might be threatened on account of a protected ground. It is not limited to instances in which an alien has had a full removal hearing with significant procedural protections, as would be the case under § 1229a.

The Government’s second argument is that the MPP satisfies our anti-refoulement obligations by providing a sufficiently effective method of determining whether aliens fear, or have reason to fear, returning to Mexico. In its brief, the Government contends that asylum seekers who genuinely fear returning to Mexico have “every incentive” affirmatively to raise that fear during their interviews with asylum officers, and that Mexico is not a dangerous place for non-Mexican asylum seekers. The Government writes:

[N]one of the aliens subject to MPP are Mexican nationals fleeing Mexico, and all of them voluntarily chose to enter and spend time in Mexico en route to the United States. Mexico, moreover, has committed to adhering to its domestic and international obligations regarding refugees. Those considerations together strongly suggest that the great majority of aliens subject to MPP are not more likely than not to face persecution on a protected ground or torture, in Mexico. In the rare case where an MPP-eligible alien does have a substantial and well-grounded basis for claiming that he is likely to be persecuted in Mexico, that alien will have every incentive to raise that fear at the moment he is told that he will be returned.

Blue Brief at 45. However, the Government points to no evidence supporting its speculations either that aliens, unprompted and untutored in the law of refoulement, will volunteer that they fear returning to Mexico, or that there is little danger to non-Mexican aliens in Mexico.

The Government further asserts, again without supporting evidence, that any violence that returned aliens face in Mexico is unlikely to be violence on account of a protected ground—that is, violence that constitutes persecution. The Government writes:

[T]he basic logic of the contiguous-territory-return statute is that aliens generally do not face persecution on account of a protected status, or torture, in the country from which they happen to arrive by land, as opposed to the home country from which they may have fled. (International law guards against torture and persecution on account of a protected ground, not random acts of crime or generalized violence.)

Blue Brief at 40–41 (emphasis in original).

Plaintiffs, who are aliens returned to Mexico under the MPP, presented sworn declarations to the district court directly contradicting the unsupported speculations of the Government.

Several declarants described violence and threats of violence in Mexico. Much of the violence was directed at the declarants because they were non-Mexican—that is, because of their nationality, a protected ground under asylum law. ...

* * * *

Several declarants described interviews by asylum officers in which they were not asked whether they feared returning to Mexico. ...

* * * *

Two declarants wrote that asylum officers actively prevented them from stating that they feared returning to Mexico. ...

* * * *

Two declarants did succeed in telling an asylum officer that they feared returning to Mexico, but to no avail. ...

* * * *

Despite having told their asylum officers that they feared returning, Frank Doe and Howard Doe were returned to Mexico.

This evidence in the record is enough—indeed, far more than enough—to establish that the Government’s speculations have no factual basis. Amici in this case have filed briefs bolstering this already more-than-sufficient evidence. For example, Amnesty International USA, the Washington Office on Latin America, the Latin America Working Group, and the Institute for Women in Migration submitted an amicus brief referencing many reliable news reports corroborating the stories told by the declarants. We referenced several of those reports earlier in our opinion.

Local 1924 of the American Federation of Government Employees, a labor organization representing “men and women who operate USCIS Asylum Pre-Screening Operation, which has been responsible for a large part of USCIS’s ‘credible fear’ and ‘reasonable fear’ screenings, and for implementing [the MPP],” also submitted an amicus brief. Local 1924 Amicus Brief at 1. Local 1924 writes in its brief:

Asylum officers are duty bound to protect vulnerable asylum seekers from persecution. However, under the MPP, they face a conflict between the directives of their departmental leaders to follow the MPP and adherence to our Nation’s legal commitment to not returning the persecuted to a territory where they will face persecution. They should not be forced to honor departmental directives that are fundamentally contrary to the moral fabric of our Nation and our international and domestic legal obligations.

Id. at 24.

Based on the Supreme Court’s conclusion that Congress intended in § 1253(h)(1) (the predecessor to § 1231(b)(3)(B)) to “parallel” the anti-refoulement provision of Article 33 of the 1951 Convention, and based on the record in the district court, we conclude that plaintiffs have shown a likelihood of success on the merits of their claim that the MPP does not comply with the United States’ anti-refoulement obligations under § 1231(b). We need not, and do not, reach the question whether the part of the MPP challenged as inconsistent with our anti-refoulement obligations should have been adopted through notice-and-comment rulemaking.

* * * *

6. Eligibility for Asylum

As discussed in *Digest 2019* at 38-39, the Department of Homeland Security (“DHS”) and the Department of Justice (“DOJ”) issued an Interim Final Rule (“IFR” or “rule”) barring asylum in the United States for certain individuals who transit third countries on their way to the southern border without seeking asylum there. The IFR has been subject to multiple court challenges.

a. Capital Area Immigrants’ Rights Coalition v. Trump

In *Capital Area Immigrants’ Rights Coalition (“CAIR”) v. Trump*, a federal district court in D.C. vacated the IFR on June 30, 2020, holding that DHS and DOJ had failed to engage in the requisite notice-and-comment rulemaking procedures under the Administrative Procedure Act (“APA”) before issuing the rule. 471 F. Supp. 3rd 25 (D.D.C.). Excerpts follow from the district court opinion in *CAIR*.

* * * *

Plaintiffs urge a narrow reading of the foreign affairs function exception. They note that several circuits have held that an agency may not invoke this exception just because a rule “implicates foreign affairs.” ... Plaintiffs in *CAIR* argue that the Court should limit its interpretation of the exception to cover only those paradigmatic cases in which the rule at issue implements treaties or regulates foreign diplomats. ... And in the alternative, Plaintiffs in both cases reference a test that some courts of appeals have adopted that extends this exception to circumstances where notice-and-comment procedures would create “definitely undesirable international consequences.” ... In Plaintiffs’ view, Defendants have failed to meet even that test. ... In contrast, Defendants offer up various reasons why, in their estimation, the Rule does in fact involve a foreign affairs

function of the United States, including its relationship with ongoing international negotiations. And while Defendants reject the “definitely undesirable international consequences” test because “the statute requires no such showing,” they also argue, for many of these same reasons, that the Rule satisfies it in any event. ...

The Court starts, as it must, with the text of the statute: notice-and-comment procedures are unnecessary “to the extent there is involved ... a military or foreign affairs function of the United States.” 5 U.S.C. § 553(a)(1). The first part of that phrase, “to the extent there is involved,” applies to several other categories of rulemakings as well, including those involving public benefits, 5 U.S.C. § 553(a)(2), and the D.C. Circuit has interpreted the phrase in that context. Specifically, in *Humana of South Carolina, Inc. v. Califano*, the Circuit instructed—consistent with the duty to “narrowly construe” and “reluctantly countenance” such exceptions, *New Jersey*, 626 F.2d at 1045—that “to the extent that any one of the enumerated categories is clearly and directly involved in the regulatory effort at issue, the Act’s procedural compulsions are suspended.” 590 F.2d 1070, 1082 (D.C. Cir. 1978) (citations and quotations omitted) (emphasis added). As a result, a rule falls within the foreign affairs function exception only if it “clearly and directly” involves “a foreign affairs function of the United States.”

The APA does not define the key terms in the second part of that phrase—“foreign affairs” or “function”—and so the Court turns to dictionaries in use at the time of the APA’s enactment. The definition of “foreign affairs” is reasonably straightforward: it refers to the conduct of international relations between sovereign states. See Webster’s New International Dictionary 988 (2d ed. 1945) (defining foreign affairs to include “matters having to do with international relations and with the interests of the home country in foreign countries”). The meaning of “function,” on the other hand, is less so. The 1945 version of Webster’s New International Dictionary defines it as “[t]he natural and proper action of anything; special activity,” “[t]he natural or characteristic action of any power or faculty,” or “[t]he course of action which peculiarly pertains to any public officer in church or state; the activity appropriate to any business or profession; official duty.” *Id.* at 1019. “Function” thus appears to narrow the exception further; to be covered, a rule must involve activities or actions that are especially characteristic of foreign affairs. Applying these definitions, then, a “foreign affairs function” encompasses activities or actions characteristic to the conduct of international relations. And to sum up, to be covered by the foreign affairs function exception, a rule must clearly and directly involve activities or actions characteristic to the conduct of international relations.

As noted above, some circuits have adopted a test that would also permit the exception to be invoked when notice-and-comment procedures “would provoke definitely undesirable international consequences.” *Am. Ass’n of Exps.*, 751 F.2d at 1249 (quotation omitted); see also *Rajah*, 544 F.3d at 437; *Jean*, 711 F.2d at 1478; *Yassini*, 618 F.2d at 1360 n.4. The D.C. Circuit has not adopted this test. And the Court declines to do so for three reasons.

First, this test is unmoored from the legislative text; it is lifted from the House Report relating to the APA. But as the Supreme Court has repeatedly instructed, “the authoritative statement is the statutory text, not the legislative history or any other extrinsic material,” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005). Thus, the Court declines to “rest[] its interpretation on legislative history,” which “is not the law.” *Epic Sys. Corp. v. Lewis*, — U.S. —, 138 S. Ct. 1612, 1631, 200 L.Ed.2d 889 (2018). Second, requiring negative consequences “would render the ‘military or foreign affairs function’ superfluous since the ‘good cause’ exception ... would apply.” *Mast Indus., Inc. v. Regan*, 596 F. Supp. 1567, 1581 (Ct. Int’l Trade 1984) (citation omitted). Indeed, several courts

have relied on this test to find both the foreign affairs function exception and the good cause exception satisfied on largely the same facts. See *Nademi v. INS*, 679 F.2d 811, 814 (10th Cir. 1982); *Malek-Marzban v. INS*, 653 F.2d 113, 116 (4th Cir. 1981); *Yassini*, 618 F.2d at 1360–61. Third, the Second Circuit recently clarified that it applies this test exclusively to areas of the law “that only indirectly implicate international relations” rather than “quintessential foreign affairs functions such as diplomatic relations and the regulation of foreign missions,” which it characterized as “different.” *City of New York*, 618 F.3d at 202 (emphasis added). “Such actions clearly and directly involve a foreign affairs function, and so fall within the exception without a case-by-case iteration of specific undesirable consequences.” *Id.* (citations and quotations omitted) (emphasis added). But this approach conflicts with the D.C. Circuit’s admonition that a rule must “clearly and directly” involve the basis for the asserted exception—here, the foreign affairs function—full stop, without exception. *Califano*, 590 F.2d at 1082.

Thus, the foreign affairs function exception plainly covers heartland cases in which a rule itself directly involves the conduct of foreign affairs. For example, the exception covers scenarios in which a rule implements an international agreement between the United States and another sovereign state. Indeed, that is the only circumstance to which the D.C. Circuit has applied it. ... The exception also certainly covers rules that regulate foreign diplomats in the United States. For example, in *City of New York v. Permanent Mission of India to United Nations*, the Second Circuit held that the exception covered an action by the State Department “exempt[ing] from real property taxes” any “property owned by foreign governments and used to house the staff of permanent missions to the United Nations or the Organization of American States or of consular posts.” 618 F.3d at 175. As the court observed, “the action taken by the State Department to regulate the treatment of foreign missions implicates matters of diplomacy directly.” *Id.* at 202 (emphasis added).

That Congress would categorically exclude rules like these from notice-and-comment procedures is unsurprising. These procedures enhance the rulemaking process by exposing proposed regulations to feedback from a broad set of interested parties. See *Int’l Union*, 407 F.3d at 1259. But comments are unlikely to impact a rule to which the United States has already effectively committed itself through international agreement. See *Pena*, 17 F.3d at 1486 (“After all ... the agreement called for the United States to recognize Mexican [commercial divers’ licenses] even if comments revealed widespread objections.”). Similarly, in the diplomatic context, agency action may be grounded in international reciprocity. See *City of New York*, 618 F.3d at 178 (noting that the State Department explained that its action “conforms to the general practice abroad of exempting government-owned property used for bilateral or multilateral diplomatic and consular mission housing”).

Here, however, the foreign affairs function exception does not excuse the Departments from failing to engage in notice-and-comment rulemaking before promulgating the Rule. The Rule overhauls the procedure through which the United States decides whether aliens who arrive at our southern border are eligible for asylum here, no matter the country from which they originally fled. These changes to our asylum criteria do not “clearly and directly” involve activities or actions characteristic of the conduct of international relations. They do not, for example, themselves involve the mechanisms through which the United States conducts relations with foreign states. Nor were they the product of any agreement between the United States and another country, regardless of any ongoing negotiations. To be sure, Defendants say they intended that the Rule would have downstream effects in other countries, and perhaps on those negotiations. Obviously, they expected that the Rule would cause more aliens to apply for

protection in other countries before arriving in the United States and seeking asylum here. But these indirect effects do not clear the high bar necessary to dispense with notice-and-comment rulemaking under the foreign affairs function exception.

It may seem a quibble that the exception distinguishes between rules that “clearly and directly” involve activities characteristic of the conduct of international relations and those that have indirect international effects. And of course, the Court is bound to apply both Circuit precedent and the statutory text as it is, “even if it thinks some other approach might accord with good policy.” *Loving v. IRS*, 742 F.3d 1013, 1022 (D.C. Cir. 2014) (cleaned up). But it is worth pointing out that the Circuit’s holding in *Califano* and Congress’s use of the word “function”—instead of, say, “effects” or “implications”—prevent the foreign affairs function exception from swallowing the proverbial rule. There are many rulemakings that an agency might plausibly argue have downstream effects in other countries or on international negotiations in which the United States is perpetually engaged. Courts have, for example, warned that in the immigration context, the “dangers of an expansive reading of the foreign affairs exception ... are manifest.” *City of New York*, 618 F.3d at 202. But this is true in other areas of the law as well. One agency might reach for a too-sweeping interpretation of the foreign affairs function exception to argue that a rule involving climate change that affects other countries is subject to the exception. Another might contend that a rule regarding domestic production of some good or commodity that impacts ongoing trade negotiations is covered. Thus, as Plaintiffs point out, courts of appeals have generally rejected the idea that the exception applies merely because a rule “implicate[s] foreign affairs,” *City of New York*, 618 F.3d at 202; see also *Zhang*, 55 F.3d at 744; *Yassini*, 618 F.2d at 1360 n.4, or “touche[s] on national sovereignty,” *Jean*, 711 F.2d at 1478. In the end, the narrowness of this exception does not mean that these agencies cannot take these hypothetical actions; it simply means that they are not excused from engaging in notice-and-comment rulemaking when they do.

Defendants argue that the Rule falls within the exception for two broad reasons, but neither passes muster. First, they say that the Rule implicates foreign affairs or the President’s foreign policy agenda. For example, they note that “the flow of aliens across the southern border directly implicates the foreign policy and national security of the United States.” Defs.’ Cross Mtn at 41 (cleaned up). They explain that the Rule is “linked intimately with the Government’s overall political agenda concerning relations with another country.” *Id.* at 43 (quoting *Am. Ass’n of Exps.*, 751 F.2d at 1249).²³ And they add that the changes embodied in the Rule “involve the relationship between the United States and its alien visitors that implicate our relations with foreign powers, and implement the President’s foreign policy.” *Id.* (cleaned up). But for the reasons already explained, although the Rule implicates foreign affairs at least indirectly, that alone is not enough to satisfy the foreign affairs function exception.

Second, Defendants contend that notice-and-comment procedures would in some way affect ongoing negotiations with other countries. For example, they assert that the Rule will “facilitate ongoing diplomatic negotiations with foreign countries” about migration issues. *Id.* at 41 (quoting 84 Fed. Reg. at 33,842). They also argue that delaying the effective date of the Rule would disturb the domestic political situation in other countries and hinder the United States’ negotiating strategy. *Id.* at 42. And relatedly, they argue that the faster the Rule went into effect, the faster it would address the circumstances at our southern border, “thereby facilitating the likelihood of success in the United States’ ongoing negotiations with Mexico regarding regional and bilateral approaches to asylum, and supporting the President’s foreign-policy aims.” *Id.* (cleaned up). This argument gets Defendants no further. As explained above, downstream effects

on foreign affairs or negotiations with other countries—either positive or negative—do not bring the Rule under this exception. And while negative international effects could well satisfy the good cause exception, Defendants do not make that argument, or back it up with an appropriate factual record, such as sworn declarations from appropriate officials.

Defendants also argue that the Court should defer to the Departments’ conclusion that the foreign affairs function exception applies. Defs.’ Supp. Br. at 4 (arguing that “principles of deference are heightened in the context of Defendants’ invocation of the ‘foreign affairs’ exception”). But they do not point to any case law suggesting that agencies are entitled to deference in interpreting the scope of the exception. That is hardly surprising. As this Circuit has explained, “an agency has no interpretive authority over the APA.” *Sorenson*, 755 F.3d at 706; see also *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm’n*, 194 F.3d 72, 79 n.7 (D.C. Cir. 1999) (noting that “when it comes to statutes administered by several different agencies—statutes, that is, like the APA ...—courts do not defer to any one agency’s particular interpretation”). And Defendants again point to cases like *Holder*, 561 U.S. at 35, 130 S.Ct. 2705, see Defs.’ Supp. Br. at 5. The Court reiterates that there are many circumstances in which courts appropriately defer to the national security judgments of the Executive. But determining the scope of an APA exception is not one of them. As noted above, if engaging in notice-and-comment rulemaking before implementing the rule would have harmed ongoing international negotiations, Defendants could have argued that these effects gave them good cause to forgo these procedures. And they could have provided an adequate factual record to support those predictive judgments to which the Court could defer. But they did not do so.

For all the above reasons, the Court finds that the Rule is not exempt from the APA’s notice-and-comment procedures. Because the Departments unlawfully dispensed with those requirements, they issued the Rule “without observance of procedure required by law,” 5 U.S.C. § 706.

* * * *

b. East Bay Sanctuary Covenant v. Trump

In the case brought in federal court in the Northern District of California, *East Bay Sanctuary Covenant*, the district court initially issued a nationwide preliminary injunction which was stayed by the U.S. Supreme Court pending appeal. See *Barr v. East Bay Sanctuary Covenant*, 588 U.S. ___, 140 S. Ct. 3 (2019). The Ninth Circuit subsequently affirmed the district court’s nationwide preliminary injunction. *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020). In December of 2020, DHS and DOJ issued a final rule (effective January 19, 2021), asserting that the IFR contained all APA-required elements of a notice of proposed rulemaking (“NPRM”), and therefore its publication as an IFR rather than an NPRM does not invalidate the final rule (citing *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U.S. ___, 140 S. Ct. 2367, 2384-86 (2020)). 85 Fed. Reg. 82,260 (Dec. 17, 2020). Excerpts follow from the Ninth Circuit opinion in *East Bay Sanctuary Covenant*, 964 F.3d. 832 (9th Cir. 2020).

* * * *

The Rule creates a bar to asylum, in addition to the asylum bars that already exist in § 1158. To justify the additional bar, the government relies on § 1158(b)(2)(C), which provides that “[t]he Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph [b](1).” ...

An agency action must be “set aside” if it is “not in accordance with law,” or “in excess of statutory jurisdiction, authority, or limitations.” 5 U.S.C. § 706(2)(A), (C). ... We hold, independently of *Chevron*, that the Rule is not “consistent with” § 1158. We note, however, that we would come to the same conclusion even if we were to apply *Chevron*, for the Rule is contrary to the unambiguous language of § 1158.

...

Asylum bars under § 1158 fall into two broad categories. As relevant here, the first category covers aliens who may otherwise be entitled to asylum but who pose a threat to society—aliens who have persecuted others, aliens who have been convicted of particularly serious crimes, aliens who may have committed serious non-political crimes outside the United States, and aliens who may be terrorists or a danger to the security of the United States. See 8 U.S.C. § 1158(b)(2)(A)(i)–(iv). The second category covers aliens who do not need the protection of asylum in the United States—aliens who may be removed to a safe third country, and aliens who have firmly resettled in another country. See *id.* § 1158(a)(2)(A) and (b)(2)(A)(vi).

Section 1158 is rooted in the [United Nation’s 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 137, referred to herein as the] 1951 Convention, which excludes from protection two broad categories of aliens—those persons “considered not to be deserving of international protection,” and those persons “not considered to be in need of international protection.” U.N. High Commissioner for Refugees (“UNHCR”) Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979) (“Handbook”), ch. 4, ¶¶ 144–63 (emphases added) ... Specifically, the 1951 Convention recognizes that a nation may justifiably exclude persons convicted of certain crimes, such as a “serious nonpolitical crime” from entering its borders, 1951 Convention, art. 1(F)(b), and persons who have found full “rights and obligations” in a third country, *id.*, art. 1(E). ... Scholars have noted that the bars of § 1158 “rough[ly] parallel[]” the bars of the 1951 Convention....

The government does not argue that aliens subject to the Rule are similar to aliens barred because they are persecutors, criminals, or a threat to national security. That is, it does not argue that the Rule furthers the purpose and is therefore “consistent with” § 1158(b)(2)(A)(i)–(iv). Rather, the government argues that the Rule is “consistent with” the safe-third-country and firm-resettlement bars. See 8 U.S.C. § 1158(a)(2)(A) and (b)(2)(A)(vi).

The safe-third-country and firm-resettlement bars “limit an alien’s ability to claim asylum in the United States when other safe options are available.” *Matter of B-R-*, 26 I. & N. Dec. 119, 122 (BIA 2013). These two asylum bars are consistent with the “core regulatory purpose of asylum,” which is “to protect [refugees] with nowhere else to turn,” because “by definition” an applicant barred by a safe-place provision has somewhere else to turn. *Id.*; *Yang v. INS*, 79 F.3d 932, 939 (9th Cir. 1996).

A critical component of both bars is the requirement that the alien’s “safe option” be genuinely safe. The safe-third-country bar requires that the third country enter into a formal agreement with the United States; that the alien will not be persecuted on account of a protected

ground in that country; and that the alien will have access to a “full and fair” asylum procedure in that country. 8 U.S.C. § 1158(a)(2)(A). “The requirement of a pre-existing [safe-third-country] agreement was an essential procedural safeguard agreed to among members of Congress to prevent arbitrary denials of asylum.” Understanding the 1996 Immigration Act § 2–6 (Juan P. Osuna ed., 1997). The firm-resettlement bar requires the government to make an individualized determination whether an alien has truly been firmly resettled, or, if only an offer of permanent resettlement has been made, an individualized determination whether an alien has too tenuous a tie to the country making the offer or is too restricted by that country’s authorities. 8 C.F.R. § 208.15(a), (b); *Arrey*, 916 F.3d at 1159. The safe-place requirements embedded in the safe-third-country and firm-resettlement bars “ensure that if [the United States] denies a refugee asylum, the refugee will not be forced to return to a land where he would once again become a victim of harm or persecution”—an outcome which “would totally undermine the humanitarian policy underlying the regulation.” *Andriasian v. INS*, 180 F.3d 1033, 1046–47 (9th Cir. 1999).

In stark contrast to the safe-third-country and firm resettlement bars, “the Rule does virtually nothing to ensure that a third country is a ‘safe option.’ ” *E. Bay I*, 385 F. Supp. 3d at 944. The sole protection provided by the Rule is its requirement that the country through which the barred alien has traveled be a “signatory” to the 1951 Convention and the 1967 Protocol. This requirement does not remotely resemble the assurances of safety built into the two safeplace bars of § 1158. A country becomes a signatory to the Convention and the Protocol merely by submitting an instrument of accession to the U.N. Secretary General. It need not “submit to any meaningful international procedure to ensure that its obligations are in fact discharged.” See Declaration of Deborah Anker, Harvard Law School, & James C. Hathaway, University of Michigan Law School, ¶¶ 5, 7.

Many of the aliens subject to the Rule are now in Mexico. They have fled from Guatemala, Honduras, and El Salvador. All four of these countries are parties to the Convention and Protocol. 84 Fed. Reg. at 33,839. The Rule superficially resembles the safe-third-country bar in that aliens subject to the Rule are in a third country, and they must apply for asylum in that country (Mexico) or must have previously applied for asylum in another third country (Guatemala). Similarly, the safe-third-country bar under § 1158(a)(2)(A) allows the United States to deny asylum on the ground that the alien may be removed to and apply for asylum in a safe third country. But entirely absent from the Rule are the requirements under § 1158(a)(2)(A) that there be a formal agreement between the United States and the third country, and that there be a “full and fair” procedure for applying for asylum in that country.

The Rule does not even superficially resemble the firm resettlement bar. The firm-resettlement bar denies asylum to aliens who have either truly resettled in a third country, or have received an actual offer of firm resettlement in a country where they have ties and will be provided appropriate status. Aliens subject to the Rule cannot conceivably be regarded as firmly resettled in Mexico. They do not intend to settle in Mexico. They have been there only for the time necessary to reach our border and apply for asylum. Nor have they received an offer of resettlement. Even if they were to receive such an offer, they have no ties to Mexico. The Supreme Court has long recognized that the firm-resettlement bar does not bar aliens who have merely traveled through third countries, since “many refugees make their escape to freedom from persecution in successive stages and come to this country only after stops along the way.” *Rosenberg*, 402 U.S. at 57 n.6, 91 S.Ct. 1312. The BIA has likewise understood that denial of asylum cannot be predicated solely on an alien’s transit through a third country. See *Matter of*

Soleimani, 20 I. & N. Dec. 99, 103 (BIA 1989); see also *Matter of Pula*, 19 I. & N. Dec. 467, 473–74 (BIA 1987); E. Bay I, 385 F. Supp. 3d at 940.

“A statute should be construed so that ... no part will be inoperative or superfluous, void or insignificant.” *Hibbs v. Winn*, 542 U.S. 88, 101, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004) (quoting 2A N. Singer, *Statutes and Statutory Construction* § 46.06, at 181–86 (rev. 6th ed. 2000)). In enacting the two safe-place bars, Congress specifically addressed the circumstances in which an alien who has traveled through, or stayed in, a third country can be deemed sufficiently safe in that country to warrant a denial of asylum in the United States. The administration’s new Rule would make entirely superfluous the protection provided by the two safe-place bars in § 1158. Under the Rule, the government need neither enter into a safe-third-country agreement, nor show firm resettlement in Mexico, in order to deny asylum. The government need only show that an alien from Guatemala, Honduras, or El Salvador has arrived at our southern border with Mexico.

* * * *

7. Asylum Cooperative Agreements

The United States continued to provide targeted foreign assistance for El Salvador, Guatemala, and Honduras, implementing U.S. policy goals of decreasing illegal immigration to the United States. See April 13, 2020 State Department press statement, available at <https://2017-2021.state.gov/united-states-continues-u-s-foreign-assistance-for-el-salvador-guatemala-and-honduras/>. The three Central American governments signed Asylum Cooperative Agreements (“ACAs”) in 2019, and the ACA with Guatemala entered into force in 2019, as discussed in *Digest 2019* at 39–40. The ACA with Honduras, formally the “Agreement between the Government of the United States and the Government of the Republic of Honduras for Cooperation in the Examination of Protection Claims,” entered into force March 25, 2020 and is available at <https://www.state.gov/honduras-20-325>. The ACA with El Salvador entered into force December 10, 2020 and is available at https://www.state.gov/el_salvador-20-1210.***

*** Editor’s note: In February 2021, after the President issued a new executive order on migration, the United States notified the Governments of El Salvador, Guatemala, and Honduras that it was suspending and initiating the process of terminating the ACAs. See February 6, 2021 State Department press statement, available at <https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/>.

Cross References

IACHR petition challenging Presidential Proclamation 9645, **Ch. 7.D.3.d**

Nkrumah v. Pompeo, **Ch. 10.D.3**

Visa restrictions, **Ch. 16.A**

CHAPTER 2

Consular and Judicial Assistance and Related Issues

A. CONSULAR NOTIFICATION, ACCESS, AND ASSISTANCE

U.S. Statement on Consular Access for Canadians Detained in China

On June 22, 2020, the State Department issued a press statement by Secretary of State Michael R. Pompeo expressing concern about the People's Republic of China's ("PRC") decision to formally charge Canadian citizens Michael Kovrig and Michael Spavor. The press statement, available at <https://2017-2021.state.gov/united-states-stands-with-canada-against-chinas-arbitrary-detention-of-canadian-citizens/>, further states:

...we echo Canada's call for immediate consular access to its two citizens, in accordance with the Vienna Convention on Consular Relations, as China has prohibited such access for almost six months, and the world has no knowledge of the two Canadians' condition.

B. CHILDREN

1. Adoption

a. Annual Reports

In March 2020, the State Department released its Annual Report to Congress on Intercountry Adoptions. The Fiscal Year 2019 Annual Report, as well as past annual reports, can be found at https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/AnnualReports.html. The report includes several tables showing numbers of intercountry adoptions by country during fiscal year 2019, average times to complete adoptions, and median fees charged by adoption service providers.

The Intercountry Adoption Information Act of 2019 (“IAIA”), Pub. L. 116-184, 134 Stat. 897, which directs the Department to include additional information in its intercountry adoptions annual report to Congress, was signed into law on October 30, 2020. The IAIA requires the Department to identify countries with laws that “prevented or prohibited” adoptions to the United States and identify the Department’s actions that would have similarly “prevented, prohibited, or halted any adoptions.” The annual report will also address the impact on prospective adoptive families of fees charged by the Department’s accrediting entity.

b. Litigation

i. European Adoption Consultants v. Pompeo

European Adoption Consultants (“EAC”) brought suit to set aside its debarment as a provider of intercountry adoption services, with claims under the Intercountry Adoption Act (“IAA”), the Administrative Procedure Act (“APA”), and the Due Process Clause of the United States Constitution. In an opinion issued January 31, 2020, the U.S. District Court for the District of Columbia granted the government’s motion for summary judgment on the IAA claim and dismissed the APA and Due Process claims. Excerpts follow from the district court opinion. *EAC v. Pompeo*, No. 18-cv-1676.

* * * *

A. Count I

* * * *

The Hearing Officer found that the Department had proven, by a preponderance of the evidence, that EAC committed 14 distinct violations of 42 U.S.C. § 14944 and 22 C.F.R. § 96, Subpart F. AR 2–3. The Hearing Officer’s findings of these 14 violations exceeded the requisite threshold of “substantial evidence that the agency . . . is out of compliance with applicable requirements” as well as a “pattern of serious, willful, or grossly negligent failures to comply” and “aggravating circumstances indicating that continued accreditation . . . would not be in the best interests of the children and families concerned.” 42 U.S.C. § 14924. Because even a small subset of these 14 violations satisfies the statutory threshold, however, the Court addresses only three violations here.

a. Failure to Report Disruption in Placement

* * * *

Under the applicable regulations, EAC was obligated to report the disruption in M’s placement to the State Department and to relevant foreign authorities. See 22 C.F.R. § 96.52(a); 22 C.F.R. § 96.52(e).¹ The regulations also required EAC to “assume[] responsibility for making another placement of the child,” 22 C.F.R. § 96.50(d), and to “remove the child” from a placement that “may no longer be in the child’s best interests,” as well as to provide temporary care under such circumstances, 22 C.F.R. § 96.50(e). It is undisputed that EAC did not fulfill any of these requirements.

b. Threatening Client for Correcting Fraudulent Documents

Second, the Hearing Officer found that EAC violated 22 C.F.R. § 96.41(e) for threatening Ms. Ro, another prospective adoptive parent, if she insisted on returning to court to correct errors in the adoption paperwork that EAC had submitted. That provision prohibits an agency or person from “tak[ing] any action to discourage a client or prospective client from, or retaliat[ing] against a client or prospective client for: making a complaint; expressing a grievance; providing information in writing or interviews to an accrediting entity on the agency’s or person’s performance; or questioning the conduct of or expressing an opinion about the performance of an agency or person.” 22 C.F.R. § 96.41(e). The Hearing Officer found that EAC employee Debra Parris violated this provision.

This finding was not arbitrary and capricious and was amply justified by evidence in the record. Ms. Ro testified at length regarding her discovery that EAC had submitted fraudulent documents to a Ugandan court—itsself an independent violation of the IAA. ...

* * * *

c. Failure to Verify Parent’s Informed Consent

Third, the Hearing Officer found that EAC “violated 22 C.F.R. §§ 96.14, 96.44, and 96.46 because EAC failed to supervise its providers or to independently verify Ms. J[]’s informed consent to N’s adoption.” AR 35. That combination of regulations required, in the context of adoptions based upon parental relinquishment or consent, that the primary adoption provider either obtain parental consent through a foreign provider subject to the primary provider’s supervision or independently verify that parental consent was obtained. See, e.g., 22 C.F.R. § 96.44 (requiring primary provider to “provide[] appropriate supervision to supervised providers”); 22 C.F.R. § 96.46(a) (requiring primary provider using a foreign supervised provider to “ensure[] that each such foreign supervised provider . . . [i]s in compliance with the laws of the foreign country in which it operates”); 22 C.F.R. § 96.46(c) (requiring primary provider “using foreign providers that are not under its supervision” to verify that “[a]ny necessary consent to the termination of parental rights or to adoption obtained by the foreign provider was obtained in accordance with applicable foreign law and Article 4 of the [Hague] Convention”).

This finding also was not arbitrary and capricious. As the Hearing Officer stated, “EAC introduced no evidence of the steps it took to confirm that Ms. J[] had truly consented to the adoption ...

* * * *

In total, the Hearing Officer identified 14 unique violations of 42 U.S.C. § 14944 and 22 C.F.R. § 96, Subpart F. The Court concludes that the above three violations alone constitute substantial evidence that EAC failed to comply with the standards in 22 C.F.R. § 96, Subpart F of the regulations. The Court further concludes that the circumstances of EAC's third violation—the failure to verify Ms. J's informed consent to her daughter's adoption—constituted aggravating circumstances indicating that EAC's continued accreditation would not be in the best interests of the children and prospective families that might interact with EAC going forward. Finally, the Court concludes that all these violations, taken together, constitute a pattern of serious, willful, or grossly negligent failures to comply with the law. Accordingly, EAC's substantive attacks on the Department's decision fail, and the decision to temporarily debar EAC was not arbitrary and capricious on those grounds.

2. Procedural Allegations

In addition to contesting the Department's conclusion that EAC's conduct met the IAA's requirements for debarment, Count I contains numerous criticisms of the procedures employed by the Department in debarring EAC. Count I does not clearly specify any legal authority for the claim that these procedures were deficient, instead stating that the Department “acted contrary to the provisions and requirements of the IAA” and that the debarment decision was “not in accordance with applicable law.” Am. Compl. ¶ 100. As explained below, though, the IAA incorporates the APA's standard of review, which permits litigants to challenge agency action that they believe is “contrary to constitutional right.” 5 U.S.C. § 706(2)(B). And the procedural allegations contained in Count I reappear verbatim in Count III, which advances EAC's standalone claim under the Due Process Clause. Accordingly, and because EAC has not identified any other legal standards against which the Department's procedures can be evaluated, the Court will construe the procedural allegations contained in Count I as a claim that those procedures violated EAC's rights under the Due Process Clause.

The Due Process Clause provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. v. Courts typically consider three factors in determining whether a due process violation has occurred: (i) the private interest affected; (ii) the risk of an erroneous deprivation of such interest and the probable value of additional or substitute procedural safeguards; and (iii) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). For the reasons explained below, the process afforded EAC, both before and after the issuance of the Notice of Temporary Debarment, did not violate the Due Process Clause.

a. Pre-Deprivation Process

EAC first contends that the Secretary's actions deprived it of due process because the Department issued EAC its Notice of Temporary Debarment “without any prior notice or opportunity to be heard.” Am. Compl. ¶ 14. Contrary to EAC's argument, however, the Supreme Court “has recognized, on many occasions, that where [the government] must act quickly, . . . postdeprivation process satisfies the requirements of the Due Process Clause,” particularly where the government “has a significant interest in immediately suspending” entities “who occupy positions of great public trust.” *Gilbert v. Homar*, 520 U.S. 924, 930–32 (1997). As the Secretary points out, “there is a well-recognized principle that due process permits [the government] to take summary administrative action without pre-deprivation process, but subject to a prompt post-deprivation hearing, where such action is needed to protect public health and safety.”

Cardinal Health, Inc. v. Holder, 846 F. Supp. 2d 203, 229 (D.D.C. 2012) (internal quotation marks omitted); see also *Zevallos v. Obama*, 793 F.3d 106, 116 (D.C. Cir. 2015) (“[T]here are extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.” (citation omitted)). In such circumstances, the state has “no constitutional obligation to provide . . . a presuspension hearing,” *Gilbert*, 520 U.S. at 933, because the private interest protected under *Mathews* is sufficiently protected by post-deprivation process, *id.* at 934.

This case epitomizes those circumstances. Adoption agencies, charged with the placement and care of vulnerable children, certainly “occupy positions of great public trust,” and allegations that an adoption agency has been abusing that trust to the detriment of those children’s interests correspondingly create a “significant interest in immediately suspending” it from such a position. *Gilbert*, 520 U.S. at 932. The Notice of Temporary Debarment against EAC contained numerous allegations of serious misconduct that spanned three countries and concerned ten different adoptions. Some of the more serious claims against EAC included allegations that “EAC providers submitted fraudulent documents to U.S. authorities,” AR 80; that EAC “made false statements and/or misrepresented material facts to birth families in order to secure their apparent relinquishment of parental rights . . . without knowledge that their consent was being obtained for purposes of adoption,” AR 79; that “EAC providers forced [prospective adoptive parents] to pay bribes to Ugandan government officials,” AR 84; and that EAC facilitated the adoption of a child by a family who had not undergone the required background check and “[t]he child was then subjected to serious abuse in the home of the” adoptive parents, AR 85. Given the gravity of these allegations, the Notice of Temporary Debarment clearly implicated the state’s “need[] to protect public health and safety,” *Cardinal Health*, 846 F. Supp. 2d at 229, justifying EAC’s temporary debarment without additional process. And despite the absence of such pre-deprivation process, the temporary debarment was nonetheless “subject to a prompt post-deprivation hearing,” *id.*; according to the Debarment Notice, EAC was entitled to request a hearing within 30 days of the debarment notice, and the Department would have held a hearing within 60 days of that request, AR 89.

EAC also questions the legitimacy of the complaints that the State Department received and on which it relied in issuing the Notice of Temporary Debarment. But the debarment decision was the product of numerous corroborating complaints received from almost a dozen EAC clients and describing similar patterns of misconduct that took place across the globe. See, e.g., AR 88 (“As described above, EAC failed to comply with multiple [regulatory] standards . . . in multiple countries and involving several families . . .”). For these reasons, the Department’s actions before EAC’s temporary debarment did not deprive EAC of due process.

2. Post-Deprivation Process

Likewise, the extensive administrative procedures that EAC was afforded after its temporary debarment more than satisfy the requirements of due process. That post-deprivation process included multiple rounds of pre-hearing briefing and a four-day hearing at which EAC was represented by counsel and received the opportunity to call and confront live witnesses. The hearing was followed by two rounds of post-hearing briefing on factual and legal issues and a written decision of nearly eighty pages in which the Hearing Officer set forth the basis for EAC’s debarment in full. Less process than this was required to justify EAC’s debarment. See, e.g., *Zevallos*, 793 F.3d at 117 (post-deprivation process was sufficient where agency provided the “administrative record justifying his designation and allowed him to respond to it on multiple occasions,” and where plaintiff was “fully equipped to rebut [the agency’s] rationale”). While the

private interest at stake—EAC’s certification—was undoubtedly significant, the Department’s comprehensive procedures provided more than adequate protection for that interest, minimizing any risk of an erroneous deprivation of EAC’s certification and obviating the need for any additional procedures to protect against that risk. See *Mathews*, 424 U.S. at 335.

EAC advances a number of specific complaints about the post-deprivation process that it received, but all of them lack merit. First, EAC objects to the fact that the Department devised new procedures for this type of adjudicatory proceeding and then applied them for the first time in this case. At the start, it bears mention that the Department specially solicited and received input from EAC in establishing those procedures, and that the Department adopted many of the proposals that EAC advanced, including one particularly important one: that the Department would bear the burden of proof at the hearing. AR 223. More importantly, EAC offers no support for the proposition that administrative procedures implemented for the first time offend due process. Newly developed procedures do not violate due process simply because they are new. Ultimately, EAC never explains how the content of those procedures was inadequate, and because EAC cannot identify any procedural protection required by the Constitution that the Department failed to provide, its argument fails.

Second, EAC advances several arguments about the Department’s supposed failure to produce relevant documents at the hearing. ...But the Department produced these documents on the same day the Hearing Officer ordered it to do so, and EAC had ample opportunity to review these records in the days remaining before trial. Finally, EAC claims that the Hearing Officer should have delayed the hearing in order to allow EAC more time to review the Department’s final productions. ...But the Hearing Officer had previously issued several additional extensions, and she reasonably decided to stand firm to the scheduled date of the hearing in spite of the last-minute sequence of document exchanges.

Third, EAC complains about circumstances related to Exhibit U94, an email from State Department employee Lauren Bishop that contained a redaction covering a case note authored by consular officer Thomas Hayes. ... But the Department recognized that the exhibit was improperly redacted and corrected the error by releasing an unredacted version prior to the hearing. ...

Fourth, EAC complains about the Department’s invocations of law enforcement privilege to withhold certain evidence and the Hearing Officer’s acceptance of those privilege claims. ... Ultimately, when all was said and done, the Hearing Officer noted that EAC’s counsel had “gotten to question a lot more than most cases would allow a law enforcement officer to be questioned during an active investigation,” AR 427, an observation that suggests that EAC was far from unduly prejudiced by the instances in which the Department’s invocations of the law-enforcement privilege were sustained.

Finally, EAC alleges that the Hearing Officer placed undue reliance on controverted hearsay evidence in reaching its decision. As EAC concedes, “administrative agencies are not barred from reliance on hearsay evidence.” ...Moreover, every time the Hearing Officer relied on a piece of hearsay, she scrutinized the evidence carefully and explained why she deemed it reliable. ...

In sum, EAC’s panoply of objections to the Department’s debarment decision—both the substantive allegations that EAC’s debarment was unjustified under the IAA and the procedural allegations that the Department did not afford it due process in arriving at that decision—are unfounded. Accordingly, the Court will grant the Secretary’s motion for summary judgment on Count I of EAC’s amended complaint.

B. Count II

The second count asserts a claim under the APA, which contains a provision authorizing courts to “decide all relevant questions of law.” 5 U.S.C. § 706. But “[t]he APA’s judicial review provision also requires that the person seeking APA review of final agency action have ‘no other adequate remedy in a court.’” *Sackett v. EPA*, 566 U.S. 120, 127 (2012). Here, EAC availed itself of the judicial review provision contained in the IAA itself for challenging temporary debarments by the Secretary of State. Under section 204(d) of the IAA, “an agency . . . who is the subject of a final action of suspension, cancellation, or debarment by the Secretary under this subchapter may petition the United States District Court for the District of Columbia . . . to set aside the action.” 42 U.S.C. § 14924(d). As explained above, that provision incorporates the very standard of review contained in the APA. See *id.* (“The court shall review the action in accordance with section 706 of Title 5.”). Because EAC had access to an adequate alternative remedy when it asserted its APA claim, the Court will dismiss EAC’s APA claim.

C. Count III

The third count purports to raise a standalone claim under the Due Process Clause. The IAA incorporates the APA’s standard of review, which permits litigants to challenge agency action that they believe is “contrary to constitutional right.” 5 U.S.C. § 706(2)(B). As explained above, see *supra* Part III.A.2, all the allegations contained in Count III of the amended complaint also appear in Count I, compare Am. Compl. ¶ 110 with *id.* ¶ 100, and the Court has properly construed the procedural allegations contained in Count I as allegations that the Department’s procedures violated due process. Because Counts I and III are duplicative, the Court will dismiss Count III. . . .

* * * *

ii. *National Council for Adoption v. Pompeo*

On May 19, 2020, the U.S. District Court for the District of Columbia issued its opinion in *National Council for Adoption (“NCFA”) v. Pompeo*, No. 18-cv-2704. NCFA brought several claims under the APA challenging State Department guidance issued in 2018 regarding “soft referrals,” (“SRG”), a practice used by adoption service providers of matching prospective adoptive parents with a child before the child’s eligibility for adoption is confirmed or the prospective parents have completed the home study process. The court determined that plaintiff lacked standing and dismissed the case. Excerpts follow from the opinion.

* * * *

1. *Plaintiff Lacks Organizational Standing*

For plaintiff, the first step in demonstrating organization standing is proving that the SRG injured plaintiff’s interest. . . .

Plaintiff alleged in its complaint that its mission is to “advocate[] for and promote[] a culture of adoptions.” Compl. ¶ 13. Plaintiff argues that “[t]he Department’s ban has actively

impaired NCFA's own activity" because "by banning this critical tool [of soft referrals], NCFA cannot offer the same advice and guidance, either to its members or to adoptive families." Pl.'s Am. Mem. Opp. Mot. Dismiss 30. And so, according to plaintiff, "it is sufficient at the pleading stage for NCFA to allege that the Department's actions in prohibiting the use of soft referrals are inconsistent with NCFA's objectives." *Id.* But these assertions are based on a mischaracterization of the SRG; because plaintiff has mischaracterized the SRG, there is no way for the Court to measure whether the SRG is actually "at loggerheads" with plaintiff's interest in promoting a culture of adoptions. See *Nat'l Treasury Emps. Union*, 101 F.3d at 1426.

Furthermore, plaintiff does not explain how the SRG (as written) constitutes an "inhibition of [NCFA's] daily operations." Pl.'s Am. Mem. Opp. Mot. Dismiss 30 (citing *PETA*, 797 F.3d at 1094). Plaintiff has thus failed to demonstrate that the SRG has caused an injury beyond any "abstract social interest," see *Elec. Priv. Info. Ctr.*, 878 F.3d at 378, so plaintiff lacks organizational standing.

2. Plaintiff Also Lacks Associational Standing

Because plaintiff lacks organizational standing, plaintiff cannot advance its claims unless it has associational standing. The first step in demonstrating associational standing is proving that at least one of its members would have Article III standing in its own right. *Nat. Res. Def. Council*, 489 F.3d at 1370. To prove this, plaintiff argues that standing is clear from the administrative record. Pl.'s Am. Mem. Opp. Mot. Dismiss 17. Plaintiff also attached ten member declarations to its amended response to defendants' motion to dismiss. Nine of the declarations are from named ASPs who are members of NCFA, and the tenth is a declaration of an attorney representing an unnamed ASP member of NCFA.

a. Plaintiff's Standing is not Self-Evident

Plaintiff claims that standing is self-evident because its members are "the object" of a governmental action. *Id.* at 15 ...

... Defendants here have raised a "comprehensible challenge" to plaintiff's standing by pointing out how plaintiff has mischaracterized SRG.

Furthermore, it is not even clear that at least one of plaintiff's members is an "object of" the SRG. Plaintiff acknowledges that "[s]oft referrals do not occur in all or even most intercountry adoptions—nor should they," Pl.'s Am. Mem. Opp. Mot. Dismiss 5, and the SRG addresses only two types of soft referrals. So it is not "inconceivable" that none of plaintiff's members were affected by the SRG. ...

Plaintiff's standing is not self-evident, so the Court must examine the administrative record for evidence of associational standing.

b. Plaintiff's Standing is not Clear from the Administrative Record

Plaintiff argues that the administrative record demonstrates that its members are directly regulated by the SRG, so this should suffice for standing purposes. Plaintiff cites to several correspondences between its members and State Department employees to prove that they ceased making soft referrals due to the SRG. ... But none of these correspondences demonstrate that any of plaintiff's members had previously made the prohibited types of soft referrals and ceased making them because of the SRG. Defendants urge the Court to resist reading the administrative record in a way that "extrapolate[s] particularized injuries from three generic communications from ASPs broadly discussing various soft referral issues." Defs.' Reply Mot. Dismiss 21. The Court will heed that request and decline to find an injury that is not present in the administrative record.

Plaintiff states that “the administrative record leaves no question that NCFA members have been affected by the Soft Referral Ban.” Pl.’s Am. Mem. Opp. Mot. Dismiss 19. If the SRG was a categorical ban on all soft referrals, then plaintiff’s arguments would be much stronger. But as the Court has already established, that is a mischaracterization of the SRG. And so, because the administrative record fails to establish that any of plaintiff’s members previously made the prohibited types of soft referrals and ceased making them because of the SRG, the administrative record cannot provide grounds for associational standing. And so, the Court must examine plaintiff’s ASP member declarations for evidence of associational standing.

c. Plaintiff’s Member Affidavits Do Not Establish Associational Standing

Most of plaintiff’s member declarations follow a pattern that is, on its face, insufficient to demonstrate associational standing. ...

As the Court has already established, the SRG is not a categorical ban on all soft referrals. The Court has no way of knowing which members, if any, engaged in the prohibited types of soft referrals prior to the SRG. And so, because the declarants also misunderstood the SRG, their statements do not describe an injury in fact caused by or fairly traceable to the SRG.

* * * *

Plaintiff lacks associational standing because none of its members have demonstrated that they would have Article III standing in their own right. Because plaintiff has failed to demonstrate either organizational or associational standing, the Court must grant defendant’s motion to dismiss pursuant to Rule 12(b)(1).

* * * *

c. *Hague Adoption Convention Accessions*

After the Republic of the Congo deposited its instrument of accession to the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption (“Convention”) in 2019, the Convention entered into force for the Republic of the Congo on April 1, 2020. The Republic of the Congo is the 102nd country to become party to the Convention, an international agreement that establishes safeguards to protect the best interests of children and to provide greater security, predictability, and transparency for all involved in an intercountry adoption. In March 2020, the State Department determined that it will not be able to process intercountry adoptions from the Republic of the Congo initiated on or after April 1, 2020. See March 31, 2020 Intercountry Adoption notice, available at <https://travel.state.gov/content/travel/en/News/Intercountry-Adoption-News/adoptions-Republic-of-Congo-2020.html>. The Republic of the Congo does not yet have implementing legislation authorizing the designated Central Authority to carry out its responsibilities under the Convention. As a result, consular officers will not be able to issue Hague Adoption Certificates or Custody Certificates, and U.S. Citizenship and Immigration Services (“USCIS”) cannot approve Form I-800, *Petition to Classify Convention Adoptee as an Immediate Relative*, for a child from the Republic of the Congo.

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 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/for-providers/legal-reports-and-data/reported-cases.html>.

b. Hague Abduction Convention Partners

On July 1, 2020, the United States accepted Pakistan’s accession to the 1980 Hague Convention on the Civil Aspects of International Child Abduction (“the Convention”). See July 15, 2020 media note, available at <https://2017-2021.state.gov/united-states-and-pakistan-to-become-partners-under-the-hague-abduction-convention/index.html>. On October 1, 2020, the Convention entered into force between the United States and Pakistan. The United States has 80 partners under the Convention as of 2020.

c. Hague Abduction Convention Case: *Monasky v. Tagleri*

As discussed in *Digest 2019* at 44-50, the United States filed a brief in the Supreme Court (in support of neither party) in *Monasky v. Tagleri*, No. 18-935, a case concerning a child’s habitual residence under the Hague Abduction Convention. On February 25, 2020, the Supreme Court issued its opinion. *Monasky v. Tagleri*, 589 U.S. ___, 140 S.Ct. 719 (2020). The Court ruled (9-0) that the test to determine a child’s habitual residence under the Convention is a totality of the circumstances test—a fact-bound inquiry that should not be encumbered by rigid rules or presumptions. The Court also ruled that the standard of review for a habitual residence determination is clear error. The opinion of the court, written by Justice Ginsburg, is excerpted below.

* * * *

The Hague Conference on Private International Law adopted the Hague Convention in 1980 “[t]o address the problem of international child abductions during domestic disputes.” *Lozano v. Montoya Alvarez*, 572 U.S. 1, 4 (2014) (internal quotation marks omitted). One hundred one countries, including the United States and Italy, are Convention signatories. Hague Conference on Private Int’l Law, Convention of 25 Oct. 1980 on the Civil Aspects of Int’l Child Abduction, Status Table, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>. The International Child Abduction Remedies Act (ICARA), 102 Stat. 437, as amended, 22 U. S. C. §9001 *et seq.*, implements our Nation’s obligations under the Convention. It is the Convention’s core premise that “the interests of children . . . in matters relating to their custody” are best served when custody decisions are made in the child’s country of “habitual residence.” Convention Preamble, Treaty Doc., at 7; see *Abbott v. Abbott*, 560 U.S. 1, 20 (2010).

To that end, the Convention ordinarily requires the prompt return of a child wrongfully removed or retained away from the country in which she habitually resides. Art. 12, Treaty Doc., at 9 (cross-referencing Art. 3, *id.*, at 7). The removal or retention is wrongful if done in violation of the custody laws of the child’s habitual residence. Art. 3, *ibid.* The Convention recognizes certain exceptions to the return obligation. Prime among them, a child’s return is not in order if the return would place her at a “grave risk” of harm or otherwise in “an intolerable situation.” Art. 13(b), *id.*, at 10.

The Convention’s return requirement is a “provisional” remedy that fixes the forum for custody proceedings. Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U. C. D. L. Rev. 1049, 1054 (2005). Upon the child’s return, the custody adjudication will proceed in that forum. See *ibid.* To avoid delaying the custody proceeding, the Convention instructs contracting states to “use the most expeditious procedures available” to return the child to her habitual residence. Art. 2, Treaty Doc., at 7. See also Art. 11, *id.*, at 9 (prescribing six weeks as normal time for return-order decisions).

B

In 2011, Monasky and Taglieri were married in the United States. Two years later, they relocated to Italy, where they both found work. Neither then had definite plans to return to the United States. During their first year in Italy, Monasky and Taglieri lived together in Milan. But the marriage soon deteriorated. Taglieri became physically abusive, Monasky asserts, and “forced himself upon [her] multiple times.” 907 F. 3d 404, 406 (CA6 2018) (en banc).

About a year after their move to Italy, in May 2014, Monasky became pregnant. Taglieri thereafter took up new employment in the town of Lugo, while Monasky, who did not speak Italian, remained about three hours away in Milan. The long-distance separation and a difficult pregnancy further strained their marriage. Monasky looked into returning to the United States. She applied for jobs there, asked about U.S. divorce lawyers, and obtained cost information from moving companies. At the same time, though, she and Taglieri made preparations to care for their expected child in Italy. They inquired about childcare options there, made purchases needed for their baby to live in Italy, and found a larger apartment in a Milan suburb.

Their daughter, A. M. T., was born in February 2015. Shortly thereafter, Monasky told Taglieri that she wanted to divorce him, a matter they had previously broached, and that she anticipated returning to the United States. Later, however, she agreed to join Taglieri, together with A. M. T., in Lugo. The parties dispute whether they reconciled while together in that town.

On March 31, 2015, after yet another heated argument, Monasky fled with her daughter to the Italian police and sought shelter in a safe house. In a written statement to the police, Monasky alleged that Taglieri had abused her and that she feared for her life. Two weeks later, in

April 2015, Monasky and two-month-old A. M. T. left Italy for Ohio, where they moved in with Monasky's parents.

Taglieri sought recourse in the courts. With Monasky absent from the proceedings, an Italian court granted Taglieri's request to terminate Monasky's parental rights, discrediting her statement to the Italian police. App. 183. In the United States, on May 15, 2015, Taglieri petitioned the U. S. District Court for the Northern District of Ohio for the return of A. M. T. to Italy under the Hague Convention, pursuant to 22 U. S. C. §9003(b), on the ground that Italy was her habitual residence.

The District Court granted Taglieri's petition after a four-day bench trial. Sixth Circuit precedent at the time, the District Court observed, instructed courts that a child habitually resides where the child has become "acclimatiz[ed]" to her surroundings. App. to Pet. for Cert. 85a (quoting *Robert v. Tesson*, 507 F. 3d 981, 993 (CA6 2007)). An infant, however, is "too young" to acclimate to her surroundings. App. to Pet. for Cert. 87a. The District Court therefore proceeded on the assumption that "the shared intent of the [parents] is relevant in determining the habitual residence of an infant," though "particular facts and circumstances . . . might necessitate the consideration [of] other factors." *Id.*, at 97a. The shared intention of A. M. T.'s parents, the District Court found, was for their daughter to live in Italy, where the parents had established a marital home "with no definitive plan to return to the United States." *Ibid.* Even if Monasky could change A. M. T.'s habitual residence unilaterally by making plans to raise A. M. T. away from Italy, the District Court added, the evidence on that score indicated that, until the day she fled her husband, Monasky had "no definitive plans" to raise A. M. T. in the United States. *Id.*, at 98a. In line with its findings, the District Court ordered A. M. T.'s prompt return to Italy.

The Sixth Circuit and this Court denied Monasky's requests for a stay of the return order pending appeal. 907 F. 3d, at 407. In December 2016, A. M. T., nearly two years old, was returned to Italy and placed in her father's care.

Taglieri represents that "[a]n order issued by the Italian court in December 2018 awarded legal custody of A. M. T., on an interim basis, to the Lugo municipality . . . with placement at [Taglieri's] residence; and provided that mother-daughter visits would continue under the plan prescribed in a court order issued earlier in 2018." Brief for Respondent 56, n. 13.

In the United States, Monasky's appeal of the District Court's return order proceeded. See *Chafin v. Chafin*, 568 U. S. 165, 180 (2013) (the return of a child under the Hague Convention does not moot an appeal of the return order). A divided three-judge panel of the Sixth Circuit affirmed the District Court's order, and a divided en banc court adhered to that disposition.

The en banc majority noted first that, after the District Court's decision, a precedential Sixth Circuit opinion, *Ahmed v. Ahmed*, 867 F. 3d 682 (2017), established that, as the District Court had assumed, an infant's habitual residence depends on "shared parental intent." 907 F. 3d, at 408 (quoting *Ahmed*, 867 F. 3d, at 690). The en banc majority then reviewed the District Court's habitual-residence determination for clear error and found none. Sustaining the District Court's determination that A. M. T.'s habitual residence was Italy, the majority rejected Monasky's argument that the District Court erred because "she and Taglieri never had a 'meeting of the minds' about their child's future home." 907 F. 3d, at 410.

No member of the en banc court disagreed with the majority's rejection of Monasky's proposed actual-agreement requirement. Nor did any judge maintain that Italy was not A. M. T.'s habitual residence. Judge Boggs wrote a concurring opinion adhering to the reasoning of his

three-judge panel majority opinion: “[A]bsent unusual circumstances, where a child has resided exclusively in a single country, especially with both parents, that country is the child’s habitual residence.” *Id.*, at 411. The dissenters urged two discrete objections. Some would have reviewed the District Court’s habitual-residence determination *de novo*. See *id.*, at 419 (opinion of Moore, J.). All would have remanded for the District Court to reconsider A. M. T.’s habitual residence in light of the Sixth Circuit’s *Ahmed* precedent. See 907 F. 3d, at 419-420; *id.*, at 421-422 (opinion of Gibbons, J.); *id.*, at 423 (opinion of Stranch, J.).

We granted certiorari to clarify the standard for habitual residence, an important question of federal and international law, in view of differences in emphasis among the Courts of Appeals. 587 U. S. ____ (2019). Compare, *e.g.*, 907 F. 3d, at 407 (case below) (describing inquiry into the child’s acclimatization as the “primary” approach), with, *e.g.*, *Mozes v. Mozes*, 239 F. 3d 1067, 1073-1081 (CA9 2001) (placing greater weight on the shared intentions of the parents), with, *e.g.*, *Redmond v. Redmond*, 724 F. 3d 729, 746 (CA7 2013) (rejecting “rigid rules, formulas, or presumptions”). Certiorari was further warranted to resolve a division in Courts of Appeals over the appropriate standard of appellate review. Compare, *e.g.*, 907 F. 3d, at 408-409 (case below) (clear error), with, *e.g.*, *Mozes*, 239 F. 3d, at 1073 (*de novo*).

II

The first question presented concerns the standard for habitual residence: Is an actual agreement between the parents on where to raise their child categorically necessary to establish an infant’s habitual residence? We hold that the determination of habitual residence does not turn on the existence of an actual agreement.

A

We begin with “the text of the treaty and the context in which the written words are used.” *Air France v. Saks*, 470 U.S. 392, 397 (1985). The Hague Convention does not define the term “habitual residence.” A child “resides” where she lives. See Black’s Law Dictionary 1176 (5th ed. 1979). Her residence in a particular country can be deemed “habitual,” however, only when her residence there is more than transitory. “Habitual” implies “[c]ustomary, usual, of the nature of a habit.” *Id.*, at 640. The Hague Convention’s text alone does not definitively tell us what makes a child’s residence sufficiently enduring to be deemed “habitual.” It surely does not say that habitual residence depends on an actual agreement between a child’s parents. But the term “habitual” does suggest a fact-sensitive inquiry, not a categorical one.

The Convention’s explanatory report confirms what the Convention’s text suggests. The report informs that habitual residence is a concept “well-established . . . in the Hague Conference.” 1980 Conférence de La Haye de droit international privé, Enlèvement d’enfants, E. Pérez-Vera, Explanatory Report in 3 Actes et documents de la Quatorzième session, p. 445, ¶66 (1982) (Pérez-Vera). The report refers to a child’s habitual residence in fact-focused terms: “the family and social environment in which [the child’s] life has developed.” *Id.*, at 428, ¶11. What makes a child’s residence “habitual” is therefore “some degree of integration by the child in a social and family environment.” *OL v. PQ*, 2017 E. C. R. No. C-111/17, ¶42 (Judgt. of June 8); accord *Office of the Children’s Lawyer v. Balev*, [2018] 1 S. C. R. 398, 421, ¶43, 424 D. L. R. (4th) 391, 410, ¶43 (Can.); *A v. A*, [2014] A. C., ¶54 (2013) (U. K.). Accordingly, while Federal Courts of Appeals have diverged, if only in emphasis, in the standards they use to locate a child’s habitual residence, see *supra*, at 6, they share a “common” understanding: The place where a child is at home, at the time of removal or retention, ranks as the child’s habitual residence. *Karkkainen v. Kovalchuk*, 445 F. 3d 280, 291 (CA3 2006).

According to an analysis provided by the Department of State to the Senate during the ratification process, the “explanatory report is recognized by the [Hague] Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention.” Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10503 (1986). The explanatory report notes, however, that “it has not been approved by the Conference, and it is possible that, despite the Rapporteur’s [*sic*] efforts to remain objective, certain passages reflect a viewpoint which is in part subjective.” Pérez-Vera 427-428, ¶8. See *Abbott v. Abbott*, 560 U. S. 1, 19 (2010) (“We need not decide whether this Report should be given greater weight than a scholarly commentary.”).

Because locating a child’s home is a fact-driven inquiry, courts must be “sensitive to the unique circumstances of the case and informed by common sense.” *Redmond*, 724 F. 3d, at 744. For older children capable of acclimating to their surroundings, courts have long recognized, facts indicating acclimatization will be highly relevant. Because children, especially those too young or otherwise unable to acclimate, depend on their parents as caregivers, the intentions and circumstances of caregiving parents are relevant considerations. No single fact, however, is dispositive across all cases. Common sense suggests that some cases will be straightforward: Where a child has lived in one place with her family indefinitely, that place is likely to be her habitual residence. But suppose, for instance, that an infant lived in a country only because a caregiving parent had been coerced into remaining there. Those circumstances should figure in the calculus. See *Karkkainen*, 445 F. 3d, at 291 (“The inquiry into a child’s habitual residence is a fact-intensive determination that cannot be reduced to a predetermined formula and necessarily varies with the circumstances of each case.”).

Facts courts have considered include: “a change in geography combined with the passage of an appreciable period of time,” “age of the child,” “immigration status of child and parent,” “academic activities,” “social engagements,” “participation in sports programs and excursions,” “meaningful connections with the people and places in the child’s new country,” “language proficiency,” and “location of personal belongings.” Federal Judicial Center, J. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges* 67-68 (2d ed. 2015).

The treaty’s “negotiation and drafting history” corroborates that a child’s habitual residence depends on the specific circumstances of the particular case. *Medellín v. Texas*, 552 U.S. 491, 507 (2008) (noting that such history may aid treaty interpretation). The Convention’s explanatory report states that the Hague Conference regarded habitual residence as “a question of pure fact, differing in that respect from domicile.” Pérez-Vera 445, ¶66. The Conference deliberately chose “habitual residence” for its factual character, making it the foundation for the Convention’s return remedy in lieu of formal legal concepts like domicile and nationality. See Anton, *The Hague Convention on International Child Abduction*, 30 Int’l & Comp. L. Q. 537, 544 (1981) (history of the Convention authored by the drafting commission’s chairman). That choice is instructive. The signatory nations sought to afford courts charged with determining a child’s habitual residence “maximum flexibility” to respond to the particular circumstances of each case. P. Beaumont & P. McEleavy, *The Hague Convention on International Child Abduction* 89-90 (1999) (Beaumont & McEleavy). The aim: to ensure that custody is adjudicated in what is presumptively the most appropriate forum—the country where the child is at home.

Our conclusion that a child’s habitual residence depends on the particular circumstances of each case is bolstered by the views of our treaty partners. ICARA expressly recognizes “the need for uniform international interpretation of the Convention.” 22 U. S. C. §9001(b)(3)(B).

The understanding that the opinions of our sister signatories to a treaty are due “considerable weight,” this Court has said, has “special force” in Hague Convention cases. . . . The “clear trend” among our treaty partners is to treat the determination of habitual residence as a fact-driven inquiry into the particular circumstances of the case. *Balev*, [2018] 1 S. C. R., at 423, ¶50, 424 D. L. R. (4th), at 411, ¶50.

Lady Hale wrote for the Supreme Court of the United Kingdom: A child’s habitual residence “depends on numerous factors . . . with the purposes and intentions of the parents being merely one of the relevant factors. . . . The essentially factual and individual nature of the inquiry should not be glossed with legal concepts.” A, [2014] A. C., at ¶54. The Court of Justice of the European Union, the Supreme Court of Canada, and the High Court of Australia agree. See *OL*, 2017 E. C. R. No. C-111/17, ¶42 (the habitual residence of a child “must be established . . . taking account of all the circumstances of fact specific to each individual case”); *Balev*, [2018] 1 S. C. R., at 421, 423-430, ¶¶43, 48-71, 424 D. L. R. (4th), at 410-417, ¶¶43, 48-71 (adopting an approach to habitual residence under which “[t]he judge considers all relevant links and circumstances”); *LK v. Director-General, Dept. of Community Servs.*, [2009] 237 C. L. R. 582, 596, ¶35 (Austl.) (“to seek to identify a set list of criteria that bear upon where a child is habitually resident . . . would deny the simple observation that the question of habitual residence will fall for decision in a very wide range of circumstances”). Intermediate appellate courts in Hong Kong and New Zealand have similarly stated what “habitual residence” imports. See *LCYP v. JEK*, [2015] 4 H. K. L. R. D. 798, 809-810, ¶7.7 (H. K.); *Punter v. Secretary for Justice*, [2007] 1 N. Z. L. R. 40, 71, ¶130 (N. Z.). Tellingly, Monasky has not identified a single treaty partner that has adopted her actual-agreement proposal. See Tr. of Oral Arg. 9.

Monasky disputes that foreign courts apply a totality-of-the-circumstances standard to *infants*, as opposed to older children. In this regard, she points out, the Court of Justice of the European Union instructs that, “where ‘the infant is in fact looked after by her mother,’ ‘it is necessary to assess the mother’s integration in her social and family environment’ in the relevant country.” Reply Brief 5-6 (quoting *Mercred v. Chaffe*, 2010 E. C. R. I-14309, I-14379, ¶55). True, a caregiving parent’s ties to the country at issue are highly relevant. But the Court of Justice did not hold that the caregiver’s ties are the end of the inquiry. Rather, the deciding court must “tak[e] account of *all* the circumstances of fact specific to each individual case.” *Id.*, ¶56 (emphasis added) (also considering, among other factors, the infant’s physical presence and duration of time in the country).

The bottom line: There are no categorical requirements for establishing a child’s habitual residence—least of all an actual-agreement requirement for infants. Monasky’s proposed actual-agreement requirement is not only unsupported by the Convention’s text and inconsistent with the leeway and international harmony the Convention demands; her proposal would thwart the Convention’s “objects and purposes.” *Abbott*, 560 U. S., at 20. An actual-agreement requirement would enable a parent, by withholding agreement, unilaterally to block any finding of habitual residence for an infant. If adopted, the requirement would undermine the Convention’s aim to stop unilateral decisions to remove children across international borders. Moreover, when parents’ relations are acrimonious, as is often the case in controversies arising under the Convention, agreement can hardly be expected. In short, as the Court of Appeals observed below, “Monasky’s approach would create a presumption of no habitual residence for infants, leaving the population most vulnerable to abduction the least protected.” 907 F. 3d, at 410.

B

Monasky counters that an actual-agreement requirement is necessary to ensure “that an infant’s mere physical presence in a country has a sufficiently settled quality to be deemed ‘habitual.’” Brief for Petitioner 32. An infant’s “mere physical presence,” we agree, is not a dispositive indicator of an infant’s habitual residence. But a wide range of facts other than an actual agreement, including facts indicating that the parents have made their home in a particular place, can enable a trier to determine whether an infant’s residence in that place has the quality of being “habitual.”

Monasky also argues that a bright-line rule like her proposed actual-agreement requirement would promote prompt returns of abducted children and deter would-be abductors from “tak[ing] their chances” in the first place. *Id.*, at 35, 38. Adjudicating a winner-takes-all evidentiary dispute over whether an agreement existed, however, is scarcely more expeditious than providing courts with leeway to make “a quick impression gained on a panoramic view of the evidence.” Beaumont & McEleavy 103 (internal quotation marks omitted). When all the circumstances are in play, would-be abductors should find it more, not less, difficult to manipulate the reality on the ground, thus impeding them from forging “artificial jurisdictional links . . . with a view to obtaining custody of a child.” Pérez-Vera 428, ¶11.

Finally, Monasky and *amici curiae* raise a troublesome matter: An actual-agreement requirement, they say, is necessary to protect children born into domestic violence. Brief for Petitioner 42-44; Brief for Sanctuary for Families et al. as *Amici Curiae* 11-20. Domestic violence poses an “intractable” problem in Hague Convention cases involving caregiving parents fleeing with their children from abuse. Hale, Taking Flight—Domestic Violence and Child Abduction, 70 Current Legal Prob. 3, 11 (2017). We doubt, however, that imposing a categorical actual-agreement requirement is an appropriate solution, for it would leave many infants without a habitual residence, and therefore outside the Convention’s domain. See *supra*, at 11-12. Settling the forum for adjudication of a dispute over a child’s custody, of course, does not dispose of the merits of the controversy over custody. Domestic violence should be an issue fully explored in the custody adjudication upon the child’s return.

The Hague Convention, we add, has a mechanism for guarding children from the harms of domestic violence: Article 13(b). See Hale, 70 Current Legal Prob., at 10-16 (on Hague Conference working group to develop a best-practices guide to the interpretation and application of Article 13(b) in cases involving domestic violence). Article 13(b), as noted *supra*, at 3, allows a court to refrain from ordering a child’s return to her habitual residence if “there is a grave risk that [the child’s] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” Art. 13(b), Treaty Doc., at 10. Monasky raised below an Article 13(b) defense to Taglieri’s return petition. In response, the District Court credited Monasky’s “deeply troubl[ing]” allegations of her exposure to Taglieri’s physical abuse. App. to Pet. for Cert. 105a. But the District Court found “no evidence” that Taglieri ever abused A. M. T. or otherwise disregarded her well-being. *Id.*, at 103a, 105a. That court also followed Circuit precedent disallowing consideration of psychological harm A. M. T. might experience due to separation from her mother. *Id.*, at 102a. Monasky does not challenge those dispositions in this Court.

III

Turning to the second question presented: What is the appropriate standard of appellate review of an initial adjudicator’s habitual-residence determination? Neither the Convention nor ICARA prescribes modes of appellate review, other than the directive to act “expeditiously.” Art.

11, Treaty Doc., at 9; see Federal Judicial Center, J. Garbolino, *The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges* 162 (2d ed. 2015) (the Convention’s “emphasis on prompt disposition applies to appellate proceedings”).

Monasky contends that only *de novo* review can satisfy “the need for uniform international interpretation of the Convention.” 22 U. S. C. §9001(b)(3)(B). See Brief for Petitioner 19-21. However, ICARA’s recognition of the need for harmonious international interpretation is hardly akin to the “clear statutory prescription” on the standard of appellate review that Congress has provided “[f]or some few trial court determinations.” *Pierce v. Underwood*, 487 U. S. 552, 558 (1988).

Absent a treaty or statutory prescription, the appropriate level of deference to a trial court’s habitual-residence determination depends on whether that determination resolves a question of law, a question of fact, or a mixed question of law and fact. Generally, questions of law are reviewed *de novo* and questions of fact, for clear error, while the appropriate standard of appellate review for a mixed question “depends . . . on whether answering it entails primarily legal or factual work.” *U.S. Bank N.A. v. Village at Lakeridge, LLC*, 583 U. S. ___, ___-___ (2018) (slip op., at 8-9).

A child’s habitual residence presents what U.S. law types a “mixed question” of law and fact—albeit barely so. *Id.*, at ___ (slip op., at 7). The inquiry begins with a legal question: What is the appropriate standard for habitual residence? Once the trial court correctly identifies the governing totality-of-the-circumstances standard, however, what remains for the court to do in applying that standard, as we explained *supra*, at 7-11, is to answer a factual question: Was the child at home in the particular country at issue? The habitual-residence determination thus presents a task for factfinding courts, not appellate courts, and should be judged on appeal by a clear-error review standard deferential to the factfinding court.

In selecting standards of appellate review, the Court has also asked whether there is “a long history of appellate practice” indicating the appropriate standard, for arriving at the standard from first principles can prove “uncommonly difficult.” *Pierce v. Underwood*, 487 U.S. 552, 558(1988). Although some Federal Courts of Appeals have reviewed habitual-residence determinations *de novo*, there has been no uniform, reasoned practice in this regard, nothing resembling “a historical tradition.” *Ibid.* See also *supra*, at 6-7 (noting a Circuit split). Moreover, when a mixed question has a factual foundation as evident as the habitual-residence inquiry here does, there is scant cause to default to historical practice.

Clear-error review has a particular virtue in Hague Convention cases. As a deferential standard of review, clear-error review speeds up appeals and thus serves the Convention’s premium on expedition. See Arts. 2, 11, Treaty Doc., at 7, 9. Notably, courts of our treaty partners review first-instance habitual-residence determinations deferentially. See, e.g., *Balev*, [2018] 1 S. C. R., at 419, ¶38, 424 D. L. R. (4th), at 408, ¶38; *Punter*, [2007] 1 N. Z. L. R., at 88, ¶204; *AR v. RN*, [2015] UKSC 35, ¶18.

IV

Although agreeing with the manner in which the Court has resolved the two questions presented, the United States, as an *amicus curiae* supporting neither party, suggests remanding to the Court of Appeals rather than affirming that court’s judgment. Brief for United States as *Amicus Curiae* 28. Ordinarily, we might take that course, giving the lower courts an opportunity to apply the governing totality-of-the-circumstances standard in the first instance.

Under the circumstances of this case, however, we decline to disturb the judgment below.

True, the lower courts viewed A. M. T.'s situation through the lens of her parents' shared intentions. But, after a four-day bench trial, the District Court had before it all the facts relevant to the dispute. Asked at oral argument to identify any additional fact the District Court did not digest, counsel for the United States offered none. Tr. of Oral Arg. 38. Monasky and Taglieri agree that their dispute "requires no 'further factual development,'" and neither party asks for a remand. Reply Brief 22 (quoting Brief for Respondent 54).

Monasky does urge the Court to reverse if it rests A. M. T.'s habitual residence on all relevant circumstances. She points to her "absence of settled ties to Italy" and the "unsettled and unstable conditions in which A. M. T. resided in Italy." Reply Brief 19 (internal quotation marks and alteration omitted). The District Court considered the competing facts bearing on those assertions, however, including the fraught circumstances in which the parties' marriage unraveled. That court nevertheless found that Monasky had sufficient ties to Italy such that "[a]rguably, [she] was a habitual resident of Italy." App. to Pet. for Cert. 91a. And, despite the rocky state of the marriage, the District Court found beyond question that A. M. T. was born into "a marital home in Italy," one that her parents established "with no definitive plan to return to the United States." *Id.*, at 97a. Nothing in the record suggests that the District Court would appraise the facts differently on remand.

A remand would consume time when swift resolution is the Convention's objective. The instant return-order proceedings began a few months after A. M. T.'s birth. She is now five years old. The more than four-and-a-half-year duration of this litigation dwarfs the six-week target time for resolving a return-order petition. See Art. 11, Treaty Doc., at 9. Taglieri represents that custody of A. M. T. has so far been resolved only "on an interim basis," Brief for Respondent 56, n. 13, and that custody proceedings, including the matter of Monasky's parental rights, remain pending in Italy. Tr. of Oral Arg. 60-61. Given the exhaustive record before the District Court, the absence of any reason to anticipate that the District Court's judgment would change on a remand that neither party seeks, and the protraction of proceedings thus far, final judgment on A. M. T.'s return is in order.

* * * *

Cross References

Children, **Chapter 6.C**

IACHR petition of Carty (consular notification), **Ch. 7.D.3.b**

Enhanced consular immunities, **Chapter 10.C.4**

CHAPTER 3

International Criminal Law

A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

1. Extradition Treaty and MLAT with the Republic of Croatia

On June 18, 2020, the President transmitted to the Senate for consideration the Agreement between the Government of the United States of America and the Government of the Republic of Croatia comprising the instrument as contemplated by Article 3(2) of the Agreement on Extradition between the United States of America and the European Union, signed June 25, 2003, as to the Application of the Treaty on Extradition signed on October 25, 1901 (the “U.S.-Croatia Extradition Agreement”), and the Agreement between the Government of the United States and the Government of the Republic of Croatia comprising the Instrument as contemplated by Article 3(3) of the Agreement on Mutual Legal Assistance between the United States of America and the European Union signed at Washington on June 25, 2003 (the “U.S.-Croatia Mutual Legal Assistance Agreement”), both signed at Washington on December 10, 2019. Treaty Document 116-2, available at <https://www.congress.gov/treaty-document/116th-congress/2?s=3&r=3>. See *Digest 2019* at 57-58 regarding the signing of these treaties with Croatia. The President’s letter of transmittal follows.

* * * *

With a view to receiving advice and consent of the Senate to ratification, I transmit herewith the Agreement between the Government of the United States of America and the Government of the Republic of Croatia comprising the instrument as contemplated by Article 3(2) of the Agreement on Extradition between the United States of America and the European Union, signed June 25, 2003, as to the Application of the Treaty on Extradition signed on October 25, 1901 (the “U.S.-

Croatia Extradition Agreement”), and the Agreement between the Government of the United States and the Government of the Republic of Croatia comprising the Instrument as contemplated by Article 3(3) of the Agreement on Mutual Legal Assistance between the United States of America and the European Union signed at Washington on June 25, 2003 (the “U.S.-Croatia Mutual Legal Assistance Agreement”), both signed at Washington on December 10, 2019. I also transmit, for the information of the Senate, the report of the Department of State with respect to the U.S.-Croatia Extradition and Mutual Legal Assistance Agreements. Following Croatia's accession to the European Union on July 1, 2013, these two agreements fulfill the requirements, in respect of Croatia, for implementing bilateral instruments between the United States and each member of the European Union contained in the Agreements on Extradition and Mutual Legal Assistance between the United States of America and the European Union, both of which entered into force on February 1, 2010.

The U.S.-Croatia Extradition Agreement modernizes in important respects the Treaty between the United States of America and the Kingdom of Serbia for the Extradition of Fugitives from Justice, signed October 25, 1901 (the “1901 Extradition Treaty”), which is currently in force between the United States of America and the Republic of Croatia. Most significantly, it replaces the outdated list of extraditable offenses with the modern “dual criminality” approach, thereby enabling coverage of newer offenses, such as cyber-related crimes, environmental offenses, and money laundering. In addition, it includes several provisions updating and streamlining procedural requirements for preparing and transmitting extradition documents.

The U.S.-Croatia Mutual Legal Assistance Agreement formalizes and strengthens the institutional framework for legal assistance between the United States of America and the Republic of Croatia in criminal matters. Because the United States of America and the Republic of Croatia do not have a bilateral mutual legal assistance treaty in force, the U.S.-Croatia Mutual Legal Assistance Agreement is a partial treaty governing only those issues regulated by the U.S.-European Union Mutual Legal Assistance Agreement, specifically: identification of bank information, joint investigative teams, video-conferencing, expedited transmission of requests, assistance to administrative authorities, use limitations, confidentiality, and grounds for refusal. This approach is consistent with that taken with other European Union member states (Bulgaria, Denmark, Finland, Malta, Portugal, Slovak Republic, and Slovenia) with which the United States does not have an existing mutual legal assistance treaty.

I recommend that the Senate give early and favorable consideration to the U.S.-Croatia Extradition Agreement and the U.S.-Croatia Mutual Legal Assistance Agreement.

* * * *

2. Universal Jurisdiction

On November 3, 2020, Deputy Legal Adviser Julian Simcock delivered the U.S. statement at the 75th General Assembly Sixth Committee meeting on the principle of universal jurisdiction. His statement is excerpted below and available at <https://usun.usmission.gov/statement-at-the-75th-un-general-assembly-sixth-committee-on-agenda-item-number-87-scope-and-application-of-the-principle-of-universal-jurisdiction/>.

* * * *

We greatly appreciate the Sixth Committee's continued interest in this important topic. 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 continues to be that basic questions remain regarding how jurisdiction should be exercised in relation to universal crimes, and States' views and practices related to the topic.

In the years since the Committee took up this issue, we have engaged in thoughtful discussions on a number of important topics regarding universal jurisdiction, including with respect to its definition, scope, and application. The submissions made by States to date, the work of the Working Group in this Committee, and the Secretary-General's reports have been valuable 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.

* * * *

B. INTERNATIONAL CRIMES

1. Terrorism

a. Transmittal of Treaties

(1) Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation ("Beijing Convention")

On June 18, 2020, the President transmitted to the Senate for consideration the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (the "Beijing Convention"), adopted by the International Civil Aviation Organization International Conference on Air Law (Diplomatic Conference on Aviation Security) in Beijing on September 10, 2010, and signed by the United States on that same date. Treaty Document 116-3, available at <https://www.congress.gov/treaty-document/116th-congress/3?s=3&r=2>. The President's letter of transmittal follows.

* * * *

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (the “Beijing Convention”), adopted by the International Civil Aviation Organization International Conference on Air Law (Diplomatic Conference on Aviation Security) in Beijing on September 10, 2010, and signed by the United States on that same date. I also transmit, for the information of the Senate, the report of the Department of State with respect to the Beijing Convention.

The Beijing Convention is an important component of international efforts to prevent and punish both terrorism targeting civil aviation and the proliferation of weapons of mass destruction. As between parties to the Beijing Convention, it replaces and supersedes the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal, September 23, 1971, and its supplementary protocol, the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal, February 24, 1988. It significantly strengthens the existing international counterterrorism legal framework and facilitates the prosecution and extradition of those who seek to commit acts of terror, including acts such as those committed on September 11, 2001.

The Beijing Convention establishes the first international treaty framework that criminalizes certain terrorist acts, including using an aircraft in a terrorist activity and certain acts relating to the transport of weapons of mass destruction or related materials by aircraft. The Beijing Convention requires States Parties to criminalize specified acts under their domestic laws and to cooperate to prevent and investigate suspected crimes under the Beijing Convention. It includes an “extradite or prosecute” obligation with respect to persons accused of committing, attempting to commit, conspiring to commit, or aiding in the commission of such offenses.

Some changes to United States law will be needed for the United States to implement provisions of the Beijing Convention obligating the United States to criminalize certain offenses, make those offenses punishable by appropriate penalties, and authorize the assertion of jurisdiction over such offenses. Proposed legislation is being separately transmitted by my Administration to the Congress.

I recommend that the Senate give early and favorable consideration to the Beijing Convention, subject to a reservation and certain understandings that are described in the accompanying report of the Department of State.

* * * *

(2) *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (“Beijing Protocol”)*

On June 18, 2020, the President transmitted to the Senate for its consideration the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (the “Beijing Protocol”), adopted by the International Civil Aviation Organization International Conference on Air Law (Diplomatic Conference on Aviation Security) in Beijing on September 10, 2010, and signed by the United States on that same date. Treaty Document 116-4, available at <https://www.congress.gov/treaty-document/116th-congress/4/document-text?r=1&s=3>. The President’s letter of transmittal follows.

* * * *

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (the “Beijing Protocol”), adopted by the International Civil Aviation Organization International Conference on Air Law (Diplomatic Conference on Aviation Security) in Beijing on September 10, 2010, and signed by the United States on that same date. I also transmit, for the information of the Senate, the report of the Department of State with respect to the Beijing Protocol.

The Beijing Protocol is an important component of international efforts to prevent and punish terrorism targeting civil aviation. It supplements the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on December 16, 1970 (the “Hague Convention”), and fills several gaps in the existing international legal framework for combatting global terrorism. It will significantly advance cooperation between States Parties in the prevention of the full range of unlawful acts relating to civil aviation and in the prosecution and punishment of offenders.

The Beijing Protocol amends the existing hijacking offense in the Hague Convention to cover hijackings that occur pre- or post-flight and addresses situations in which the offender may attempt to control an aircraft from outside of the aircraft, such as by remotely interfering with flight operation or data transmission systems. The Beijing Protocol requires States Parties to criminalize these acts under their domestic laws and to cooperate to prevent and investigate suspected crimes under the Beijing Protocol. It includes an “extradite or prosecute” obligation with respect to persons accused of committing, attempting to commit, conspiring to commit, or aiding in the commission of such offenses.

Some changes to United States law will be needed for the United States to implement provisions of the Beijing Protocol, obligating the United States to criminalize certain offenses, make those offenses punishable by appropriate penalties, and authorize the assertion of jurisdiction over such offenses. Proposed legislation is being separately transmitted by my Administration to the Congress.

I recommend that the Senate give early and favorable consideration to the Beijing Protocol, subject to a reservation and certain understandings that are described in the accompanying report of the Department of State.

* * * *

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

On May 11, 2020, Secretary of State Pompeo determined and certified 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.” 85 Fed. Reg. 33,772 (June 2, 2020). The countries are: Iran, Democratic People’s Republic of Korea, Syria, Venezuela, and Cuba. On May 13, 2020, the State Department issued a media note about the determination and certification, which is available at

<https://2017-2021.state.gov/countries-certified-as-not-cooperating-fully-with-u-s-counterterrorism-efforts/>, and excerpted below.

* * * *

...This is the first year that Cuba has been certified as not fully cooperating since 2015. This certification prohibits the sale or license for export of defense articles and services and notifies the U.S. public and international community that these countries are not fully cooperating with U.S. counterterrorism efforts.

Iran: In 2019, Iran continued to be the world's largest state sponsor of terrorism, supporting Hizballah, Palestinian terrorist groups, and other terrorist groups operating throughout the Middle East. In 2019, Iran maintained its support for various Iraqi Shia terrorist groups, including Kata'ib Hizballah (KH), Harakat al-Nujaba (HAN), and Asa'ib Ahl al-Haq (AAH). Iran's Islamic Revolutionary Guard Corps (IRGC), a designated Foreign Terrorist Organization, has been directly involved in terrorist plotting and has killed U.S. citizens. The IRGC—most prominently through its Qods Force—has the greatest role among Iranian regime actors in directing and carrying out a global terrorist campaign.

North Korea: In 2019, four Japanese individuals who participated in the 1970 hijacking of a Japan Airline flight continued to live in the DPRK. The Japanese government also continued to seek a full account of the fate of 12 Japanese nationals believed to have been abducted by DPRK state entities in the 1970s and 1980s.

Syria: Syria has continued its political and military support for terrorist groups, including the provision of weapons and political support to Hizballah. The Assad regime's relationship with Hizballah and Iran grew stronger in 2019 as the regime became more reliant on external actors to fight opponents and secure areas. The IRGC and IRGC-backed militias remain present and active in the country with the permission of President Bashar al-Assad.

Venezuela: In 2019, Maduro and members of his former regime in Venezuela continued to provide permissive environments for terrorists in the region to maintain a presence. While Maduro was not the recognized President of Venezuela during this period, his control within Venezuela effectively precluded cooperation with the United States on counterterrorism efforts. Individuals linked to Revolutionary Armed Forces of Colombia (FARC) dissidents (who remain committed to terrorism notwithstanding the peace accord) and the National Liberation Army (ELN) were present in the country. The U.S. Department of Justice has criminally charged Maduro and certain other former regime members with running a narco-terrorism partnership with the FARC for the past 20 years.

Cuba: Members of the ELN, who travelled to Havana to conduct peace talks with the Colombian government in 2017, remained in Cuba in 2019. Citing peace negotiation protocols, Cuba refused Colombia's request to extradite ten ELN leaders living in Havana after the group claimed responsibility for the January 2019 bombing of a Bogota police academy that killed 22 people and injured more than 60 others. As the United States maintains an enduring security partnership with Colombia and shares with Colombia the important counterterrorism objective of combating organizations like the ELN, Cuba's refusal to productively engage with the Colombian government demonstrates that it is not cooperating with U.S. work to support Colombia's efforts to secure a just and lasting peace, security, and opportunity for its people.

Cuba harbors several U.S. fugitives from justice wanted on charges of political violence, many of whom have resided in Cuba for decades. For example, the Cuban regime has refused to return Joanne Chesimard, who was convicted of executing New Jersey State Trooper Werner Foerster in 1973. The Cuban Government provides housing, food ration books, and medical care for these individuals.

* * * *

c. *State Sponsors of Terrorism*

See Chapter 16 for discussion of the State Department's 2020 rescission of the designation of Sudan as a State Sponsor of Terrorism ("SST").

d. *Country Reports on Terrorism*

On June 24, 2020, the State Department released its annual Country Reports on Terrorism, detailing key developments in 2019 in the global fight against ISIS, al-Qa'ida, Iran-supported terrorist groups, and other terrorist groups. See State Department media note, available at <https://2017-2021.state.gov/u-s-state-department-issues-country-reports-on-terrorism-2019/>. 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 2019 calendar year and includes: 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 media note highlights the portions of the report which note major strides to defeat and degrade international terrorism organizations in 2019 such as: the efforts of the Global Coalition to Defeat ISIS, the death of Abu Bakr al Baghdadi after a U.S. military raid on his compound in Syria, the U.S. designation of Iran's Islamic Revolutionary Guard Corps as a Foreign Terrorist Organization, an update of U.S. terrorism designation authorities, and terrorist designations by other governments in the Western Hemisphere and Europe of Hizballah. The media note also states that the report covers "U.S. efforts to address new and ongoing challenges, including the repatriation of foreign terrorist fighters, particularly to Western Europe; the expansion of ISIS branches and networks in Africa; and the threat of racially or ethnically motivated terrorism." The report can be accessed at <https://www.state.gov/reports/country-reports-on-terrorism-2019/>. Secretary Pompeo and Coordinator for Counterterrorism Ambassador Nathan Sales made remarks on the 2019 Country Reports on Terrorism at a press availability on June 24, 2020, which are available at <https://2017-2021.state.gov/secretary-michael-r-pompeo-at-a-press-availability-on-the-release-of-the-2019-country-reports-on-terrorism/>.

e. U.S. Actions Against Terrorist Groups

(1) General

Designations of organizations as Foreign Terrorist Organizations (“FTOs”) under § 219 of the Immigration and Nationality Act (“INA”), as amended by the Intelligence Reform and Terrorism Prevention Act of 2004 (“IRTPA”), Pub. L. No. 108-458, 118 Stat. 3638 (2004), expose and isolate the designated terrorist organizations, deny them access to the U.S. financial system, and create significant criminal and immigration consequences for their members and supporters. FTO designations can also assist or complement the law enforcement actions of other U.S. agencies and governments. On April 30, 2020, the Department of State issued a statement by Secretary Pompeo commending Germany for taking action against Hizballah in its entirety as a terrorist organization and against Hizballah supporters. The press statement, available at <https://2017-2021.state.gov/united-states-commends-germany-for-banning-hizballah/>, also mentions recent actions against Hizballah by Argentina, Colombia, Honduras, Kosovo, Paraguay, and the United Kingdom, and urges other EU member states to join them in holding Hizballah accountable for its terrorist activities. On September 13, 2020, a State Department press statement, available at <https://2017-2021.state.gov/u-s-welcomes-serbias-intention-to-designate-hizballah-as-a-terrorist-organization/>, welcomed Serbia’s announcement that it would designate Hizballah. The October 24, 2020 State Department press statement welcoming Estonia’s actions against Hizballah, available at <https://2017-2021.state.gov/u-s-welcomes-estonias-action-against-hizballah/>, says that Estonia prohibited Hizballah affiliates from entering its territory, recognizing that Hizballah “is a terrorist organization in its entirety.” Also on October 24, 2020, the Department of State welcomed Guatemala’s designation of Hizballah (in its entirety) as a terrorist organization in a press statement, available at <https://2017-2021.state.gov/u-s-welcomes-guatemalas-designation-of-hizballah-as-a-terrorist-organization/>. The press statement on Guatemala’s designation also urges U.S. partner states “to designate Hizballah in its entirety, and to recognize that there is no distinction between its so-called ‘military’ and ‘political’ wings.” On December 4, 2020, the State Department commended Slovenia for designating Hizballah in its entirety as a terrorist organization in a press statement available at <https://2017-2021.state.gov/u-s-commends-slovenia-for-designating-hizballah/>.

(2) Foreign Terrorist Organizations

(i) New Designation

In 2020, the Secretary of State designated one additional organization as an FTO. On January 2, 2020, Secretary Pompeo designated Asa’ib Ahl al-Haq (“AAH”) and its associated aliases as an FTO. 85 Fed. Reg. 1369 (Jan. 10, 2020).

(ii) *Reviews of FTO Designations*

During 2020, 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 INA. See *Digest 2005* at 113–16 and *Digest 2008* at 101–3 for additional details on the IRTPA amendments and review procedures.

(3) *Terrorist Exclusion List*

On October 20, 2020, the Secretary revoked the designation of the Eastern Turkistan Islamic Movement, also known as ETIM, as a “terrorist organization” under Section 212(a)(3)(B)(vi)(II) of the INA, thereby removing ETIM from the Terrorist Exclusion List (“TEL”). 85 Fed. Reg. 70,703 (Nov. 5, 2020). See *Digest 2001* at 896, 904, 921–23 and the Bureau of Counterterrorism webpage at <https://www.state.gov/terrorist-exclusion-list/> regarding the TEL.

(4) *Rewards for Justice (RFJ) Office*

On April 10, 2020, the U.S. Department of State announced an RFJ reward offer of up to \$10 million for information on the activities, networks, and associates of Muhammad Kawtharani, a senior Hizballah military commander. The media note announcing the offer, available at <https://2017-2021.state.gov/reward-offer-for-information-on-hizballahs-financial-networks-muhammad-kawtharani/>, elaborates on the activities of Kawtharani:

Muhammad Kawtharani is a senior leader of Hizballah’s forces in Iraq and has taken over some of the political coordination of Iran-aligned paramilitary groups formerly organized by Qassim Sulemani after Sulemani’s death in January. In this capacity, he facilitates the actions of groups operating outside the control of the Government of Iraq that have violently suppressed protests, attacked foreign diplomatic missions, and engaged in wide-spread organized criminal activity. As a member of Hizballah’s Political Council, Kawtharani has worked to promote Hizballah’s interests in Iraq, including Hizballah efforts to provide training, funding, political, and logistical support to Iraqi Shi’a insurgent groups.

The U.S. Department of the Treasury designated Kawtharani as a Specially Designated Global Terrorist in 2013.

See *Digest 2019* at 76–79 for discussion of the RFJ reward offer, announced in April 2019, for information leading to the disruption of the financial mechanisms of the global terrorist organization Lebanese Hizballah.

On May 28, 2020, the U.S. Department of State announced an RFJ reward offer of up to \$3 million for information leading to the location or identification of Muhammad Khadir Musa Ramadan, a senior leader of and key propagandist for ISIS. The media note announcing the offer, available at <https://2017-2021.state.gov/rewards-for-justice-reward-offer-for-information-on-muhammad-ramadan/>, describes Ramadan's activities:

Also known as Abu Bakr al-Gharib, Ramadan was born in Jordan.

He is one of ISIS's longest-serving senior media officials and oversees the group's daily media operations, including the management of content from ISIS's dispersed global network of supporters.

Ramadan has played a key role in ISIS's propaganda operations to radicalize, recruit, and incite individuals around the globe. He has overseen the planning, coordination, and production of numerous propaganda videos, publications, and online platforms that included brutal and cruel scenes of torture and mass execution of innocent civilians.

On August 26, 2020, the State Department announced an RFJ program reward offer of up to \$5 million for information concerning the kidnappings of Mark Randall Frerichs and Paul Edwin Overby, Jr., who disappeared in Afghanistan. The media note, available at <https://2017-2021.state.gov/rewards-for-justice-reward-offer-for-information-on-kidnapping-of-mark-randall-frerichs-and-paul-edwin-overby-jr/>, provides background:

Mr. Overby was last seen in Khost, Afghanistan, near the border with Pakistan, in mid-May of 2014. At the time of his disappearance, he was conducting research for a book he was writing and it appeared that he planned to cross the border into Pakistan in furtherance of his work.

Mark Frerichs was kidnapped in early February 2020. At the time of his kidnapping, he resided in Kabul. He moved to Afghanistan in approximately 2010 and worked on construction projects throughout the country.

On October 23, 2020, the State Department issued a media note reiterating its 2019 RFJ reward offer for information on Hizballah's financial mechanisms and specifically highlighting Muhammad Qasir, Muhammad Qasim al-Bazzal, and Ali Qasir, as key financiers and facilitators within Hizballah. The media note, available at <https://2017-2021.state.gov/rewards-for-justice-up-to-10-million-reward-offer-for-information-on-hizballahs-financial-networks-muhammad-qasir-muhammad-qasim-al-bazzal-and-ali-qasir/>, provides the following information on these individuals:

Muhammad Qasir is a critical link between Hizballah and its primary funder, Iran. He has been a significant conduit for financial disbursements from Iran's Islamic Revolutionary Guard Corps-Qods Force (IRGC-QF) to Hizballah. Qasir and other Hizballah officials oversee several front companies to hide the IRGC-QF's role in

selling crude oil, condensate, and gas oil, thus evading U.S. sanctions related to the IRGC. Qasir also directs the Hizballah unit that assists in the transfer of weapons, technology and other support from Syria to Lebanon.

Muhammad Qasim al-Bazzal is a key financier for Hizballah and the IRGC-QF. He also is a co-founder of the Syria-based Talaqi Group and oversees other terrorist financing enterprises, such as Hokoul S.A.L. Offshore and Nagham Al Hayat. Since late 2018, al-Bazzal has used the Talaqi Group and his other companies to finance, coordinate and obscure various illicit IRGC-QF-linked oil shipments. Al-Bazzal also has overseen Talaqi Group's partnership with Lebanon-based ALUMIX for aluminum shipments to Iran.

Ali Qasir is the managing director of the Hizballah-linked front company Talaqi Group. Ali Qasir assigns maritime vessels to deliver shipments for the terrorist network based on the IRGC-QF's guidance. Ali Qasir has overseen sales price negotiations and collaborated to cover expenses and to facilitate an Iranian oil shipment by the Adrian Darya 1 for the benefit of the IRGC-QF. Ali Qasir represents the Lebanon-based Hokoul company in negotiations over its supply of Iranian crude to Syria. Additionally, Ali Qasir has worked with others to use the Talaqi Group to facilitate the sale of tens of millions of dollars' worth of steel.

All three individuals have previously been designated by the U.S. Department of the Treasury as Specially Designated Global Terrorists.

More information about reward offers is available on the RFJ website at www.rewardsforjustice.net.

2. Narcotics

a. Majors List Process

(1) International Narcotics Control Strategy Report

On March 2, 2020, the Department of State submitted the 2020 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 2019. 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 2020 INCSR is available at <https://www.state.gov/2020-international-narcotics-control-strategy-report/>.

(2) Major Drug Transit or Illicit Drug Producing Countries

On September 16, 2020, the White House issued Presidential Determination No. 2020-11, "Presidential Determination on Major Drug Transit or Major Illicit Drug Producing

Countries for Fiscal Year 2021.” 85 Fed. Reg. 60,351 (Sep. 25, 2020). In this year’s determination, the President named 22 countries as countries meeting the definition of a major drug transit or major illicit drug producing country: 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. 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 the Maduro regime in 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 that support the legitimate interim government in Venezuela and the government of Bolivia are vital to the national interests of the United States, thus ensuring that such U.S. assistance would not be restricted during fiscal year 2021 by virtue of § 706(3) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350.

On February 15, 2020, Deputy Secretary of State Stephen E. Biegun made the determination and certification relating to the largest exporting and importing countries of certain precursor chemicals, under Section 490(b)(1)(A) of the Foreign Assistance Act of 1961, as amended. 85 Fed. Reg. 14,720 (Mar. 13, 2020). The Federal Register notice states:

...I hereby determine and certify that the top five exporting and top five importing countries and economies of pseudoephedrine and ephedrine (France, Germany, India, Indonesia, Iran, China (PRC), Republic of Korea, Singapore, Switzerland, Taiwan, Turkey, and the United Kingdom) have cooperated fully with the United States, or have taken adequate steps on their own, to achieve full compliance with the goals and objectives established by the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

b. *Interdiction Assistance*

On July 17, 2020, the President of the United States again certified, with respect to Colombia (Presidential Determination No. 2020-09, 85 Fed. Reg. 45,751 (July 29, 2020)), 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) Colombia 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 includes 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. *Narcotics Rewards Program*

On March 26, 2020, the U. S. Department of State announced rewards under its Narcotics Rewards Program (“NRP”) for information leading to the arrest and/or conviction of Venezuelan nationals indicted in the United States for international narcotics trafficking. See State Department press statement, available at <https://2017-2021.state.gov/department-of-state-offers-rewards-for-information-to-bring-venezuelan-drug-traffickers-to-justice/>. Those subjects of the unsealed indictment by the Department of Justice and the reward offer are: Nicolás Maduro Moros, Diosdado Cabello Rondón, Hugo Carvajal Barrios, Clíver Alcalá Cordones, and Tareck Zaidan El Aissami Maddah. The reward offers are: up to \$15 million for information related to Nicolás Maduro Moros; and up to \$10 million each for information related to Diosdado Cabello Rondón (President of the illegitimate National Constituent Assembly), General (retired) Hugo Carvajal Barrios (former Director of Venezuela’s military intelligence), Clíver Alcalá Cordones (Major General (retired) in Venezuela’s Army), and Tareck Zaidan El Aissami Maddah (Minister for Industry and National Production).

On June 18, 2020, the U.S. Department of State announced rewards under the NRP up to \$10 million each for information leading to the arrest and/or conviction of Seuxis Hernandez-Solarte, aka “Jesus Santrich,” and Luciano Marin Arango, aka “Ivan Marquez.” The press statement announcing the rewards, available at <https://2017-2021.state.gov/department-of-state-offers-rewards-for-information-to-bring-colombian-drug-traffickers-to-justice/>, explains that “both are former senior leaders of the FARC who dropped out of the peace process and have a long history of involvement in drug trafficking activities, which resulted in their criminal indictments.”

3. *Trafficking in Persons*

a. *New executive order*

On January 31, 2020, President Trump issued Executive Order 13903, “Combating Human Trafficking and Online Child Exploitation in the United States.” 85 Fed. Reg. 6721 (Feb. 5, 2020). Excerpts follow from the order.

* * * *

Sec. 2. *Strengthening Federal Responsiveness to Human Trafficking.* (a) The Domestic Policy Council shall commit one employee position to work on issues related to combating human trafficking occurring into, from, and within the United States and to coordinate with personnel in other components of the Executive Office of the President, including the Office of Economic

Initiatives and the National Security Council, on such efforts. This position shall be filled by an employee of the executive branch detailed from the Department of Justice, the Department of Labor, the Department of Health and Human Services, the Department of Transportation, or the Department of Homeland Security.

(b) The Secretary of State, on behalf of the President's Interagency Task Force to Monitor and Combat Trafficking in Persons, shall make available, online, a list of the Federal Government's resources to combat human trafficking, including resources to identify and report instances of human trafficking, to protect and support the victims of trafficking, and to provide public outreach and training.

(c) The Secretary of State, the Attorney General, the Secretary of Labor, the Secretary of Health and Human Services, and the Secretary of Homeland Security shall, in coordination and consistent with applicable law:

(i) improve methodologies of estimating the prevalence of human trafficking, including in specific sectors or regions, and monitoring the impact of anti-trafficking efforts and publish such methodologies as appropriate; and

(ii) establish estimates of the prevalence of human trafficking in the United States.

Sec. 3. *Prosecuting Human Traffickers and Individuals Who Exploit Children Online.* (a) The Attorney General, through the Federal Enforcement Working Group, in collaboration with the Secretary of Labor and the Secretary of Homeland Security, shall:

(i) improve interagency coordination with respect to targeting traffickers, determining threat assessments, and sharing law enforcement intelligence to build on the Administration's commitment to the continued success of ongoing anti-trafficking enforcement initiatives, such as the Anti-Trafficking Coordination Team and the U.S.-Mexico Bilateral Human Trafficking Enforcement Initiatives; and

(ii) coordinate activities, as appropriate, with the Task Force on Missing and Murdered American Indians and Alaska Natives as established by Executive Order 13898 of November 26, 2019 (Establishing the Task Force on Missing and Murdered American Indians and Alaska Natives).

(b) The Attorney General and the Secretary of Homeland Security, and other heads of executive departments and agencies as appropriate, shall, within 180 days of the date of this order, propose to the President, through the Director of the Domestic Policy Council, legislative and executive actions that would overcome information-sharing challenges and improve law enforcement's capabilities to detect in real-time the sharing of child sexual abuse material on the internet, including material referred to in Federal law as "child pornography." Overcoming these challenges would allow law enforcement officials to more efficiently identify, protect, and rescue victims of online child sexual exploitation; investigate and prosecute alleged offenders; and eliminate the child sexual abuse material online.

Sec. 4. *Protecting Victims of Human Trafficking and Child Exploitation.* (a) The Attorney General, the Secretary of Health and Human Services, and the Secretary of Homeland Security, and other heads of executive departments and agencies as appropriate, shall work together to enhance capabilities to locate children who are missing, including those who have run away from foster care and those previously in Federal custody, and are vulnerable to human trafficking and child exploitation. In doing so, such heads of executive departments and agencies, shall, as appropriate, engage social media companies; the technology industry; State, local, tribal and territorial child welfare agencies; the National Center for Missing and Exploited Children; and law enforcement at all levels.

(b) The Secretary of Health and Human Services, in consultation with the Secretary of Housing and Urban Development, shall establish an internal working group to develop and incorporate practical strategies for State, local, and tribal governments, child welfare agencies, and faith-based and other community organizations to expand housing options for victims of human trafficking.

Sec. 5. *Preventing Human Trafficking and Child Exploitation Through Education Partnerships.* The Attorney General and the Secretary of Homeland Security, in coordination with the Secretary of Education, shall partner with State, local, and tribal law enforcement entities to fund human trafficking and child exploitation prevention programs for our Nation's youth in schools, consistent with applicable law and available appropriations.

* * * *

b. *Trafficking in Persons Report*

In June 2020, the Department of State released the 20th edition of the annual 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 2019 through March 2020 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 2020 report lists 19 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/reports/2020-trafficking-in-persons-report/>. Chapter 6 in this *Digest* discusses the determinations relating to child soldiers.

On June 25, 2020, Secretary Pompeo delivered remarks at the 2020 Trafficking in Persons Report launch ceremony. Their remarks are excerpted below and available at <https://2017-2021.state.gov/at-the-2020-trafficking-in-persons-report-launch-ceremony/>.

* * * *

Last year, President Trump restricted certain types of assistance to the governments of 15 countries that were ranked Tier 3—the lowest possible designation—in the 2019 TIP Report.

In January of this year, the President hosted a White House Summit on Human Trafficking. He signed an executive order to combat human trafficking, online child exploitation here in the United States.

This administration has ensured that nearly half a billion dollars is dedicated to the global fight against both sex and labor trafficking.

Today we continue this good work.

I'd like to share just a few highlights from this report, starting with some really good news:

Twenty-two countries received upgrade this year, 13 of them from Sub-Saharan Africa. Namibia received a Tier 1 rating—the best possible. It is the first and only African country to do so since 2012. Congratulations on that good work.

I also want to recognize Singapore—the report's other newly ranked Tier 1 country—and Bolivia for their progress to increase convictions and identify victims, among other significant improvements.

Unfortunately, the report also calls out a group of nations whose state-sponsored pattern[s] of forced labor have designated them in the Tier 3 category.

Among them are China, where the Chinese Communist Party and its state-owned enterprises often force citizens to work in horrendous conditions on Belt and Road projects.

Then there's Cuba. Up to 50,000 Cuban doctors have been forced by the Castro regime into human trafficking situations in more than 60 countries around the globe. They are the regime's number one source of income.

And in Central Asia, some governments have a long-standing history of compelling people to work in the cotton industry and other sectors.

Uzbekistan's significant efforts to address this are setting a new standard for others in the region.

We take government-sponsored trafficking very seriously. It's a perversion of any government's reason for existence: to protect rights, not crush them. The United States will not stand by as any government with a policy or pattern of human trafficking subjects its own citizens to this kind of oppression.

We will work tirelessly in the United States to free those who are still enslaved.

We will help restore the lives of those who have been freed.

And we will punish their tormentors.

* * * *

c. *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 September 28, 2020, the President issued a memorandum for the Secretary of State, “Presidential Determination With Respect to the Efforts of Foreign Governments Regarding Trafficking in Persons.” 85 Fed. Reg. 71,209 (Nov. 6, 2020). The President's memorandum conveys determinations concerning the countries that the 2020 Trafficking in Persons Report lists as Tier 3 countries. See Chapter 3.B.3.b., *supra*, for discussion of the 2020 report.

4. Money Laundering and Financial Crimes

a. Trilateral agreement for return of stolen assets to Nigeria

On February 3, 2020, the U.S. government, the Bailiwick of Jersey, and the Government of the Federal Republic of Nigeria signed an agreement for the return of more than \$308 million in stolen assets to the Nigerian people. Former Nigerian military dictator Sani Abacha stole the assets and hid them in foreign accounts. A February 4, 2020 State Department press statement announcing the agreement is available at <https://2017-2021.state.gov/return-of-stolen-assets-to-the-nigerian-people/> and includes the following:

The funds will be used by the Nigeria Sovereign Investment Authority for three infrastructure projects in strategic economic zones across Nigeria. To ensure that the funds are used responsibly and for the good of the nation, the agreement includes mechanisms for monitoring the implementation of these projects as well as external oversight, and it requires Nigeria to repay any funds lost as a result of any new corruption or fraud to the account established to hold the returned assets. This return reflects the growing international consensus that countries must work together to ensure stolen assets are returned in a transparent and accountable manner. It is also consistent with the commitments both the United States and Nigeria made under the principles agreed to at the 2017 Global Forum on Asset Recovery co-hosted by the United States and the United Kingdom.

This agreement is a symbol of the weight that the United States government places on the fight against corruption. We welcome President Buhari's personal commitment to that fight, and we will continue to support civil society and other Nigerian efforts to combat corruption at all levels. The fight against corruption is an investment in the future of Nigeria.

On February 3, 2020, the U.S. Department of Justice issued a press release on the trilateral agreement with Nigeria and Jersey, which is available at <https://www.justice.gov/opa/pr/us-enters-trilateral-agreement-nigeria-and-jersey-repatriate-over-300-million-nigeria-assets>. Excerpts follow from the Justice Department press release.

* * * *

The Department of Justice, on behalf of the U.S. government, has executed a trilateral agreement with the governments of the Federal Republic of Nigeria (Nigeria) and the Bailiwick of Jersey (Jersey) to repatriate to Nigeria approximately \$308 million traceable to the kleptocracy of former Nigerian dictator Sani Abacha and his co-conspirators.

In 2014, U.S. District Judge John D. Bates for the District of Columbia entered judgment forfeiting approximately \$500 million located in accounts around the world, as the result of a civil forfeiture complaint the Department of Justice filed against more than \$625 million traceable to money laundering involving the proceeds of Abacha's corruption. After appeals in the United States were exhausted in 2018, the government of Jersey enforced the U.S. judgment against over \$308 million located in that jurisdiction.

* * * *

The forfeited assets represent corrupt monies laundered during and after the military regime of General Abacha, who assumed the office of the president of the Federal Republic of Nigeria through a military coup on Nov. 17, 1993, and held that position until his death on June 8, 1998. The complaint alleges that General Abacha, his son Mohammed Sani Abacha, their associate Abubakar Atiku Bagudu and others embezzled, misappropriated and extorted billions from the government of Nigeria and others, then laundered their criminal proceeds through U.S. financial institutions and the purchase of bonds backed by the United States. Jersey's cooperation in the investigation, restraint and enforcement of the U.S. judgment, along with the valuable contributions of Nigeria and other law enforcement partners around the world, have been instrumental to the recovery of these funds.

Under the trilateral agreement signed today, the United States and Jersey will transfer 100 percent of the net forfeited assets to the Federal Republic of Nigeria to support three critical infrastructure projects in Nigeria that were previously authorized by Nigerian president Muhammadu Buhari and the Nigerian legislature. Specifically, the laundered funds under this agreement will help finance the construction of the Second Niger Bridge, the Lagos-Ibadan Expressway and the Abuja-Kano road—investments that will benefit the citizens of each of these important regions in Nigeria.

The agreement includes key measures to ensure the transparency and accountability, including administration of the funds and projects by the Nigeria Sovereign Investment Authority (NSIA), financial review by an independent auditor, and monitoring by an independent civil society organization with expertise in engineering and other areas. The agreement also precludes the expenditure of funds to benefit alleged perpetrators of the corruption or to pay contingency fees for lawyers. The agreement reflects the sound principles for ensuring transparency and accountability adopted at the Global Forum on Asset Recovery (GFAR) in December 2016 in Washington, D.C., which the United States and the United Kingdom (UK) hosted with support from the Stolen Asset Recovery Initiative of the World Bank and United Nations Office on Drugs and Crime.

In addition to the more than \$308 million forfeited in Jersey, the Department of Justice is seeking to enforce its forfeiture judgment against approximately \$30 million located in the UK and over \$144 million in France. The United States is also continuing to seek forfeiture of over \$177 million in additional laundered funds held in trusts that name Abacha associate Bagudu, the current governor of Kebbi State, and his relatives as beneficiaries. The United States has asked the government of Nigeria to withdraw litigation it has instituted in the UK that hinders the U.S. effort to recover these additional funds for the people of Nigeria. The United States entered into the trilateral agreement to repatriate the Jersey assets because of its longstanding commitment to recover asset for the benefit of those harmed by grand corruption and because of the important safeguards embodied in the agreement.

This case was brought under the Kleptocracy Asset Recovery Initiative by a team of dedicated prosecutors in the Criminal Division’s Money Laundering and Asset Recovery Section working in partnership with the FBI. Through the Kleptocracy Asset Recovery Initiative, the Department of Justice and federal law enforcement agencies seek to safeguard the U.S. financial system from criminal money laundering and to recover the proceeds of foreign official corruption. Where appropriate and possible, the department endeavors to use recovered corruption proceeds to benefit the people harmed by acts of corruption and abuse of public trust.

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b. Iran

On February 21, 2020, the State Department issued a press statement commending the Financial Action Task Force (“FATF”) on its call for all jurisdictions to swiftly enact measures to counter the terrorist financing threats emanating from Iran. The press statement, available at <https://2017-2021.state.gov/united-states-commends-fatf-for-re-imposition-of-countermeasures-on-iran/>, includes the following:

Since Iran’s FATF action plan expired in 2018, Iran has failed to fulfill its commitments to adhere to the FATF’s anti-money laundering and combating the financing of terrorism standards, including ratifying the UN Palermo and Terrorist Financing Conventions. The regime needs to adhere to the basic standards that virtually every other country in the world agrees to. Iran must cease its reckless behavior and act like a normal nation if it wants its isolation to end.

c. Counterfeit Libyan currency printed by Russian state-owned company

On May 29, 2020, the State Department issued a press statement commending the Government of the Republic of Malta on its seizure of \$1.1 billion of counterfeit Libyan currency printed by Joint Stock Company Goznak—a Russian state-owned company. The press statement is available at <https://2017-2021.state.gov/seizure-by-malta-of-1-1-billion-of-counterfeit-libyan-currency/>, and further explains that the incident is part of an influx of counterfeit, Russian-printed Libyan currency in recent years that has exacerbated Libya’s economic problems and detracted from the authority of the Central Bank of Libya in Tripoli as Libya’s only legitimate central bank.

d. Repeal of FinCEN finding and special measure against Banco Delta Asia

On August 10, 2020, the Financial Crimes Enforcement Network (“FinCEN”) withdrew its finding that Banco Delta Asia (“BDA”) is a financial institution of primary money laundering concern, pursuant to Section 311 of the USA PATRIOT Act (Section 311). 85 Fed. Reg. 48,104 (Aug. 10, 2020). FinCEN also repealed the related rulemaking, published March 19, 2007, imposing the fifth special measure against BDA. 85 Fed. Reg.

48,105 (Aug. 10, 2020). Excerpts follow from the Federal Register notice repealing the measures.

In addition to petitioning FinCEN to withdraw the Final Rule, BDA filed suit on March 14, 2013, in the United States District Court for the District of Columbia challenging the Notice of Finding and the Final Rule. This litigation was stayed for many years so that ... dialogue ... could continue. Both FinCEN and BDA have since agreed that there are advantages to FinCEN's revisiting the Final Rule and to settling this litigation. This course of action allows BDA to submit any remaining additional comments and permits FinCEN to take stock of the present circumstances and, if appropriate, to avail itself of the informal rulemaking process (providing the public with an opportunity for notice and comment, in contrast to action on a petition) if it decides to take further action. As part of this settlement, FinCEN has agreed to reassess whether BDA is presently a financial institution of primary money laundering concern. BDA will be permitted to submit comments to FinCEN regarding the September 26, 2019, petition denial prior to FinCEN's engaging in any additional Section 311 rulemaking involving BDA.

In the event that FinCEN determines that the imposition of any special measures may be warranted, it will undertake a new rulemaking effort (including the publication of a new notice of proposed rulemaking). Any such proposed rule will allow for 30 days of comment, and as part of the rulemaking proceeding, FinCEN will make available for comment the unclassified, non-protected material relied upon by FinCEN in connection with any such rulemaking. If FinCEN determines that a final rule is appropriate, FinCEN will publish such a final rule 60 days following the close of the comment period. If the extent of submitted comments requires additional time, or if COVID-19-related issues hinder the agency's ability to satisfy the proposed timeframes, FinCEN will so announce in the Federal Register.

e. *Renewal of FinCEN measure regarding Bank of Dandong*

The U.S. Department of the Treasury, Financial Crimes Enforcement Network ("FinCEN") issued a final rule on November 8, 2017, imposing the fifth special measure to prohibit covered U.S. financial institutions from opening or maintaining a correspondent account for, or on behalf of, Bank of Dandong. The rule further requires covered U.S. financial institutions to apply due diligence to their correspondent accounts that is reasonably designed to guard against their use by Bank of Dandong. It also requires covered institutions to apply special due diligence to their foreign correspondent accounts that is reasonably designed to guard against their use to process transactions involving Bank of Dandong. See *Digest 2017* at 74-76. On August 10, 2020, FinCEN published a notice and request for comments on the renewal of the special measure concerning Bank of Dandong as a financial institution of primary money laundering concern. 85 Fed. Reg. 48,327 (Aug. 10, 2020).

5. Organized Crime

On June 1, 2020, the State Department announced a reward offer in the Transnational Organized Crime Rewards Program (“TOCRP”) for information on Venezuelan national, Joselit de la Trinidad Ramirez Camacho. The press statement announcing the reward offer is available at <https://2017-2021.state.gov/transnational-organized-crime-rewards-program-offer-for-information-to-bring-venezuelan-national-to-justice/>, and describes the transnational organized criminal activity of Ramirez Camacho as follows:

The Department is offering a reward of up to \$5 million for information leading to the arrest and/or conviction of Joselit de la Trinidad Ramirez Camacho for participating in transnational organized crime. While holding public positions in the Venezuelan regime, Ramirez Camacho violated the public trust by conspiring to launder illicit funds obtained in Venezuela. Ramirez Camacho, the current National Superintendent of Cryptoactive and Related Activities in the Maduro regime, was charged by indictment, along with former Venezuelan Vice-President Tareck El-Aissami, in the Southern District of New York with several transnational crimes, including money laundering.

On July 22, 2020, the State Department announced a TOCRP offer of up to \$1 million each for information leading to the arrests and/or convictions of Ukrainian nationals Artem Viacheslavovich Radchenko and Oleksandr Vitalyevich Ieremenko for participating in transnational organized crime, specifically cybercrime. The press statement announcing the offer, available at <https://2017-2021.state.gov/transnational-organized-crime-rewards-program-offer-for-information-to-bring-ukrainian-nationals-to-justice/>, provides background on the Ukrainian nationals:

In January 2019, a U.S. Secret Service led investigation resulted in a 16-count indictment against Radchenko and Ieremenko, charging them with securities fraud conspiracy, wire fraud conspiracy, computer fraud conspiracy, wire fraud, and computer fraud. The indictment alleges Radchenko and Ieremenko hacked the Security and Exchange Commission’s (SEC) Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system and stole thousands of confidential files, which were then illegally sold for profit. The SEC has also filed a civil complaint charging Ieremenko and other individuals and entities.

On October 8, 2020, the U.S. Department of State announced a TOCRP reward of up to \$5 million for information leading to the arrest and/or conviction of Venezuelan national Samark Jose Lopez Bello for participating in transnational organized crime. The media note making the announcement is available at <https://2017-2021.state.gov/transnational-organized-crime-rewards-program-requests-information-to-bring-venezuelan-national-to-justice/>, and excerpted below.

This offer is made in connection with the announcements of reward offers up to \$10 million for former Venezuelan Vice President Tareck Zaidan El-Aissami Maddah on March 26, 2020 and up to \$5 million for National Superintendent of Cryptocurrencies in the Maduro regime Joselit de la Trinidad Ramirez Camacho on June 1, 2020. Lopez Bello worked with others in an effort to violate and evade OFAC sanctions imposed pursuant to the Foreign Narcotics Kingpin Designation Act and related regulations. He was charged by indictment, along with El-Aissami and Ramirez, in the Southern District of New York with several transnational crimes.

On October 13, 2020, the U.S. Department of State announced a reward of up to \$1 million under the TOCRP for information leading to the arrest and/or conviction of Jose Rodolfo Villarreal-Hernandez. The press statement announcing the reward offer is available at <https://2017-2021.state.gov/department-of-state-offers-reward-for-information-to-bring-mexican-transnational-criminal-to-justice/>, and includes the following further information:

Jose Rodolfo Villarreal-Hernandez has been a high-ranking member of the Beltran-Leyva Organization (BLO) Drug Cartel with specific responsibility for maintaining control of the San Pedro Garza Garcia/Monterrey Plazas. In this role, Villarreal-Hernandez oversees an organization responsible for the importation of cocaine and marijuana into the United States, and commits violent acts within Mexico and the United States to maintain his organization's power and status. Villarreal-Hernandez is currently charged in the United States for his role in directing a cartel-related murder-for-hire of a Mexican defense attorney in the Dallas suburb of Southlake, Texas, in 2013.

6. International Crime Issues Relating to Cyberspace

a. UK CLOUD Agreement

As discussed in *Digest 2019* at 95-96, the United States concluded its first agreement under the Clarifying Lawful Overseas Use of Data Act ("CLOUD Act") with the United Kingdom. The CLOUD Act requires that the Attorney General, with the concurrence of the Secretary of State, determine that the United Kingdom satisfies the CLOUD Act's requirements with respect to human rights and rule of law protections and that the Agreement itself meets the rigorous requirements of the CLOUD Act. On January 16, 2020, the Department of Justice transmitted to Congress notification that the Attorney General, with the concurrence of the Secretary of State, had certified that the requirements of the CLOUD Act are satisfied with respect to the agreement with the United Kingdom. The notification is available at <https://www.justice.gov/dag/page/file/1236281/download>.

b. *Criminal charges against Russian military intelligence officers for cyber crimes*

On October 19, 2020, the Department of Justice (“DOJ”) and Federal Bureau of Investigation (“FBI”) announced criminal charges against six officers of the Russian General Staff Main Intelligence Directorate’s (“GRU”) Military Unit 74455. See Department of State press statement, available at <https://2017-2021.state.gov/united-states-charges-russian-military-intelligence-officers-for-cyber-crimes/>. The press statement summarizes the charges as follows:

... this Russian military intelligence unit unleashed some of the most destructive malware the world has seen. The 2017 NotPetya cyber attack, which we publicly attributed previously to Russian military intelligence, was launched in Ukraine and caused billions of dollars in damage across Europe, Asia, and the Americas. The GRU’s action disrupted the delivery of critical infrastructure services to the public, including in the transportation and healthcare sectors.

Meanwhile, the GRU’s targeting of the 2018 PyeongChang Winter Olympics, after Russia was penalized for anti-doping violations, shows Russia’s willingness to use cyber capabilities to lash out at those who would hold it accountable for its malign behavior. Another GRU cyber attack described in the indictment resulted in the disruption of critical electrical distribution networks and financial services in Ukraine. Additional malicious cyber activities included in the indictment targeted organizations investigating the 2018 nerve agent poisoning of Sergei Skripal and others in the UK. Finally, the indictment describes GRU malicious cyber activity targeting government entities and private companies in Georgia and elections in France.

The statement further calls on Russia to put an end to its irresponsible behavior and on other states to promote greater stability in cyberspace by helping bring the Russian actors charged to justice.

c. *Rewards for Justice*

On August 5, 2020, the U.S. Department of State announced an RFJ reward offer of up to \$10 million for information leading to the identification or location of any person who works with or for a foreign government for the purpose of interfering with U.S. elections through certain illegal cyber activities. The media note announcing the reward offer, available at <https://2017-2021.state.gov/rewards-for-justice-reward-offer-for-information-on-foreign-interference-in-u-s-elections/>, further states:

The reward offer seeks information on the identification or location of any person who, while acting at the direction of or under the control of a foreign government, interferes with any U.S. federal, state, or local election by aiding or abetting a violation of section 1030 of title 18, which relates to computer fraud

and abuse. The Rewards for Justice program is administered by the Diplomatic Security Service.

Persons engaged in certain malicious cyber operations targeting election or campaign infrastructure may be subject to prosecution under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, which criminalizes unauthorized computer intrusions and other forms of fraud related to computers. Among other offenses, the statute prohibits unauthorized accessing of computers to obtain information and transmit it to unauthorized recipients.

C. INTERNATIONAL TRIBUNALS AND OTHER ACCOUNTABILITY MECHANISMS

1. General

Ambassador-at-Large for Global Criminal Justice Morse Tan contributed an opinion piece to *The Hill*, which was published on September 18, 2020, and is available at <https://thehill.com/opinion/international/517049-americans-can-be-proud-of-our-record-on-promoting-global-justice>. The piece, entitled “Americans can be proud of our record on promoting global justice,” is excerpted below.

* * * *

Supporters of the International Criminal Court like to portray it as the best and only venue through which the free world can seek justice for perpetrators of mass atrocities and war crimes. The United States’ incredible, superior record of pursuing and achieving justice is rarely mentioned. But it should be.

More than the ICC or any other international court, the United States continues to lead the world to pursue justice. Justice remains at the core of America’s ideals, as our Declaration of Independence and our Constitution affirm. Americans have worked for decades not only to hold those responsible for mass atrocities to account but also to prevent and mitigate such horrors.

It was the United States that led efforts to put war criminals on trial after WWII. In the Nuremberg and Tokyo Trials, the United States led in establishing the courts and prosecuting the cases against German and Japanese officials for war crimes and crimes against humanity.

The principles underpinning these trials spawned the creation of the U.S. Department of State’s Office of War Crimes Issues (now the Office of Global Criminal Justice) in 1997, which I am now honored to lead. This office is committed to pursuing justice regarding genocide, crimes against humanity, and war crimes in partnership with other countries, international organizations, and the NGO community.

The Trump Administration has been particularly assertive in continuing to promote accountability. In August 2017, the Trump Administration made the historic determination that ISIS was responsible for genocide against Yezidis, Christians, and Shia Muslims, and crimes against humanity and ethnic cleansing against these same groups and Sunni Muslims, Kurds, and other minorities. The following November, the Administration concluded that ethnic cleansing

took place against Rohingya in northern Rakhine State in Burma, increasing pressure on the Burmese government to promote accountability for mass atrocities.

Secretary Pompeo has continued this record. For example, he has consistently emphasized U.S. support for the Kosovo Specialist Chambers, which is doing essential work to deliver justice to victims of international crimes committed in Kosovo during and after the conflict 1990s.

Moreover, in September 2019, he declared the Assad regime in Syria was responsible for many atrocities, including some that rise to the level of war crimes and crimes against humanity. These include chemical weapons, extrajudicial killings, torture, forced disappearances, and other inhumane acts.

In February of this year, Secretary Pompeo publicly designated the current Commander of the Sri Lanka Army and Acting Chief of Defense Staff, Lieutenant General Shavendra Silva, for his involvement in gross violations of human rights, namely extrajudicial killings, during the final days of Sri Lanka's civil war in 2009.

These are no small gestures. Designations come with visa restrictions underscoring our concern over impunity for human rights violations and our support for accountability.

Through GCJ's War Crimes Rewards Program, the United States is also the only country that offers financial rewards for information that leads to the arrest of certain individuals wanted by international or hybrid tribunals for war crimes, genocide, or crimes against humanity. Over the life of the program, we have contributed to the arrest of more than 20 individuals accused of terrible crimes.

My office is currently focusing on six individuals wanted by the International Residual Mechanism for Criminal Tribunals for their roles in the 1994 genocide in Rwanda. Our work gets results: Félicien Kabuga, arrested near Paris in May after 26 years at large, was designated under the Rewards Program. Kabuga was the chief financier and a major instigator of the Rwandan genocide.

With bipartisan Congressional support, GCJ has allocated \$5 million for grants supporting efforts to collect and catalog evidence to be used in various courts, from international tribunals to national courts, including trials currently underway in Germany against alleged members of ISIS and the Assad regime.

The State Department's financial and diplomatic support for the Central African Republic Special Criminal Court and the Hybrid Court for South Sudan provide other concrete examples where the United States has provided substantial support for accountability and justice.

We Americans will continue to pursue justice and get results, just as we've done for decades.

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2. International Criminal Court

a. General

Ambassador Richard Mills, U.S. deputy permanent representative to the UN, delivered the U.S. explanation of position on November 2, 2020 on the adoption of a UN General Assembly resolution on the International Criminal Court ("ICC"). Ambassador Mills's remarks are excerpted below and available at <https://usun.usmission.gov/explanation->

[of-position-on-the-adoption-of-a-un-general-assembly-resolution-on-the-international-criminal-court/](#).

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The United States has historically been, and will continue to be, a strong supporter of meaningful accountability and justice for victims of atrocities through appropriate and legitimate mechanism. Perpetrators of atrocities must face justice, but we must also be careful to recognize the right tool for each situation.

The United States reiterates its continuing, longstanding, principled objection to any attempt to assert 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.

The U.S. Government seeks to protect U.S. personnel from unjust and illegitimate prosecution by the ICC, which threatens U.S. sovereignty, purports, without our consent, to judge our highly robust and transparent national judicial system, and we believe poses a danger to the United States and our allies and partners. The ICC's past conduct, including its disregard for the sovereignty of non-Parties to the Rome Statute and its ingrained institutional weaknesses, have led the United States to conclude that major changes are needed, such as an amendment to the Rome Statute regarding jurisdiction.

I have heard the remarks of fellow delegates with interest, frustration, sadness. Let me tell everyone, the U.S. remains a leader in the fight to end impunity and supports justice and accountability for international crimes, including war crimes, crimes against humanity, genocide. The United States respects the decision of those nations that have chosen to join the ICC, and in turn, we expect and demand that our own national decision not to join and not to place our citizens under the court's jurisdiction also be respected.

Since the ICC has flagrantly disregarded our position, the United States disassociates itself from consensus on this resolution.

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b. *Afghanistan*

On March 5, 2020, the ICC Appeals Chamber authorized an investigation into activities of the Taliban and U.S. and Afghan personnel related to Afghanistan. The United States strongly objected to this step, including in a March 5, 2020 State Department press statement, available at <https://2017-2021.state.gov/icc-decision-on-afghanistan/>. As explained in the press statement, the ICC's decision followed shortly after the United States signed a peace deal on Afghanistan and the Afghan government also objected to the ICC investigation. Secretary Pompeo also delivered remarks to the press on March 5, 2020, available at <https://2017-2021.state.gov/secretary-pompeos-remarks-to-the-press/>, denouncing the ICC Appeals Chamber decision.

Secretary Pompeo held a press availability with Secretary of Defense Mark Esper, Attorney General William Barr, and National Security Advisor Robert O'Brien on June 11,

2020, to further respond to the ICC investigation related to Afghanistan. The remarks of these U.S. government officials are excerpted below and available at <https://2017-2021.state.gov/secretary-michael-r-pompeo-at-a-press-availability-with-secretary-of-defense-mark-esper-attorney-general-william-barr-and-national-security-advisor-robert-obrien/>.

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Many of you might recall back in November of 2017, the Court's Office of the Prosecutor announced its intention to investigate our brave warriors for alleged crimes arising from counterterrorism missions in Afghanistan.

It wasn't a prosecution of justice. It was a persecution of Americans.

The ICC cannot subject Americans to arrest, prosecution, and jail. The U.S. is not a party to the Rome Statute that created the ICC.

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We have responded ... by condemning the investigation, by suspending cooperation with the court, and denying visas to those most directly responsible for going after our personnel.

We welcomed growing criticism and calls to reform the court from countries like the UK, Germany, and Japan.

For a time, it looked like the ICC might do the right thing and kill the investigation. But last spring, the Pre-Trial Chamber unanimously rejected the prosecutor's request to open the investigation.

But unfortunately, then in the spring, in March, the Appeals Chamber overturned that sound judgment and gave a green light to the current investigation, effectively eliminating constraints on the prosecutor's office ability to launch new investigations of Americans in the future.

We cannot, we will not stand by as our people are threatened by a kangaroo court.

And indeed, I have a message to many close allies around the world: Your people could be next, especially those from NATO countries who fought terrorism in Afghanistan right alongside of us.

We're also gravely concerned about the threat the court poses to Israel.

The ICC is already threatening Israel with an investigation of so-called war crimes committed by its forces and personnel in the West Bank and in the Gaza Strip.

Given Israel's robust civilian and military legal system and strong track record of investigating and prosecuting wrongdoing by military personnel, it's clear the ICC is only putting Israel in its crosshairs for nakedly political purposes. It's a mockery of justice.

More than 300 members of Congress—Republicans and Democrats alike—recently sent me letters asking that the United States support Israel in the face of the ICC's lawless, politicized attacks.

That's what the U.S. is dead set on doing, and with good reason. They're a trusted and wonderful partner and a buttress of American security. If a rogue court can intimidate our friend or any other ally into abrogating its right to self-defense, that puts Americans at risk as well.

Absent corrective action, we can expect the ICC will continue its present, reckless course.

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The Trump Administration is taking the following actions:

First, we're authorizing the imposition of economic sanctions against ICC officials directly engaged in the ICC efforts to investigate U.S. personnel or allied personnel against that allied state's consent, and against others who materially support such officials' activities. Designations will be made on a case-by-case basis against specific individuals or entities.

And second, the United States is expanding visa restrictions for officials directly engaged in those same investigations. We're extending and expanding these restrictions to include their family members.

It gives us no joy to punish them. But we cannot allow ICC officials and their families to come to the United States to shop and travel and otherwise enjoy American freedoms as these same officials seek to prosecute the defender of those very freedoms.

I'll close by saying this: Never forget the American commitment to real justice and accountability.

From the Nuremberg and Tokyo trials after World War II to the more recent Yugoslavia and Rwanda tribunals, the United States has always sought to uphold good and punish evil under international law. We will continue to do so.

When our own people do wrong, we lawfully punish those individuals—as rare as they are—who tarnish the reputation of our great U.S. military and our intelligence services.

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SECRETARY ESPER: ...

Good morning, everyone, and thank you for being here for this important announcement. Today the President took necessary and decisive action with an executive order that will protect American citizens and our nation's sovereignty and defend our national security interests and those of our allies.

The International Criminal Court's efforts to investigate and prosecute Americans are inconsistent with fundamental principles of international law and the practice of international courts. As the executive order notes, the United States is not a party to the Rome Statute that created the ICC, nor have we ever accepted its jurisdiction over our personnel.

That is why our nation and this administration will not allow American citizens who have served our country to be subjected to illegitimate investigations. Instead, we expect information about alleged misconduct by our people to be turned over to U.S. authorities so that we can take the appropriate action, as we have consistently done so in the past.

The United States maintains the sovereign right and obligation to properly investigate and address any of our personnel's alleged violations of the laws of war. We have a proven record of doing just that through an American justice system that is eminently capable of handling each cases. This includes investigating and prosecuting the alleged abuse of detainees or any other misconduct. Ultimately, our justice system ensures that our people are held to account under the United States Constitution, not the International Criminal Court or other overreaching intergovernmental bodies.

Moreover, there is no other force more disciplined and committed to compliance with the laws of war than the United States military, which has made lasting contributions to the cause of

justice and accountability in armed conflict. For example, our military led prosecutions in historic international military tribunals, including at Nuremberg, as Secretary Pompeo mentioned, in addition to providing critical support to the International Criminal Tribunal for the Former Yugoslavia.

We have consistently provided training on the rule of law and given related assistance to scores of partners and allies around the globe. Additionally, since our founding, the United States military has fought to liberate the oppressed and defeat the enemies of justice, from Tripoli to Normandy and from Korea to Kandahar.

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AMBASSADOR O'BRIEN: ...

As my colleagues made clear and as General Barr will make clear, we are here today to defend American sovereignty and the American people who serve our great nation. The ICC's effort to target American servicemen and women and other public servants are unfounded, illegitimate, and make a mockery of justice. ...

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ATTORNEY GENERAL BARR: Thank you. I'm pleased to join my colleagues today in support of the President's action against the International Criminal Court. The ICC's recent decision to authorize an investigation into the conduct of U.S. personnel who were fighting to defeat terrorists in Afghanistan and bring peace and prosperity to the Afghan people validates our longstanding concerns about the ICC.

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The United States, as has been mentioned, has never consented to ICC jurisdiction. Worse yet, we are concerned that foreign powers, like Russia, are also manipulating the ICC in pursuit of their own agenda. The measures announced today are an important first step in holding the ICC accountable for exceeding its mandate and violating the sovereignty of the United States.

The U.S. Government has reason to doubt the honesty of the ICC. The Department of Justice has received substantial, credible information that raises serious concerns about a long history of financial corruption and malfeasance at the highest levels of the office of the prosecutor. This information calls into question the integrity of the ICC's investigations. This includes information going back many years about multiple matters, including recent matters, and that has, in our view, may well have a bearing on the current investigation announced by the ICC.

The Department of Justice, together with partners across the United States Government, is investigating, and we are committed to uncovering and if possible holding people accountable for their wrongdoing – any wrongdoing – that we may find.

The executive actions announced here will ensure that those who assist the ICC's politically motivated investigation of American service members and intelligence officers without the United States' consent will suffer serious consequences. The Department of Justice

fully supports these measures and will vigorously enforce the sanctions imposed today under the executive order to the fullest extent of the law.

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As discussed in the joint press availability *supra*, the President issued E.O. 13928 of June 11, 2020, which authorizes sanctions in response to the ICC's actions. 85 Fed. Reg. 36,139 (June 15, 2020). The order authorizes sanctions on:

(i) any foreign person determined by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General:

(A) to have directly engaged in any effort by the ICC to investigate, arrest, detain, or prosecute any United States personnel without the consent of the United States;

(B) to have directly engaged in any effort by the ICC to investigate, arrest, detain, or prosecute any personnel of a country that is an ally of the United States without the consent of that country's government;

(C) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any activity described in subsection (a)(i)(A) or (a)(i)(B) of this section or any person whose property and interests in property are blocked pursuant to this order; or

(D) 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.

In September, sanctions were imposed under E.O. 13928 on ICC Prosecutor Fatou Bensouda for having directly engaged in an effort to investigate U.S. personnel, and the ICC's Head of the Jurisdiction, Complementarity and Cooperation Division Phakiso Mochochoko for having materially assisted Prosecutor Bensouda. See State Department press statement, available at <https://2017-2021.state.gov/actions-to-protect-u-s-personnel-from-illegitimate-investigation-by-the-international-criminal-court/>. See also Secretary Pompeo's remarks on the sanctions, available at <https://2017-2021.state.gov/secretary-michael-r-pompeo-at-a-press-availability-12/>.*

c. Libya

On May 5, 2020, Minister Counselor Mark Simonoff of the U.S. Mission to the UN, delivered remarks at a UN Security Council briefing on the situation in Libya. His statement follows and is available at <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-situation-in-libya-via-vtc/>.

* Editor's note: On April 2, 2021, the Secretary of State announced termination of sanctions previously imposed on certain ICC officials. See April 2, 2021 press statement, available at <https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/>.

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It is shameful that several of the most notorious perpetrators of crimes against the Libyan people this past decade continue to enjoy impunity. Saif al-Islam Qadhafi, Mahmoud al-Werfalli, Al-Tuhamy Mohamed Khaled, and Abdullah al-Senussi should face justice for their alleged crimes. We call on those who harbor Saif al-Islam Qadhafi and Mahmoud al-Werfalli to deliver them to Libyan authorities immediately. We also call on those who shelter Al-Tuhamy Mohamed Khaled, the former head of Libya's notorious Internal Security Agency, to end their protection of this perpetrator. We are monitoring the status of the Supreme Court of Libya's case against Abdullah Al-Senussi.

Accountability for the architects of Libya's darkest days would bring justice to the victims of these atrocities and their families and help ensure they are not forgotten. It would also deliver a powerful deterrent message to potential future abusers – and to those involved in the current conflict who may be guilty of atrocities. The U.S. government continues to receive other reports of human rights abuses in Libya occurring today. Accounts include arbitrary killings, forced disappearances, unlawful detention, torture, human trafficking, and sexual violence. The conflict in Libya is destabilizing the region, and has displaced many, including migrants and refugees.

Libyan militia groups and security forces on all sides – as well as their international backers – stand accused of perpetrating these human rights abuses. We are deeply alarmed and continue to call for de-escalation and a ceasefire to end these abuses and permit Libyans to address the threat posed by the COVID-19 pandemic. Libya's political and security instability has created an environment conducive to the commission of human rights abuses. In an effort to address this environment, the United States continues to oppose foreign military intervention in Libya and support a rapid return to a political process, and we thank Acting Special Representative Stephanie Williams and her team for their ongoing efforts to secure a negotiated political solution to the crisis.

The United States has historically been, and will continue to be, a strong supporter of meaningful accountability and justice for victims of atrocities through appropriate mechanisms. Perpetrators of atrocity crimes must face justice, but we must also be careful to use the right tools for each situation.

I must reiterate our longstanding and principled objection to any assertion of ICC jurisdiction over nationals of States that are not party to the Rome Statute, absent a UN Security Council referral or the consent of such States. Our concerns regarding the ICC and the situation in Afghanistan are well-known. Our position on the ICC in no way diminishes the United States' commitment to supporting accountability for atrocity crimes, violations of international humanitarian law, and gross violations of human rights.

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Ambassador Mills addressed the UN Security Council at a briefing on the situation in Libya on November 10, 2020. His remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-situation-in-libya-via-vtc-4/>.

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The United States is concerned about crimes and human rights abuses in Libya, including violence against civilians and atrocities in Tarhouna, that we have just heard described in the briefing. But there are long outstanding crimes that also must be accounted for expeditiously.

Accountability for the architects of Libya's darkest days would bring justice to the victims of these atrocities and their families and help ensure they are not forgotten. It would also strengthen the durability of the inclusive, negotiated political agreement we hope is in the future, because it would deliver a powerful deterrent message to potential abusers, and to those involved in the current conflict who may have committed abuses and atrocities—that there is no place for the perpetration of atrocities and other human rights abuses, in Libya's future.

For that reason, the United States supported the recent announcement of economic sanctions from the European Union against Mahmoud al-Werfalli for the human rights abuses he has committed against Libyans.

The U.S. Government continues to receive reports of atrocities and other human rights abuses in Libya that are happening now. Accounts include arbitrary killings, forced disappearances, unlawful detention, torture, and sexual and gender-based violence. The conflict in Libya is destabilizing to the region and has displaced many. A culture of impunity has prolonged the conflict by enabling human rights abuses against Libyans.

The United States is further concerned by reports of violence against peaceful protestors this past August in Zawiya, Tripoli, and Hun. We support UNSMIL's call for an investigation into the reports of the use of excessive force against protestors. Libyans must be allowed to exercise their right to peaceful assembly.

We also express concern about the mines and booby traps in the outskirts of Tripoli and the reports of a massacre of migrants in Mizda.

The United States shares the horror of Libyans' and the international community at the discovery of mass graves and of bodies showing signs of torture near Tarhouna. We support immediate efforts by the Libyan government and international bodies to investigate these abuses and bring the perpetrators to justice.

Specifically, Mohammed al-Kani and the Kaniyat militia is one of the most egregious abusers of human rights in Libya and has carried out enforced disappearances, torture, and killings in Tarhouna. The United States will nominate al-Kani and the Kaniyat militia to the 1970 Libya Sanctions Committee for designation shortly. These designations would be a strong message from the Security Council for Libyan authorities and the international community to take meaningful enforcement action against human rights violators, and to end the culture of impunity in Libya that is fueling the conflict.

Libyan armed groups and security forces on all sides—as well as their international backers—stand accused of perpetrating and enabling human rights abuses. These actions are unacceptable. The United States welcomes the creation of an international fact-finding mission to document atrocities and other human rights abuses in Libya, and we strongly urge that the Fact-Finding Mission be granted full access throughout Libya.

We join our colleagues on the Council in welcoming the October 23 announcement of the nationwide Libyan ceasefire, facilitated by the UN Acting Special Representative Stephanie

Williams, and we will press to ensure that it leads to an end to these abuses, facilitates efforts to bring the perpetrators to justice, and permits the Libyan people to find a lasting, political solution to this conflict.

The United States continues to oppose all foreign military intervention in Libya and supports the UN's efforts to convene the Libyan Political Dialogue Forum this week in Tunis for in-person discussions aimed at determining a new executive authority to prepare for national elections. We thank UN Acting Special Representative Stephanie Williams and her team for their ongoing efforts in this regard.

The United States has been, historically, and will continue to be, a strong supporter of meaningful accountability and justice for victims of atrocities through appropriate mechanisms. Perpetrators of atrocity crimes must face justice, but we must also be careful to use the right tools for each situation.

I have heard my colleagues mention the United States' view and position on the ICC, so let me close by reiterating our longstanding and principled objection to any assertion of ICC jurisdiction over nationals of States that are not party to the Rome Statute, absent a UN Security Council referral or the consent of such States. . . . Our concerns regarding the ICC and the situation in Afghanistan are well-known.

Our position on the ICC in no way diminishes the United States' commitment to supporting accountability for these crimes, these atrocities, these violations of international humanitarian law, and we will continue to be an advocate for justice.

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d. Israel

The State Department issued a press statement on May 15, 2020 condemning the ICC prosecutor's assertion of jurisdiction over Israel, which is not a party to the Rome Statute. The statement, available at <https://2017-2021.state.gov/the-international-criminal-courts-illegitimate-prosecutions/>, elaborates:

On April 30, the ICC Prosecutor re-affirmed her attempt to exercise jurisdiction over the West Bank, East Jerusalem, and Gaza through a new filing to the Court. As we made clear when the Palestinians purported to join the Rome Statute, we do not believe the Palestinians qualify as a sovereign state, and they therefore are not qualified to obtain full membership, or participate as a state in international organizations, entities, or conferences, including the ICC.

Seven states that are party to the Rome Statute—Australia, Austria, Brazil, Czech Republic, Germany, Hungary, and Uganda—have made formal submissions to the Court that assert that the ICC does not have jurisdiction to proceed with this investigation. We concur. A court that attempts to exercise its power outside its jurisdiction is a political tool that makes a mockery of the law and due process.

e. Sudan

On June 10, 2020, Minister Counselor Mark Simonoff delivered remarks for the U.S. Mission to the UN at a UN Security Council briefing by the ICC prosecutor on Sudan. Mr. Simonoff's remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-by-the-international-criminal-court-prosecutor-on-sudan-via-vtc/>.

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Despite the impacts of the COVID-19 pandemic, which are being felt everywhere, we are heartened to see continued positive developments in Sudan over the past few months. The civilian-led transitional government (CLTG), in their discussions with armed opposition, are demonstrating that they are committed to justice for victims of atrocities in the Darfur conflict.

We have been encouraged by concrete steps parties in Sudan have taken to build a more stable, secure, and human rights-respecting future. We commend the civilian-led transitional government for agreeing to justice and accountability measures in the Transitional Justice and Reconciliation protocol negotiated in February 2020 with the Darfur armed opposition, including through the formation of a special court in Darfur to try atrocity crimes. Actions like this, taken to address the decades of violence committed with impunity against Darfuri victims, will increase the prospects for a just and enduring peace across Sudan.

We are encouraged by Prime Minister Hamdok's Eid speech on May 25, during which he stated that the perpetrators of the June 3, 2019, massacre, when 127 protestors were killed during a sit-in, and other protesters were beaten and sexually assaulted, will be held accountable. Genuine accountability would be a positive step for Sudan and a clear break from the past, and a clear demonstration of its commitment to freedom of peaceful assembly. We urge the Prime Minister and the civilian-led transitional government to honor this commitment. We also call for the National Independent Committee investigating the massacre to conduct a thorough, credible investigation that addresses all the crimes committed on that day and identifies those responsible for the grave crimes that were committed so that they can be brought to justice.

The United States will continue our efforts to deepen diplomatic relations with the new Sudanese government and support ongoing peace negotiations with armed opposition groups. We will continue to encourage them to use a survivor-centered approach during these negotiations, and ensure that the voices of women, youth, and other groups who have borne the brunt of the Bashir regime's violence are heard, in order to ensure that crimes against the Sudanese people committed under the Bashir regime are not forgotten or ignored.

The United States supports Sudan in its path to upholding democratic values, strengthening an independent justice system, and pursuing legal reform to ensure equality for all, regardless of gender, religion, or ethnicity. We will continue to support Sudanese efforts to ensure justice and encourage open, inclusive national dialogues about how transitional justice mechanisms can facilitate truth, justice, reconciliation and healing.

There are few in Sudan more deserving of facing justice than Omar Al-Bashir. While we are encouraged by his recent conviction in April, we note that the charges narrowly related to financial corruption. We believe more needs to be done.

As we have said for over a decade, there will be no lasting peace in Sudan until there is genuine accountability for all of the crimes that have been committed against the Sudanese people. To date, no one has been held accountable for the estimated 300,000 people killed in Darfur, the rampant sexual violence, or the looting and burning of homes. Those most responsible for the crimes committed in the conflicts in Darfur and the Two Areas must be held accountable for their actions. We received reports that Ali Kushayb is in custody. Ali Kushayb must be held accountable for his alleged abuses. The people of Darfur, victims, survivors, and their families deserve justice.

We must also ensure that those who oppose Sudan's efforts to address its painful past have no power to hijack Sudan's future. We were deeply concerned to learn of the attempted assassination attempt against Prime Minister Hamdok—such attempts undermine the Sudanese people's hard-fought liberation efforts.

The United States has historically been, and will continue to be, a strong supporter of meaningful accountability and justice for victims of atrocities through appropriate mechanisms. Perpetrators of atrocity crimes must face justice, but we must also be careful to recognize the right tool for each situation.

I must reiterate our longstanding and principled objection to any assertion of ICC jurisdiction over nationals of States that are not party to the Rome Statute, absent a UN Security Council referral or the consent of such States. Our concerns regarding the ICC and the situation in Afghanistan are well-known.

Our position on the ICC in no way diminishes the United States' commitment to supporting accountability for atrocity crimes, violations of international humanitarian law, and gross violations of human rights.

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On December 10, 2020, Deputy Legal Adviser Julian Simcock delivered remarks for the U.S. Mission to the UN at a UN Security Council briefing by the prosecutor of the International Criminal Court on Sudan (via VTC). Mr. Simcock's remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-by-the-prosecutor-of-the-international-criminal-court-on-sudan-via-vtc/>.

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We have been encouraged by the concrete steps parties in Sudan have taken to build a more stable, secure, and human rights-respecting future. We are particularly pleased that Sudan's civilian-led transitional government, the Sudan Revolutionary Front, and other groups signed a landmark peace agreement aimed at ending almost two decades of conflict. This important step forward alongside the transitional government's implementation of justice and accountability measures, including the formation of a special court in Darfur to try atrocity crimes, can help address decades of violence committed with impunity against Darfuri victims, and will increase the prospects for a just and enduring peace across Sudan.

The sound of celebration in the streets as the government welcomed rebels back to Khartoum is a sign the Sudanese people are tired of war and conflict and are ready to move

forward. Genuine accountability would be a positive step for Sudan, a clear break from the past, and a clear demonstration of its commitment to freedom and justice.

The United States will continue its efforts to deepen diplomatic relations with the new Sudanese government and support its ongoing peace negotiations with several other armed opposition groups. We will continue to encourage them to use a survivor-centered approach during these negotiations, and ensure that the voices of women, youth, and other groups, who have borne the brunt of the Bashir regime's violence, are heard. We must ensure the Bashir-era crimes are not forgotten or ignored. In particular, we applaud the Sudanese women who were on the frontlines to promote human rights and good governance, often at great risk to their personal safety.

The United States supports Sudan's efforts to uphold democratic values, strengthen an independent justice system, and pursue legal reform to ensure equality for all, regardless of gender, religion, or ethnicity. We will continue to encourage open, inclusive national dialogues about how transitional justice mechanisms can facilitate truth, justice, reconciliation, and healing during Sudan's fragile and ongoing political transition.

There are few in Sudan who deserve to face justice more than Omar al-Bashir. Although we are encouraged by his recent conviction for financial corruption, we believe more needs to be done to pursue justice and accountability, specifically with regard to his alleged responsibility for acts of genocide committed in Darfur and other atrocities committed throughout the country.

As we have said for more than a decade, there will be no lasting peace in Sudan until there is genuine accountability for all the crimes that have been committed during the long years of conflict. The Darfur conflict – which killed an estimated 300,000 people, led to the displacement of millions more and entailed rampant sexual violence and the looting and burning of homes – demands justice. There are still almost two million internally displaced persons in Darfur. Those responsible for the crimes committed in the conflicts in Darfur and the Two Areas must be held accountable for their misconduct. We must also ensure that those who oppose Sudan's efforts to address its painful past have no power to hijack Sudan's future.

The United States has historically been, and will continue to be, a strong supporter of meaningful accountability and justice for victims of atrocities through appropriate mechanisms. Perpetrators of atrocities must face justice, but we must also be careful to recognize the right tool for each situation.

I must reiterate our longstanding and principled objection to any assertion of ICC jurisdiction over nationals of States that are not party to the Rome Statute, absent a UN Security Council referral or the consent of such States. Our concerns regarding the ICC and the situation in Afghanistan are well-known.

Our position on the ICC in no way diminishes the United States' commitment to supporting accountability for atrocities, violations of international humanitarian law, and gross violations of human rights.

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

On May 18, 2020, the State Department issued a press statement welcoming the arrest of Félicien Kabuga for his role in the 1994 genocide in Rwanda. The press statement, available at <https://2017-2021.state.gov/the-united-states-applauds-the-arrest-of->

[felicien-kabuga/](#), applauds the Government of France and the International Residual Mechanism for Criminal Tribunals and law enforcement officials worldwide who contributed to the arrest. The statement also includes the following:

Twenty-six years after the genocide in Rwanda, the United States remains committed to seeking justice for the many men, women, and children who were killed. Through the War Crimes Reward Program, we offer up to \$5 million for information that leads to the arrest of the remaining seven Rwandans wanted for genocide by the International Residual Mechanism for Criminal Tribunals.

On June 8, 2020, Ambassador Cherith Norman Chalet, acting deputy permanent representative for the U.S. Mission to the United Nations, delivered remarks at a UN Security Council Briefing on the International Residual Mechanism for Criminal Tribunals. Ambassador Chalet's 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-via-vtc/>.

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The United States wishes to congratulate the Residual Mechanism, the Government of France, and all the other national and international bodies that collaborated to bring about the recent arrest of Rwandan businessman, Félicien Kabuga, who was indicted for genocide, crimes against humanity, and other serious violations of international humanitarian law. Mr. Kabuga is alleged to be the main financier and backer of the political and militia groups that committed the Rwandan genocide, as well as the founder of the notorious Radio-Television Milles Collines.

Mr. Kabuga's arrest after 26 years at large demonstrates the continued relevance of the Residual Mechanism and its work. We support its efforts to ensure justice is meted out for Mr. Kabuga's alleged role in the horrific acts perpetrated in Rwanda.

We further congratulate the Residual Mechanism and its collaborators on confirming the death of the long-time fugitive Augustin Bizimana. We will continue to support the Residual Mechanism's efforts to apprehend the remaining six Rwandans still wanted for their roles in the 1994 genocide. The United States continues to offer rewards of up to \$5 million for information that leads to the arrest, transfer, or conviction of any of the remaining fugitives. We strongly urge all countries to cooperate fully with the Residual Mechanism and bring these people, wanted for some of the worst crimes in history, to justice.

As mentioned, the global pandemic has impacted every aspect of the UN's work, and the Residual Mechanism is no different. We acknowledge that in-court proceedings have had to be delayed, and we commend your efforts to adhere to public health guidelines while doing your work. We hope the Residual Mechanism is able to proceed expeditiously with the Mladić appeal, as the conclusion of that case will be an important moment for the victims.

General Ratko Mladić served as the commander of the Bosnian Serb Army during the genocide of Bosnian Muslim men and boys in Srebrenica, and his forces raped women and girls, shelled and sniped the civilian population of Sarajevo, and brutalized Muslim and Croat

prisoners—all with the horrifying objective of permanently removing Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory. We mention these again to reiterate the importance of the case against Mladić and the important work and we welcome that work that the Residual Mechanism is undergoing and the efforts to continue the work of the International Criminal Tribunal for the former Yugoslavia in adjudicating General Mladić's responsibility for grave crimes committed during the war.

Similarly, we acknowledge progress on the retrial of Jovica Stanišić and Franko Simatović on charges of crimes against humanity and war crimes for their alleged roles in the unlawful, forcible removal of non-Serbs from Croatia and Bosnia and Herzegovina.

As regards the contempt proceedings in the Turinabo et al, and Jojic and Radeta cases, we note that attempts to interfere with witnesses or otherwise undermine court proceedings are a grave threat to the rule of law and must be dealt with seriously.

We also commend the Residual Mechanism's efforts to support national judicial efforts, from the Balkans to Rwanda. These proceedings remain vital to ensure that the pursuit of justice will not end even as prosecutions at the Residual Mechanism conclude. We note Rwanda's progress in continuing to try cases related to the genocide and urge Balkan states to improve their cooperation across national systems.

We will also strongly support the renewal of the Residual Mechanism's mandate, which we have for consideration at this time. The work of the Residual Mechanism remains vital, relevant, and crucial for the administration of justice, as we have laid out this morning. We urge the Council to support the extension of this mandate, as its work must continue.

The Prosecutor continues to provide deeply troubling reports about the ongoing challenge of genocide denial and non-acceptance of historical truths in both Rwanda and the Balkans. We cannot bring back those whose lives were lost. But we would fail to ensure justice for them and their loved ones if we do not act forcefully when leaders seek to turn certain populations into scapegoats for society's ills or deny historical facts.

We must re-commit to protecting the welfare of civilians during armed conflict and holding those who violate international humanitarian law accountable. The Residual Mechanism has been an important part of this work and we will continue to support its efforts on behalf of victims.

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On October 21, 2020, Ambassador Mills delivered remarks at a UN General Assembly debate on the International Residual Mechanism for Criminal Tribunals. His remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-general-assembly-debate-on-the-international-residual-mechanism-for-criminal-tribunals-via-vtc/>.

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...We are very grateful in the United States for [the Mechanism president's] hard work and the unwavering commitment of all the judges, attorneys, and staff in Arusha and The Hague, as well as in the field offices in Kigali and Sarajevo, to the pursuit of justice for the victims in Rwanda and the former Yugoslavia.

I appreciated the President's mention of the 25th anniversary of the signing of the Dayton Accords. This is an opportune time to reflect on the Accords. We must never forget the commitments made in Dayton regarding justice, and we must ensure that the Mechanism is able to complete its vital work delivering justice and accountability to survivors.

The United States was very pleased to hear that despite the ongoing impacts of the COVID pandemic that affect all of us every day, the Mechanism has been able to carry out its important work and deliver results. We join others in commending the judges for their ability to adapt to these trying circumstances and to avoid serious delays in the judicial proceedings.

The United States also wants to congratulate the Mechanism and France on the recent arrest of the Rwandan businessman, Félicien Kabuga, who was indicted for genocide, crimes against humanity, and violations of international humanitarian law.

Kabuga's arrest, after being at large for 26 years, demonstrates the continued relevance of the Mechanism and the importance of its work. We support the Mechanism's efforts to ensure justice for Kabuga's alleged role in the horrific acts perpetrated in Rwanda.

The United States further thanks the Mechanism for confirming the death of long-time fugitive Augustin Bizimana. We will continue to support the Mechanism's efforts to apprehend the remaining six Rwandans still wanted for their roles in the 1994 genocide. The United States continues to offer rewards of up to five million U.S. dollars for information that will lead to the arrest, transfer, or the conviction of any of these remaining fugitives. We strongly urge all countries to cooperate fully with the Mechanism and bring these people, wanted for horrific atrocities, to justice.

We were pleased as well that the Mechanism was able to hold a hearing in the Mladić appeal, and we hope the Mechanism will be able to proceed quickly, as the conclusion of that case will be an important moment for the victims. We welcome the Mechanism's work to adjudicate General Mladić's responsibility for grave crimes committed during the war.

Similarly, the United States acknowledges progress on the retrial of Jovica Stanišić and Franko Simatović on charges of crimes against humanity and war crimes for their alleged roles in the unlawful, forcible removal of non-Serbs from Croatia and Bosnia and Herzegovina.

With regard to the contempt proceedings in the Turinabo et al, and Jojic and Radeta cases, let us reaffirm that attempts to interfere with witnesses or otherwise undermine judicial proceedings are a grave threat to the rule of law and they must be dealt with seriously. We understand that the ongoing pandemic complicates this matter, but we do hope that these ongoing cases are completed early in 2021.

Mr. President, we were happy to participate in the negotiation of Security Council Resolution 2529, concluding the Council's review of the Tribunal's work for the past two years, and we want to thank Vietnam for its skillful handling of this review. We also want to welcome the appointment of the new Mechanism Registrar, Mr. Tambadou. We are very confident that he will contribute significantly to the effectiveness and the efficiency of the Mechanism's work.

While the Mechanism continues to contribute to the documentation and redress of the crimes that are within its purview, it is deeply troubling to hear the Prosecutor's continuing reports of ongoing challenge of genocide denial and the non-acceptance of historical truths in both Rwanda and Bosnia.

Let me end by saying when we consider the hope and the promise that was laid forth with the Dayton Accords 25 years ago, one thing is clear: While we cannot bring back those whose lives were lost, we can pursue justice for them and their loved ones and respond forcefully when leaders seek to turn certain populations into scapegoats or to deny historical facts. The

Mechanism has and continues to be an important part of this work and the United States continues to support its efforts on behalf of victims.

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On December 14, 2020, Mr. Simonoff delivered remarks at a UN Security Council briefing on the International Residual Mechanism for Criminal Tribunals. His remarks are available at <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-international-residual-mechanism-for-criminal-tribunals-via-vtc-2/> and excerpted below.

* * * *

Thank you, Mr. President, and thank you for your briefings, President Agius and Prosecutor Brammertz. We are grateful for your hard work and the unwavering commitment of the judges, attorneys, and staff in Arusha and The Hague, as well as in field offices in Kigali and Sarajevo, in your pursuit of justice for the victims in Rwanda and the former Yugoslavia.

We are pleased that you and President Agius have been reappointed to your positions, and that Abubacarr Tambadou has been appointed as the new Registrar. Mr. Tambadou had an impressive record as Attorney General of the Gambia, and we understand that he is already making a valuable contribution to the Mechanism's work. We also welcome Pierre St. Hilaire, the new head of fugitive tracking, whose work we have also been impressed with.

We are pleased to hear that the Mechanism was able to make progress on its judicial caseload, despite the ongoing COVID-19 pandemic that continues to affect us every day. The progress made since the last briefing is commendable, given the circumstances.

We are impressed to hear about the steps taken to allow the Mechanism's work to continue in both its branches, and are glad the Mechanism is able to hold hearings in a way that does not jeopardize the health and safety of those involved. We thank you for these efforts and your commitment to justice in these extraordinary times.

After the historic arrest of Rwandan businessman, Félicien Kabuga, who was indicted for genocide, crimes against humanity, and other serious violations of international humanitarian law, it is good to hear that he has successfully passed into the Mechanism's custody and that pre-trial proceedings have begun.

These developments, taking place after Kabuga spent 26 years at large, demonstrates the continued relevance and impact of the Mechanism and its work. We support its efforts to ensure that justice is meted out for Kabuga's alleged role in the horrific acts perpetrated in Rwanda.

We will continue to support the Mechanism's efforts to apprehend the remaining six Rwandans still wanted for their roles in the 1994 genocide. The United States continues to offer rewards of up to \$5 million for information that leads to the arrest, transfer, or conviction of any of the remaining fugitives. We strongly urge all countries to cooperate fully with the Mechanism and bring these people, wanted for some of the worst crimes in history, to justice.

We further congratulate the court for successfully holding the appeal hearing for Ratko Mladić. As we all know, General Mladić served as the commander of the Bosnian Serb Army during the genocide of Bosnian Muslim men and boys in Srebrenica, and his forces raped women

and girls, shelled and sniped the civilian population of Sarajevo, and brutalized Muslim and Croat prisoners – all with the horrifying objective of permanently removing Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory. We welcome the Mechanism’s work to adjudicate General Mladić’s responsibility for grave crimes committed during the war and await the results of the Mechanism’s judgement as soon as possible.

Similarly, we commend the Mechanism’s progress on the retrial of Jovica Stanišić and Franko Simatović on charges of crimes against humanity and war crimes for their alleged roles in the unlawful, forcible removal of non-Serbs from Croatia and Bosnia and Herzegovina.

With regard to the contempt proceedings in the Turinabo and Jojic and Radeta cases, we are relieved that trial proceedings were finally able to commence, despite attempts to interfere with witnesses and efforts to undermine court proceedings.

We also commend the Mechanism’s efforts to support national judicial efforts, from the Balkans to Rwanda. These proceedings remain vital to ensure that the pursuit of justice will not end even as prosecutions at the Mechanism conclude. We note Rwanda’s progress in continuing to try cases related to the genocide and urge Balkan states to improve their cooperation across national systems.

We remain extremely concerned about the Mechanism’s reporting about genocide denial, the non-acceptance of historical facts, and the glorification of war criminals. We must do more to fight such rhetoric, particularly in the Balkans, and we condemn efforts by political leaders to distort historical facts and to use their platforms to increase divisions and exacerbate tensions.

We welcome the Mechanism’s recent progress increasing transparency and education regarding its work, including the launch of the Unified Judicial Database in September, additional workshops for educators, and the public streaming of court sessions. These efforts are a valuable contribution to establishing a public record of the crimes committed.

We must re-commit to protecting civilians during armed conflict and holding those who violate international humanitarian law accountable. The Mechanism has been an important part of this work and we continue to support its efforts on behalf of victims.

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3. Other Accountability Proceedings and Mechanisms

a. Special Tribunal for Lebanon

On August 18, 2020, the State Department issued a press statement, available at <https://2017-2021.state.gov/statement-by-secretary-michael-r-pompeo-2/>, welcoming the guilty verdict handed down by the Special Tribunal for Lebanon (“STL”) against Hizballah operative Salim Ayyash for his role in the February 14, 2005 assassination of former Lebanese Prime Minister Rafik Hariri. The press statement further states:

This act of terrorism also claimed the lives of 21 additional victims and resulted in injuries to 226 others. Although Ayyash remains at large, the STL’s ruling underscores the importance of rendering justice and ending impunity, which is imperative to ensuring Lebanon’s security, stability, and sovereignty.

b. *UN Investigative Team for Accountability of Da'esh/ISIL ("UNITAD")*

On December 10, 2020, Rodney Hunter delivered remarks on behalf of the United States at a UN Security Council briefing by the UN Investigative Team for Accountability of Da'esh/ISIL ("UNITAD"). The U.S. statement is excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-by-the-un-investigative-team-for-accountability-of-daesh-isil-via-vtc-2/>.

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The United States is committed to supporting the critical work of UNITAD to collect, store, and preserve evidence of ISIS's atrocities that may amount to war crimes, crimes against humanity, and genocide.

We urge the Iraqi government to recommit to fair, evidence-based trials that allow the victims and survivors of ISIS's brutality and false ideology to have their day in court. These evidence-based trials will not only establish the clear culpability of ISIS and its members for the perpetration of the atrocities, they will help showcase Iraq's justice system and its commitment to the rule of law.

We are encouraged to hear that the Iraqi parliament is considering legislation that would allow Iraq to prosecute ISIS suspects for international crimes, and we support such efforts. It is imperative that these heinous crimes be labeled for exactly what they were—genocide and crimes against humanity—so that no one can ever doubt what took place, but also to reflect what the Iraqi people have overcome.

We also support UNITAD's expanded cooperation with the Government of Iraq, including with the Iraqi judiciary. We are confident this increased cooperation will contribute to additional successful prosecutions of ISIS members in Iraq and abroad, and that the partnership of the Government of Iraq and the Kurdistan Regional Government with UNITAD will help ensure positive outcomes for Iraq and the victims of these awful crimes.

We know that COVID-19 has further complicated this critical work, worsening already difficult conditions. But despite these obstacles, Iraq's Mass Graves Directorate and the Medico-Legal Directorate, in cooperation with UNITAD, continue to build the capacity of national Iraqi forensic teams to conduct evidence-based investigations and exhumations.

This was evidenced in late October when Iraqi authorities resumed the exhumations of mass graves left by ISIS in Solagh, known as the "Grave of Mothers," where dozens of elderly Yezidi women were executed by ISIS because they were deemed too old to be sold into sexual slavery. In this case, and in so many others like it, we must never forget the brutality that ISIS inflicted on their victims.

We recognize and applaud the Government of Iraq for its plans to exhume all mass graves and to remember and honor all those victimized by ISIS brutality.

The United States also recognizes that while the evidence-based trials are absolutely critical to justice and to the healing process, so is support for victims and survivors. This includes psychosocial support, as well as the realization of victims' rights through legal proceedings. Exhumations are a painful process that can trigger difficult emotions including sadness, anxiety, anger, loneliness or fear, and we commend UNITAD and its partners for providing psycho-social

support to staff, survivors, and family members. We also commend the Iraqi government and the Kurdish regional government for their continuing support of these goals.

In recognition of this critical work, the United States continues its financial support to UNITAD. As we noted in our last meeting on UNITAD, the United States provided \$2 million in support of UNITAD's first exhumations of mass grave sites in Iraq in the Sinjar region. As of December 2020, U.S. funding for UNITAD now totals \$8.85 million, which supports a wide range of different activities associated with UNITAD's mandates.

The United States once again urges Member States to repatriate, prosecute, rehabilitate, and reintegrate, as appropriate, their citizens and nationals who traveled to Iraq to join ISIS. Iraq should not have to continue to shoulder responsibility for these foreign terrorist fighters and associated family members alone. We note the valuable support UNITAD can provide to other Member States in conducting such investigations and prosecutions.

We thank the Government of Iraq and UNITAD for their continuing cooperation and work to hold ISIS accountable for all its atrocities.

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c. *Burma*

On August 25, 2020, the State Department issued a press statement calling for justice and accountability for the attacks on Rohingya in Burma. The statement, available at <https://2017-2021.state.gov/united-states-continues-to-call-for-justice-and-accountability-in-burma/>, is excerpted below.

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Three years after Burma's security forces launched brutal attacks against hundreds of thousands of Rohingya men, women, and children, the United States reiterates its call for justice for victims and accountability for those responsible. In addition, in the face of escalating fighting in Rakhine State, we urge a cessation of violence, dialogue, renewed efforts to protect local communities, and unhindered access for humanitarian assistance. The United States remains concerned over the killing of members of local communities and displacement of thousands, which undermines prospects for the voluntary return of refugees and internally displaced persons and erodes prospects for peace.

We urge authorities in Burma to establish conditions conducive to the safe, voluntary, dignified, and sustainable return of refugees and internally displaced persons, and to deepen efforts to implement recommendations from the Kofi Annan-led Advisory Commission on Rakhine State. Since 2017, the United States has provided more than \$951 million to ease the humanitarian suffering of all affected by the crisis in Burma and Bangladesh. We deeply appreciate Bangladesh's continued generosity in hosting more than 860,000 Rohingya. We call on other nations to ensure continued humanitarian support to Rohingya and to deepen efforts to resolve the crisis.

The United States has taken strong actions to promote justice for victims and accountability for those responsible for atrocities. Those actions include imposing financial

sanctions and visa restrictions on top military leaders and units linked to serious human rights abuses, supporting UN investigation mechanisms, and encouraging Burma to participate fully in International Court of Justice (ICJ) proceedings and to comply with court orders. We appreciate the sustained commitment of the international community to hold the perpetrators of these atrocities to account. Much more remains to be done.

The United States will continue to partner with the people of Burma as they work to overcome the legacy of authoritarian rule, expand democracy, and achieve peace.

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d. *UN Independent International Commission of Inquiry on Syria*

Ambassador James Jeffrey issued a statement on July 8, 2020 welcoming the UN Commission of Inquiry on Syria's July 7 report. Ambassador Jeffrey's statement is available at <https://geneva.usmission.gov/2020/07/09/statement-by-ambassador-jeffrey-on-the-un-coi-on-syrias-july-7-report/>, and excerpted below.

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The Commission's report, focusing on the period from November 2019 to June 2020, notes the devastating impacts of Syrian regime and Russian assaults in Idlib province on Syrian civilians, millions of whom were already displaced from their homes by the regime's reckless and destructive campaign of violence. The report concluded that attacks by pro-regime forces are responsible for 534 of the 582 confirmed civilian casualties that the COI investigated and many instances of mass forced displacement investigated in the reporting period. This is further confirmation of the culpability of the Assad regime and its enablers for the vast majority of atrocities inflicted on the Syrian people, as well as dire ongoing humanitarian conditions, including lack of humanitarian access. Today's report is an important step to hold the Assad regime and its military allies, Russia and Iran, accountable for their attacks on the Syrian people. Moreover, the findings of the Commission of Inquiry are fully consistent with other recent reports, including the UN Board of Inquiry on Northwest Syria, and the report by the Organization for the Prohibition of Chemical Weapons Investigation and Identification Team, that document the Assad regime's atrocities.

The United Nations report states that it has "reasonable grounds to believe that pro-regime forces committed the war crimes of deliberately attacking medical personnel and facilities by conducting airstrikes" as well as "the war crime of launching indiscriminate attacks resulting in death or injury to civilians ..." and furthermore "that members of pro-government forces, and in particular the 25th Special Mission Forces Division, committed the war crime of pillage." This is in addition to the report stating that pro-regime forces likely committed "the war crime of spreading terror among the civilian population." The report also finds "that there are reasonable grounds to believe that members of HTS committed [various] war crimes.

The report notes that "pro-government forces carried out attacks consistent with clear patterns previously documented by the Commission, affecting markets and medical facilities" and that "attacks on schools have emerged as one of the most vicious patterns in the Syrian

conflict.” This report also substantively builds on the Board of Inquiry report the Secretary General released in April which concluded that the Assad regime and its allies were likely responsible for attacks impacting hospitals in northwest Syria that were part of the UN’s deconfliction mechanism to ensure they would not be targeted by violence. We have noted this pattern of attacks elsewhere, as well as the regime’s continued use of chemical weapons, some of which rise to the level of war crimes and crimes against humanity. We deplore and condemn in the strongest terms the continued armed violence and atrocities committed by the regime against its own people, demand that the regime immediately put an end to all attacks against civilians, and that all individuals responsible for atrocities be held to account.

The United States remains committed to a sustained campaign of economic and political pressure to deny the Assad regime revenue and support it uses to wage war and commit mass atrocities against the Syrian people. Only a political resolution of the conflict as called for by UNSCR 2254 can establish an enduring peace to end the suffering of the Syrian people. We also strongly support urgently renewing UN Security Council resolution 2504 (2020), authorizing the UN to undertake life-saving cross-border humanitarian aid deliveries through essential crossing points, which are the lifeline for millions of Syrians still suffering from the atrocities detailed in the Commission’s report.

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Cross References

In re Evison, **Ch. 5.A.2**

Children in Armed Conflict, **Ch. 6.C.1**

Aybar-Ulloa (case involving jurisdiction over drug trafficking on stateless vessels), **Ch. 12.A.5**

Wildlife trafficking, **Ch. 13.C.4**

Sudan (rescission of state sponsor of terrorism designation), **Ch. 16.A.7**

Sanctions related to cyber activity, **Ch. 16.A.8 &16.A.11**

Terrorism related sanctions, **Ch. 16.A.10**

Syria, **Ch. 17.A.3**

Applicability of international law to conflicts in cyberspace, **Ch. 18.A.4.b**

Chemical weapons in Syria, **Ch. 19.D.1**

CHAPTER 4

Treaty Affairs

A. TREATY LAW IN GENERAL

1. Senate Advice and Consent to Ratification of Treaties

The President transmitted several law enforcement instruments for Senate consideration in 2020. See Chapter 3 for discussion of the transmittal of the Beijing Convention and the Beijing Protocol, as well as the U.S.-Croatia agreement on application of the extradition treaty and agreement on mutual legal assistance, which implement the U.S.-EU extradition and mutual legal assistance agreements, respectively.

2. The UN Treaty System

On October 15, 2020, Deputy Legal Adviser Julian Simcock of the U.S. Mission to the UN, addressed a meeting of the Sixth Committee on “Agenda Item 90: Strengthening and Promoting the International Treaty Framework.” 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-90-strengthening-and-promoting-the-international-treaty-framework/>.

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The Committee's discussion of this topic follows on the significant and extended work the Committee did in 2018 resulting in a consensus set of revisions to the Secretariat's treaty registration and publication regulations. We welcome the chance to continue this discussion and thank the Secretariat for its useful discussion paper.

In general, we think the UN's treaty registration and publication program should strive for transparency and accessibility of treaty information, and ease of use. We commend the Secretariat for the efforts it has made in pursuit of these goals.

We agree with a number of states who have observed that expanded use of electronic means both for registration and publication has great potential to advance these objectives. In this regard, we would support further exploration of some of the ideas mentioned in the Secretariat's report, including the possible development of an online registration tool for treaties, further enhancement of the electronic treaty database, and adapting the Treaty Series to a new digital format of publication.

On other issues discussed in the Secretariat's report, we continue to believe that the practical value of publishing treaty texts in the Treaty Series would be significantly undermined were the Secretariat to cease their translation into English and French. We also agree with those states who have expressed the view that it would be inappropriate for the UN's treaty regulations to purport to determine or modify the responsibilities of depositaries other than the United Nations.

In light of the substantial revisions made to the registration and publication regulations in 2018, we think the scope for any further changes to the regulations in the near term should be limited. In general, frequent changes to the regulations complicate the ability of states to use and rely on them. We welcome the discussion at this session of possible limited additional changes to the regulations beyond those made in 2018. However, in the interests of stability and predictability in the registration and publication regime, we do not believe the Committee should take up revision of the regulations as a routine matter at each session, and would encourage the Committee to conclude its current consideration of such proposals during this session.x

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B. CONCLUSION, ENTRY INTO FORCE, ACCESSION, WITHDRAWAL, TERMINATION

1. Suspension or Termination of Agreements with Hong Kong

As announced in a State Department press statement, available at <https://2017-2021.state.gov/suspension-or-termination-of-three-bilateral-agreements-with-hong-kong/index.html>, the United States notified Hong Kong in August 2020 of the suspension or termination of three bilateral agreements: one covering the surrender of fugitive offenders; the second on the transfer of sentenced persons; and the third on reciprocal tax exemptions on income derived from the international operation of ships. The U.S. action came in response to the Chinese Communist Party's derogation from the autonomy of Hong Kong promised under the UN-registered Sino-British Joint Declaration. See Chapter 9 for further discussion of alterations in U.S. treatment of

Hong Kong in 2020. The text of the U.S. diplomatic note received by Hong Kong on August 18, 2020 follows.

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The Consulate General of the United States of America presents its compliments to the Government of the Hong Kong Special Administrative Region, and has the honor to refer to the Agreement between the Government of the United States of America and the Government of Hong Kong for the Transfer of Sentenced Persons (“Agreement on the Transfer of Sentenced Persons”), signed at Hong Kong on April 15, 1997. Article 14(2) of the Agreement on the Transfer of Sentenced Persons provides that either party may terminate the Agreement at any time by giving notice to the other in writing, and that the Agreement shall cease to have effect three months after the date of the receipt of such notice. In accordance with this provision, the United States of America hereby gives notice of its termination of the Agreement on the Transfer of Sentenced Persons, which termination shall be effective three months from the date of receipt of this note.

The Consulate General further refers the Government of the Hong Kong Special Administrative Region to the Agreement between the Government of the United States of America and the Government of Hong Kong Concerning Tax Exemptions from the Income Derived from the International Operation of Ships (“Agreement Concerning Tax Exemptions”), effected by an exchange of notes at Hong Kong on August 1 and 16, 1989. Paragraph 8 of the Agreement Concerning Tax Exemptions provides that either party may terminate the Agreement by providing written notice of termination. In accordance with this provision, the United States of America hereby gives notice of its termination of the Agreement Concerning Tax Exemptions, which termination shall be effective the first day of January next following the date of receipt of this note.

The Consulate General further refers the Government of the Hong Kong Special Administrative Region to the Agreement between the Government of the United States of America and the Government of Hong Kong for the Surrender of Fugitive Offenders (“Extradition Agreement”), signed at Hong Kong on December 20, 1996.

The United States notes the recent enactment by the People’s Republic of China of national security legislation in respect of Hong Kong. This legislation is incompatible with the ability of Hong Kong’s courts to exercise judicial power independently and free from any interference, as provided for in the 1984 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, which constituted an essential basis of the consent of the parties to be bound by the Extradition Agreement.

Accordingly, in accordance 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 Extradition Agreement, the United States hereby gives notice of the suspension of the Extradition Agreement, which suspension shall be effective three months from the date of receipt of this note.

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2. Withdrawal from World Health Organization

On July 6, 2020, the United States provided notice of its withdrawal from the World Health Organization, effective July 6, 2021, by letter from Secretary of State Michael Pompeo to the Secretary-General of the United Nations, acting as depositary.* The text of that letter states:

I have the honor on behalf of the Government of the United States of America to refer to the Constitution of the World Health Organization done at New York on July 22, 1946, as amended.

This letter constitutes notification by the Government of the United States of America that it hereby withdraws from the World Health Organization, effective on July 6, 2021.

See Chapter 7 for further discussion of U.S. statements regarding the Trump Administration's decision to withdraw from the World Health Organization.

3. Withdrawal from Open Skies Treaty

On May 22, 2020, the United States provided notice of its decision to withdraw from the Treaty on Open Skies, done at Helsinki on March 24, 1992, in accordance with the treaty's terms. The withdrawal became effective on November 22, 2020. See Chapter 19 of this Digest for statements by the Secretary of State and other Department of State officials regarding U.S. withdrawal from the Treaty on Open Skies. The text of the May 22, 2020 U.S. diplomatic notes providing notice of the withdrawal to the treaty Depositaries and other States Parties to the Treaty on Open Skies is excerpted below:

The Embassy of the United States of America ... has the honor to refer to the Treaty on Open Skies, done at Helsinki on March 24, 1992 (the "Treaty").

Paragraph 2 of Article XV of the Treaty provides that each Party "shall have the right to withdraw from this Treaty." Pursuant to paragraph 2 of Article XV, the United States hereby provides notice of its decision to withdraw from the Treaty. The United States' withdrawal will be effective six months from May 22, 2020.

* Editor's note: On January 20, 2021, the United States retracted its notice of withdrawal and stated that it "intends to remain a member of the World Health Organization." The depositary notification is available at <https://treaties.un.org/doc/Publication/CN/2021/CN.11.2021-Eng.pdf>.

Cross References

Asylum Cooperative Agreements, **Ch. 1.C.7**

Hague Abduction Convention cases, **Ch. 2.B.2.c**

Extradition Treaty and MLAT with the Republic of Croatia, **Ch. 3.A.1**

Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (“Beijing Convention”), **Ch. 3.B.1.a(1)**

Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (“Beijing Protocol”), **Ch. 3.B.1.a(2)**

Universal Periodic Review (U.S. treaty ratification and implementation), **Ch. 6.A.2**

Renegotiating Compacts of Free Association, **Ch. 5.D**

Treaty Bodies, **Ch. 6.A.5**

World Health Organization, **Ch. 7.A.1**

Algiers Accords, **Ch. 8.C**

Sudan Claims settlement agreement, **Ch. 8.D**

Agreements to normalize relations with Israel (Abraham Accords), **Ch. 9.B.8.a**

Air Transport Agreements, **Ch. 11.A.1**

United States-Mexico-Canada Agreement, **Ch. 11.D.2**

Antarctic Treaty, **Ch. 13.B.3**

Columbia River Treaty, **Ch. 13.C.5**

1970 UNESCO Convention on Cultural Property, **Ch. 14.A**

Bilateral and Multilateral Defense Agreements and Arrangements, **Ch. 18.A.3**

Nonproliferation Treaty, **Ch. 19.B.1**

Open Skies Treaty, **Ch. 19.C.4**

CHAPTER 5

Foreign Relations

A. LITIGATION INVOLVING FOREIGN RELATIONS, NATIONAL SECURITY, AND FOREIGN POLICY ISSUES

1. *Crystallex v. Venezuela*

On July 16, 2020, the United States filed a statement of interest at the invitation of the federal district court in the District of Delaware in a case implicating U.S. foreign policy in connection with Venezuela. *Crystallex Int’l Corp. v. Venezuela*, No. 17-00151. Crystallex sought to enforce a judgment against Venezuela through the sale of assets of a state-owned entity (Petróleos de Venezuela, S.A., “PDVSA”) that the court had determined to be an alter ego of Venezuela in 2018. The U.S. statement counsels against proceeding with that sale and urges review of the alter ego determination based on changed circumstances in Venezuela. See Chapter 9 for discussion of U.S. relations with Venezuela and recognition of Juan Guaidó as interim President of Venezuela, and Chapter 16 for U.S. sanctions relating to Venezuela and the Maduro regime. The statement of interest is excerpted below and the statement and exhibits are available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

* * * *

Since January 23, 2019, the United States has recognized Juan Guaidó, the democratically elected President of the Venezuelan National Assembly, as the Interim President of Venezuela. ... U.S. policy toward Venezuela is to support the full restoration of democracy, beginning with free, fair, and transparent presidential elections in which the Venezuelan people choose their leaders. ... To achieve this, Secretary of State Pompeo recently proposed a “Democratic Transition Framework” to resolve Venezuela’s crisis that is rooted in a peaceful, democratic

transition that calls for Maduro to step aside and the establishment of a broadly acceptable, transitional government to administer free and fair presidential elections. ... This framework also sets forth a viable pathway for lifting Venezuela-related U.S. sanctions. ...

The United States has strong foreign policy and national security interests in supporting the interim government's efforts to reconstruct the Venezuelan economy following the departure of Maduro. *See* Ex. 1. In the words of Special Representative Abrams:

Since recognizing the Guaidó government on January 23, 2019, the U.S. government has taken steps, including through additional economic sanctions, to ensure Maduro is not able to liquidate in fire sales the financial assets of Venezuela that are located in United States jurisdictions (and especially CITGO, the crown jewel of PdVSA.) CITGO, as part of the U.S.-based assets of PDVH and its parent company PdVSA, is one such example of a national resource that has been placed in legal and economic jeopardy as a result of the actions of former Venezuelan governments. Critical to U.S. foreign policy, the United States assesses that the domestic legitimacy of the interim government under Guaidó would be severely eroded were a forced sale of CITGO to take place while the illegitimate Maduro regime still attempts to cling to de facto power in Caracas. The efforts by creditors to enforce judgments against Venezuela by taking immediate steps toward a conditional sale of PdVSA's U.S.-based assets, including PDVH and CITGO, are detrimental to U.S. policy and the interim government's priorities. Should these assets be advertised for public auction at this time, the Venezuelan people would seriously question the interim government's ability to protect the nation's assets, thereby weakening it and U.S. policy in Venezuela today.

Ex. 1, at 2-3.

Thus, assets such as PDVH's shares, which provide indirect ownership of CITGO, are at the heart of the United States' current foreign policy efforts with respect to Venezuela. "It is clear that its loss through a forced sale in a U.S. court would be a great political victory for the Maduro regime, which has already claimed that the United States and Guaidó are conspiring to 'steal' CITGO. The impact on Guaidó, the interim government, and U.S. foreign policy goals in Venezuela, would be greatly damaging and perhaps beyond recuperation." *Id.* at 3.

II. Changed Circumstances Could Justify Granting Venezuela's Motion.

In August 2018, this Court concluded that PDVSA was an alter ego of Venezuela pursuant to the Supreme Court's decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611 (1983). In *Bancec*, the Supreme Court recognized that duly created instrumentalities of a foreign state are to be accorded a presumption of independent status. *See id.* at 626-27. The Court noted that freely ignoring the separate status of government instrumentalities would frustrate "the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration." *Id.* at 626. As a result, *Bancec* affords a strong presumption that an independent instrumentality of a foreign state should be treated as such by U.S. courts, unless (a) that instrumentality is "so extensively controlled by its owner that a relationship of principal and agent is created" or (b) doing so "would work fraud or injustice." *Id.* at 629.

Following *Bancec*'s guidance, this Court concluded that Crystallex had "rebutt[ed] the presumption of separateness between Venezuela and PDVSA," and had sufficiently established that the "sovereign state exercises significant and repeated control over the instrumentality's day-

to-day operations.” *Crystallex Int’l Corp. v Bolivarian Rep. of Venezuela*, 333 F. Supp. 3d 380, 401, 403 (D. Del. 2018) (also concluding that Crystallex had not established that giving effect to the separateness of Venezuela and PDVSA would “work a fraud or injustice” as that term is used in *Bancec*). This Court also noted that Venezuela and PDVSA could seek to supplement the factual record and attempt to demonstrate that the additional evidence “materially alters the Court’s findings.” *Id.* at 425. The Third Circuit, in reviewing this Court’s decision, also noted that on remand, “Venezuela may direct to the District Court credible arguments to expand the record with later events.” *Crystallex Int’l Corp. v Bolivarian Rep. of Venezuela*, 932 F.3d 126, 144 (3d Cir. 2019). The United States respectfully submits that the circumstances underlying that determination have changed in such a manner that the Court should review its earlier finding concerning PDVSA’s independence from Venezuela.

This Court originally concluded that PDVSA was the alter ego of the Venezuelan government because “Venezuela extensively control[led] PDVSA,” *Crystallex*, 333 F. Supp. 3d at 406, based on Venezuela’s practices of (1) “us[ing] PDVSA’s property as its own,” (2) “[i]gnoring PDVSA’s separate status,” (3) “[d]epriving PDVSA of independence from close political control,” (4) “[r]equiring PDVSA to obtain approvals for ordinary business decisions,” and (5) “[i]ssuing policies causing PDVSA to act directly on behalf of Venezuela.” *Id.* at 406-09.

Since issuing that ruling, circumstances in Venezuela have materially changed. As detailed in the attached letter from Special Representative Abrams, there have been significant developments within Venezuela since 2018 that have precipitated a fundamental shift in U.S. foreign policy. In January 2019, in the wake of the fraudulent Venezuelan presidential elections, Maduro attempted to install himself as president for a second term. Ex. 1, at 2. Shortly afterwards, the National Assembly, in its role as the only legitimate branch of government duly elected by the Venezuelan people, responded by invoking the Venezuelan Constitution to declare the office of the presidency vacant, upon which Juan Guaidó, President of the National Assembly, was sworn in as Interim President. *Id.* President Trump immediately issued a public statement officially recognizing Guaidó as the Interim President of Venezuela, and Secretary of State Pompeo similarly issued a statement concerning the United States’ recognition of the “new Venezuelan government.” *Id.* On January 5, 2020, following Guaidó’s re-election as president of the National Assembly despite an “unlawful, violent, and despicable campaign of arrests, intimidation, and bribery” led by Maduro regime officials, the State Department issued a congratulatory statement, noting that “[t]he United States and 57 other countries continue to regard [Guaidó] as the legitimate . . . interim president of Venezuela.” The United States Congratulates Interim President Juan Guaido on His Re-Election as President of the National Assembly (Jan. 5, 2020), <https://ve.usembassy.gov/the-united-states-congratulates-interim-president-juan-guaido-on-his-re-election-as-president-of-the-national-assembly>; Ex. 1, at 2.

...

Accordingly, the U.S. government’s recognition of the Guaidó government constitutes a substantial and material change in circumstances that is itself sufficient to merit reconsideration of this Court’s earlier alter ego determination, which rested on the corrupt actions of the Maduro regime in connection with PDVSA, e.g., *Crystallex*, 333 F. Supp. 3d at 407-08. In addition, Venezuela has stated that the Guaidó government has taken “concrete steps to confirm PDVSA’s independence from Venezuela.” D.I. 184 at 13. The State Department has indicated that it has no reason to doubt the veracity of these representations concerning the independence of the PDVSA, PDVH, and CITGO boards. Ex. 1, at 2. As a result, fundamental premises underlying the alter ego ruling no longer hold.

III. If the Court Denies the Pending Motions to Dissolve or Quash the Writ of Attachment, It Should Not Authorize Crystallex to Proceed Toward a Sale at This Time.

This Court has recognized that it has discretion over whether, when, and in what manner it moves forward with the contemplated sale of shares of PDVH, to the extent otherwise consistent with U.S. sanctions law. *See* D.I. 154 at 9 n.13; *see also* *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936) (recognizing the “power inherent in every court to control the disposition of the causes on its docket”). Regardless of the disposition of the pending motions to eliminate the attachment, the United States respectfully submits that the Court should exercise any such discretion not to proceed toward a sale at this time. The prefatory steps that Crystallex proposes implicate significant U.S. foreign policy and national security interests that are rightly before the Executive Branch in the Crystallex license application, and taking action which advances toward a public auction and contingent sale would serve no purpose if OFAC ultimately denies Crystallex’s license application.

A. OFAC is currently reviewing Crystallex’s license application and is not yet in a position to issue a decision.

As this Court is aware, U.S. sanctions involving Venezuela require a license for any sale of PDVH shares. *See* 31 C.F.R. §§ 591.506(c), 591.407; 84 Fed. Reg. 3282 (Feb. 11, 2019); E.O. Nos. 13,884 (Aug. 5, 2019), 13,850 (Nov. 1, 2018), 13,835 (May 21, 2018), 13,808 (Aug. 24, 2017); *see also* OFAC FAQs 808 & 809. Crystallex has accordingly “submitted an application to OFAC for a specific license authorizing the sale of shares of PDVH,” and “seeks formal approval of the commencement of the sale process, through and including the auction of the shares of PDVH.” D.I. 182 at 7; *see also* Letter from Andrea Gacki to Ethan Davis, dated July 16, 2020, attached hereto as Ex. 2, at 1 (quoting Crystallex license application, which seeks authorization from OFAC “to provide Crystallex a Specific License to allow the federal court in the District of Delaware (which has jurisdiction over the shares in question and in whose constructive possession the shares are currently held) to pursue all activities necessary and ordinarily incident to organizing and conducting a judicial sale of the shares as provided for by U.S. federal and Delaware law, regulations, and precedents.”). OFAC notes that this request is necessary under applicable law, not least because “a license is required before a public auction or contingent sale could occur.” *See* Ex. 2, at 2 (citing E.O. Nos. 13,808, 13,835, 13,850, 13,884; 31 C.F.R. §§ 591.201, 591.506(c), 591.407; OFAC FAQs 808 & 809). OFAC is currently reviewing this application. *See id.* at 2.

OFAC is not yet in a position to issue a license decision to Crystallex, in part because of the complexity of Crystallex’s application. *Id.* at 2. “Unlike a routine OFAC license application, which may present a straightforward request to license a single transaction or limited set of transactions involving the applicant and a sanctioned person or a sanctioned jurisdiction, Crystallex’s submission implicates a series of complicated legal and policy questions.” *Id.* Relevant issues include the rapidly evolving situation in Venezuela, developments in the OFAC sanctions regime to address this situation, and the claims of other creditors against Venezuela—some of whom have also submitted license applications that implicate the PDVH shares. *Id.* Given the complex nature of these questions, the license request continues to undergo interagency review. *Id.*

Crystallex suggests that proceeding toward a sale of shares of PDVH “could aid OFAC in its review of Crystallex’s application for a specific license,” D.I. 198 at 3, by providing additional information about “[t]he mechanics of the sale process,” *id.* at 9-11; *see also* D.I. 154

at 9 (noting “Crystallex’s speculation . . . that OFAC will not issue a license until [a public auction takes place and] a winning bidder has been identified”). Contrary to this suggestion, proceeding toward a public auction and contingent sale “would not in any way facilitate OFAC’s license adjudication process with respect to Crystallex’s instant license application.” Ex. 2, at 2. As Director Gacki further explains in her attached letter:

It is well within OFAC’s licensing discretion to evaluate and determine whether to issue Crystallex’s requested license without needing to know the identity of the “winning bidder” in advance. OFAC uses its substantial discretion to evaluate a range of options when considering any specific licensing request, from a decision to deny the license in its entirety, to grant the license in its entirety, to grant the license subject to certain conditions, or even to bifurcate the license request and sequence the authorization of actions in the future. When evaluating a specific licensing request, OFAC could also separately determine that additional information or supplemental specific license requests are needed.

Id.

B. Proceeding toward a sale at this time would imperil the United States’ foreign policy and national security interests, and would serve no purpose if OFAC ultimately denies Crystallex’s license application.

Proceeding in the manner Crystallex proposes would imperil the United States’ important foreign policy interest in supporting the Guaidó government. As Special Representative Abrams has explained:

The efforts by creditors to enforce judgments against Venezuela by taking immediate steps toward a conditional sale of PdVSA’s U.S.-based assets, including PDVH and CITGO, are detrimental to U.S. policy and the interim government’s priorities. Should these assets be advertised for public auction at this time, the Venezuelan people would seriously question the interim government’s ability to protect the nation’s assets, thereby weakening it and U.S. policy in Venezuela today.

Whatever the eventual settlement of Venezuela’s debts or the fate of other accounts or assets, CITGO today is a special case. Every Venezuelan knows of this company and it is viewed, as are Venezuela’s oil reserves, as a central piece of the national patrimony. It is clear that its loss through a forced sale in a U.S. court would be a great political victory for the Maduro regime, which has already claimed that the United States and Guaidó are conspiring to ‘steal’ CITGO. The impact on Guaidó, the interim government, and U.S. foreign policy goals in Venezuela, would be greatly damaging and perhaps beyond recuperation.

Ex. 1, at 3. The situation in Venezuela is fluid, but absent a change in the above foreign policy considerations, these factors will weigh heavily in OFAC’s consideration of Crystallex’s license application and could prove to be dispositive of OFAC’s decision. *See* Ex. 2, at 2.

The United States respectfully submits that this Court should not authorize Crystallex to take further steps toward a forced sale of PDVH in light of the risk that such steps would harm U.S. foreign policy and national security interests in Venezuela. *See, e.g., Zarmach Oil Servs., Inc. v. U.S. Dep’t of the Treasury*, 750 F. Supp. 2d 150, 155 (D.D.C. 2010) (“[C]ourts owe a

substantial measure of ‘deference to the political branches in matters of foreign policy.’” (quoting *Regan v. Wald*, 468 U.S. 222, 242 (1984)); see also *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005) (noting Supreme Court’s “customary policy of deference to the President in matters of foreign affairs”); 50 U.S.C. § 1702(a)(1)(B) (conferring on the President broad authority to “nullify, void, prevent or prohibit, any” transaction involving “any property in which any foreign country or a national thereof has any interest”). Here, the value of PDVH both numerically and strategically is clear; there is no comparable asset for Venezuela and its new government. See Ex. 1, at 3; see also, e.g., D.I. 182 at 14 (estimating that “PDVH’s subsidiaries . . . have assets in excess of \$9.2 billion.”).

Additionally, at a more practical level, the parties’ submissions make clear that nothing comparable to the sale of the PDVH shares has ever been undertaken by a court in this manner. The sole example cited by Crystallex involved shares worth approximately \$500,000, a far cry from the PDVH valuations suggested by the parties. See D.I. 188 at 12 n.17 (citing “unrebutted research show[ing] that the largest stock sale ever managed by the Delaware authorities under 8 Del. C. § 324 was for \$567,000”); D.I. 182 at 1-4 (seeking to sell enough shares of PDVH under 8 Del. C. § 324 to satisfy “an arbitral award of \$1.4 billion”). While the concerns of the U.S. government are with the foreign policy implications of the contemplated auction and contingent sale, the lack of any comparable examples and experience are additional reasons for the Court to forego further action until after OFAC has issued a decision on Crystallex’s pending license application.

* * * *

2. *In re Evison*

On December 18, 2020, the United States filed a statement of interest, attaching the declaration of U.S. Ambassador to Russia John Sullivan, in *In re Evison*, No. 20-00246, a case in federal district court in the Southern District of New York. The U.S. statement of interest, excerpted below, asserts that the court should consider U.S. foreign policy interests in deciding whether to enforce Evison’s subpoenas. The declaration of Ambassador Sullivan explains that it would be in the foreign policy interests of the United States for Evison to obtain documents that might exonerate Michael Calvey, a U.S. citizen then awaiting trial in Moscow on charges that “represent the criminalization of business disputes” in Russia. On December 21, 2020, the parties notified the court that they had reached an agreement about which documents would be produced pursuant to the subpoenas.* The full texts of the statement of interest and Ambassador Sullivan’s declaration are available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

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* Editor’s note: On January 19, 2021, the court dismissed the case based on a stipulation of the parties.

Evison filed an *ex parte* application to take discovery from [BrokerCreditService (BCS) Cyprus Limited and BCS Americas, Inc., collectively, BCS] pursuant to § 1782, which authorizes federal district courts to assist interested parties in obtaining evidence for use in proceedings before foreign or international tribunals. After the Court granted Evison's § 1782 application, BCS moved to quash Evison's subpoenas on the grounds that Evison fails to satisfy the threshold statutory requirements for obtaining discovery under § 1782, and that discretionary considerations also weigh in favor of quashing the subpoenas.

The United States takes no position on whether Evison meets § 1782's statutory requirements. If the Court finds that Evison meets those requirements, however, the United States' foreign policy interests weigh in favor of Evison obtaining the discovery it seeks. Specifically, the discovery will assist Michael Calvey, a United States citizen, in defending against criminal proceedings brought against him in Russia, and the conclusion of those criminal proceedings in Calvey's favor would remove a significant impediment to achieving the United States' goal of promoting a bilateral business dialogue with Russia. Along with this Statement of Interest, the United States respectfully submits the Declaration of the U.S. Ambassador to the Russian Federation, John J. Sullivan, which details the United States' foreign policy interests in this matter. *See* Declaration of Ambassador John J. Sullivan, dated Dec. 17, 2020 ("Sullivan Decl.").

BACKGROUND

Section 1782 permits federal district courts, in their discretion, to "order [a person who resides or is found within the court's district] to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." 28 U.S.C. § 1782(a). On June 30, 2020, Evison filed an *ex parte* application pursuant to § 1782 (ECF No. 1) ("App."), seeking documents and testimony from BCS. *See* App. ¶¶ 10, 11. Evison initially sought this discovery for use in a London arbitration proceeding in which it was a party, and for Calvey's use in his Russian criminal proceedings, in which Evison asserts it is an "interested person." *See id.* ¶¶ 2-9. Following the Second Circuit's decision in *In re Guo*, 965 F.3d 96 (2d Cir. 2020), which held that § 1782 cannot be invoked to obtain discovery for use in a private commercial arbitration, Evison asserted that it sought the discovery only in connection with Calvey's criminal proceedings. *See* Evison Supplemental Mem. of Law in Support of App. for Discovery (ECF No. 11) at 2. According to news reports, as of October 2020, the private commercial arbitration is no longer pending.

Calvey is a founder of Baring Vostok, the largest foreign-funded private equity firm in Russia. *See* App. ¶ 7 & n.2. In February 2019, Calvey and several of his colleagues were arrested in Russia and charged with fraud, later amended to embezzlement, in connection with a business deal involving Evison and a company called Finvision. *See* Evison Mem. of Law in Support of App. for Discovery (ECF No. 4) ("Evison Br.") at 6. The purpose of the transaction was to merge the Orient Express Bank ("OEB"), which was majority owned by Evison, with Commercial Bank Uniastrum LLC, which was wholly owned by Finvision. *See id.* at 2-3. Shortly after the merger, a dispute arose between the parties, with Evison claiming that Finvision had misrepresented the quality and value of Uniastrum's assets, and Finvision claiming that it was entitled to additional shares of OEB. *See* App. ¶ 3; Declaration of Dmitry Savochkin, dated June 30, 2020 (ECF No. 3) ("Savochkin Decl.") ¶ 14. In April 2018, Evison commenced the London arbitration proceedings against Finvision. *See* App. ¶¶ 4-5; Evison Br. at 2. Thereafter, members of the board of OEB associated with Finvision initiated criminal charges in Russia

against Calvey and some of his colleagues. *See* App. ¶¶ 7, 9; Evison Br. at 6-7; Sullivan Decl. ¶ 6. The criminal charges allege that prior to the merger, OEB entered into loan transactions that improperly siphoned funds away from the bank, and that Calvey and his colleagues were responsible for those transactions. *See* Evison Br. at 7. Calvey was initially held in pre-trial detention and then was placed under house arrest. *See id.* at 6. In November 2020, his conditions of house arrest were largely lifted, although he remains subject to certain restrictions on his movements and activities; for example, he is prohibited from using the internet. *See* Sullivan Decl. ¶¶ 5, 8. According to Evison and BCS, Calvey’s criminal proceedings “will most likely be ongoing throughout January.” Joint Ltr. to Hon. Laura Taylor Swain, dated Oct. 30, 2020 (ECF No. 34) at 1.

Evison contends that the discovery it seeks from BCS will help support Calvey’s defense by showing that OEB’s loan transactions were for OEB’s benefit and did not siphon funds away from the bank. *See* Evison Br. at 7-10. Calvey’s Russian criminal defense counsel attests that the discovery is “urgently need[ed]” for Calvey’s defense, to “assist in establishing that no fraud, theft, or waste of corporate assets was committed.” Savochkin Decl. ¶¶ 34, 39. His defense counsel further explains that Calvey could not bring the § 1782 action in his own name due to “severe restrictions” placed on him as a result of his prosecution. Supplemental Declaration of Dmitry Savochkin, dated July 31, 2020 (ECF No. 10) ¶ 18. For example, Calvey sought to have a public notary visit his house to certify a power of attorney, but his request was denied. *See id.* Calvey also sought to have the Russian criminal investigator seek documents from BCS Cyprus, but that request was also denied. *See id.*

* * * *

DISCUSSION

If the Court determines that Evison meets the statutory requirements for obtaining discovery under § 1782, it should then take the United States’ foreign policy interests into account. Those interests weigh in favor of allowing Evison to obtain the discovery it seeks.

* * * *

Here, the foreign policy interests of the United States are a “pertinent issue[]” that the Court should take into account when deciding whether to allow Evison’s discovery requests. As explained in Ambassador Sullivan’s declaration, in 2018, “President Trump and Russian President Vladimir Putin . . . committed to a bilateral business dialogue between the United States and Russia.” Sullivan Decl. ¶ 3. “Bilateral business dialogues generally involve business leaders and others discussing and recommending solutions to legal, regulatory, and policy problems that inhibit the growth of economic relations between two countries.” *Id.* Ambassador Sullivan further states that business dialogues involving the United States and other countries “have demonstrated the potential . . . to promote U.S. investment and trade,” and “have been beneficial not only to private commercial interests, but to the people of the U.S. and other countries.” *Id.* “Likewise, a business dialogue between the United States and Russia would not only benefit business but the people of both countries by increasing communication, understanding, contacts, and people-to-people exchanges, as well as improving the macroeconomic relationship between the two countries.” *Id.*

As Ambassador Sullivan explains, however, “one of the most significant obstacles to holding the bilateral business dialogue has been the criminal prosecution of Michael Calvey.” *Id.* ¶ 4. The criminal charges against Calvey were “initiated by individuals involved in the business dispute” with Finvision, and were brought for the apparent purpose of preventing Calvey and his colleagues from “participat[ing] in the London arbitrations.” *Id.* ¶ 6. Accordingly, they “represent the criminalization of business disputes in” Russia, and present “a substantial barrier to normalizing relations between Russia and the United States with respect to business matters.” *Id.* ¶ 7.

The United States’ foreign policy goal of creating a bilateral business dialogue with Russia would therefore be advanced by the resolution of the criminal proceedings against Calvey in his favor. *See id.* ¶ 9. In its brief in support of its application, Evison asserts that the discovery it seeks is “carefully tailored to seek documents that will establish that the” loans underlying the criminal charges against Calvey “were created for the benefit of OEB, and not to siphon away funds.” Evison Br. at 7. According to Evison, “[t]he discovery . . . is therefore indisputably relevant [to] . . . Calvey[’s] . . . defenses in the Russian Criminal Proceeding.” *Id.* at 9; *see also* Savochkin Decl. ¶¶ 34, 39 (Evison’s proposed discovery is “urgently need[ed]” for Calvey’s defense). Insofar as Evison’s discovery could aid Calvey in obtaining a favorable decision in his criminal proceedings, it would also “advanc[e] the foreign policy interests of the United States” by removing “a substantial impediment to moving forward with a U.S.-Russia bilateral business dialogue.” Sullivan Decl. ¶ 9. “Such an outcome would potentially improve overall relations between the United States and Russia.” *Id.* The United States’ interests are therefore a “pertinent issue[]” that the Court should consider, and that weigh in favor of allowing Evison to enforce its subpoenas. *Kiobel*, 895 F.3d at 245.

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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). *Sosa* established a two-step framework for determining whether to recognize a common-law cause of action under the ATS: (1) whether the alleged violation is of a specific, universal, and obligatory international law norm; and (2) whether the political branches should grant specific authority before imposing liability. 542 U.S. at 732-33. In *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), the Supreme Court determined that the presumption against extraterritoriality applies to the ATS such that, “even where the claims touch and concern the territory of the United States, they must

do so with sufficient force” to state a domestic claim. See *Digest 2013* at 111-17. In *Jesner v. Arab Bank*, 584 U.S. ___, 138 S. Ct. 1386 (2018), the Supreme Court held that foreign corporations are not subject to ATS liability.

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.

2. *Nestlé/Cargill*

Former child slaves from Mali who were trafficked and forced to work cultivating cocoa in Côte d’Ivoire brought claims under the ATS against U.S. corporations, for allegedly aiding and abetting international-law violations by, among other things, purchasing cocoa beans from farms that used child slaves and providing those farms with general technical assistance. The district court dismissed, finding that the ATS does not provide jurisdiction over corporations for alleged international law violations. The U.S. Court of Appeals for the Ninth Circuit reversed and remanded. *Doe I v. Nestlé USA, Inc.*, 766 F.3d 1013 (2014), cert. denied, 577 U.S. 1062 (2016). The district court again dismissed, noting the Supreme Court’s decision in *Kiobel*, and finding that the claims did not sufficiently “touch and concern” the United States. No. 05-cv-05133 (Mar. 2, 2017). The Ninth Circuit again reversed and remanded (after the Supreme Court’s decision in *Jesner*, construing that decision as applicable only to liability of foreign corporations). It then denied rehearing en banc. *Doe v. Nestlé, S.A.*, 929 F.3d 623 (2019). The corporations filed a petition in the Supreme Court. The U.S. brief in *Nestlé*, No. 19-416, and *Cargill*, No. 19-453, was filed May 26, 2020, and argues that the petition for a writ of certiorari in *Cargill* should be granted, with the addition of the question addressing the availability of aiding-and-abetting liability, while the petition for a writ of certiorari in *Nestlé* should be held pending the Court’s disposition of the *Cargill* petition. On July 2, 2020 the Supreme Court granted the petitions and consolidated the cases. On September 8, 2020, the United States filed its amicus brief in support of petitioners, Nestlé and Cargill. The U.S. brief is excerpted below. The Supreme Court heard oral argument on December 1, 2020.

* * * *

I. THE ATS DOES NOT AUTHORIZE LIABILITY FOR DOMESTIC CORPORATIONS

Domestic corporations are not proper ATS defendants. Although *Jesner*’s holding did not squarely cover domestic corporations, its reasoning with respect to foreign corporations likewise forecloses liability for domestic corporations.

As a threshold matter, although the Court in *Jesner* declined to resolve whether corporate liability is subject to *Sosa*'s step-one requirement of an international-law norm, 138 S. Ct. at 1402 (plurality opinion), "[t]here is considerable force and weight," as the plurality explained, to the position that corporate liability is cognizable only if supported by a "specific, universal, and obligatory" international-law norm. *Id.* at 1400, 1402. Likewise, there is an "equally strong argument" that respondents "cannot satisfy the high bar of demonstrating" such a norm. *Id.* at 1400 (plurality opinion).

After all, "[i]nternational law is not silent on the question of the *subjects* of international law—that is, those that, to varying extents, have legal status, personality, rights, and *duties* under international law." *Jesner*, 138 S. Ct. at 1400 (plurality opinion) (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 126 (2d Cir. 2010), *aff'd*, 565 U.S. 961 (2011)) (brackets in original). As the *Jesner* plurality explained, whether an international-law norm extends to a particular category of actors arguably represents an important aspect of the norm itself. *Id.* at 1399-1400, 1402. Moreover, "the charters of respective international criminal tribunals often exclude corporations from their jurisdictional reach," *id.* at 1400 (plurality opinion), and "jurisdiction over corporations was considered but expressly rejected" for several of those tribunals, *Kiobel*, 621 F.3d at 136-137. "[A]t most," respondents could potentially show "that corporate liability might be permissible under international law in some circumstances." *Jesner*, 138 S. Ct. at 1401 (plurality opinion). But that "falls far short of establishing a specific, universal, and obligatory norm of corporate liability" under *Sosa*. *Ibid.*; see *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 81 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part), vacated on other grounds, 527 Fed. Appx. 7 (D.C. Cir. 2013).

Ultimately, as in *Jesner*, this "Court need not resolve" whether *Sosa*'s first step forecloses domestic-corporation liability, 138 S. Ct. at 1402 (plurality opinion), as *Sosa*'s second step plainly does so. In particular, multiple considerations—including the separation of powers, foreign policy, and analogous statutes—indicate that imposing ATS liability on domestic corporations would not represent an appropriate exercise of judicial discretion. See *id.* at 1402-1403, 1406-1407 (majority opinion); *id.* at 1403-1406 (plurality opinion); see also *Sosa*, 542 U.S. at 732-733. The court of appeals failed to engage meaningfully with *Jesner*, instead adhering to a pre-*Jesner* circuit precedent solely on the ground that *Jesner* did not expressly address domestic-corporation liability. ...

A. Separation-Of-Powers Principles Foreclose Domestic-Corporation Liability

As the *Jesner* majority noted, *Sosa*'s second step "is consistent with this Court's general reluctance to extend judicially created private rights of action." 138 S. Ct. at 1402. "[E]ven in the realm of domestic law," "recent precedents cast doubt on the authority of courts to extend or create private causes of action." *Ibid.* (discussing cases applying *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)); see *Hernandez v. Mesa*, 140 S. Ct. 735, 742, 749 (2020) (in converse scenario, applying *Jesner*'s logic to a *Bivens* claim). This Court has "repeatedly said" that such judgments are generally best left to the legislature, *Jesner*, 138 S. Ct. at 1402 (citation omitted), which is "better position[ed] to consider if the public interest would be served by imposing" legal liability in a particular type of case, *ibid.* (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017)). Accordingly, "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." *Ibid.* (quoting *Abbasi*, 137 S. Ct. at 1858).

The *Jesner* Court underscored that these background “separation-of-powers concerns * * * apply with particular force” to the ATS, given the “foreign-policy” considerations “inherent in ATS litigation,” which by definition involves claimed violations of *international* law. 138 S. Ct. at 1403. Indeed, “there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS” beyond the three traditional torts *Sosa* recognized—piracy, offenses against ambassadors, and interference with safe passage. *Ibid.*; see *id.* at 1397; cf. *Abbasi*, 137 S. Ct. at 1856 (“[I]t is possible that the analysis in the Court’s three *Bivens* cases might have been different if they were decided today.”).

Critically, the Court in *Jesner* specifically held that the need to exercise “caution” in implying new rights of action “extends to the question whether the courts should exercise the judicial authority to mandate a rule that imposes liability upon artificial entities like corporations.” 138 S. Ct. at 1402-1403. And it found the *Bivens* jurisprudence instructive at that more granular level, too. *Jesner* emphasized that the Court has declined to impose corporate liability under *Bivens* because doing so “would have been a ‘marked extension’ of *Bivens* that was unnecessary to advance its purpose of holding individual officers responsible.” *Id.* at 1403 (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)). In *Malesko*, the Court further reasoned that corporate liability might even have obstructed *Bivens*’ purpose by encouraging plaintiffs to “focus their collection efforts on [the corporate defendant], and not the individual directly responsible for the alleged injury.” 534 U.S. at 71. Similar reasoning holds true here. See *Jesner*, 138 S. Ct. at 1402 (plurality opinion) (recognizing that “only by punishing individuals who commit [crimes against international law] can the provisions of international law be enforced”) (quoting *The Nurnberg Trial*, 6 F.R.D. 69, 110 (Int’l Military Trib. 1946)). The *Malesko* Court ultimately concluded that whether corporate defendants should be subject to civil suit is “a question for Congress, not [the Court], to decide.” 534 U.S. at 72. As *Jesner* recognized, that logic applies with equal force to the ATS. 138 S. Ct. at 1403 (discussing *Malesko*).

Significantly, none of this reasoning from *Jesner* provides any basis for differentiating between foreign and domestic corporations. The same separation-of-powers principles preclude ATS liability for both. Making the intrinsically policy-oriented judgment to extend ATS liability to corporations of any kind “absent further action from Congress” would “be inappropriate.” *Jesner*, 138 S. Ct. at 1403.

B. Foreign-Policy Considerations Confirm That Domestic Corporations Should Not Be Held Liable

Although separation-of-powers considerations alone sufficed to foreclose foreign-corporation liability in *Jesner*, see 138 S. Ct. at 1402-1403, the majority separately relied on the ATS’s original purpose, see *id.* at 1406-1407. Namely, 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.” *Id.* at 1406. The Court observed that “here, and in similar cases, the opposite is occurring.” *Ibid.*

The same is true of cases brought against domestic corporations, which frequently involve claims challenging foreign conduct and the policies of foreign states, thereby embroiling courts in difficult and politically sensitive disputes. See, e.g., *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 258 (2d Cir. 2007) (per curiam), *aff’d sub nom. American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (alleging corporate aiding and abetting of apartheid); *Exxon*

Mobil Corp., 654 F.3d at 15-16 (alleging corporate aiding and abetting of the Indonesian military); see also *Jesner*, 138 S. Ct. at 1404 (plurality opinion) (noting that plaintiffs may “use corporations as surrogate defendants to challenge the conduct of foreign governments”). Although some of these lawsuits may be foreclosed by a proper application of the presumption against extraterritoriality, the presumption is not a panacea in this context. See p. 20, *infra*. These cases thus illustrate that domestic-corporation liability may provoke—and, indeed, “ha[s] provoked,” *Jesner*, 138 S. Ct. at 1410 (Alito, J., concurring in part and concurring in the judgment)—“the very foreign- relations tensions the First Congress sought to avoid,” *id.* at 1407 (majority opinion); see, e.g., *Sosa*, 542 U.S. at 733 n.21.

Apart from the evidence of practice, other considerations confirm that domestic-corporation liability is unnecessary to advance the ATS’s original purpose. Contra Br. in Opp. 21-22. Because “customary international law does not *require* corporate liability,” see p. 11, *supra*, “declining to create it under the ATS cannot give other nations just cause for complaint against the United States.” *Jesner*, 138 S. Ct. at 1410 (Alito, J., concurring in part and concurring in the judgment); see *id.* at 1420 (Sotomayor, J., dissenting). This is particularly true given that ATS suits against corporations “will seldom be the only way for plaintiffs to hold the perpetrators liable.” *Id.* at 1405 (plurality opinion) (discussing alternative remedies). Ultimately, because recognizing domestic-corporation liability under the ATS would not “*decrease* diplomatic disputes,” *id.* at 1411 (Alito, J., concurring in part and concurring in the judgment), “[i]t has not been shown that corporate liability under the ATS is essential to serve the goals of the statute,” *id.* at 1405 (plurality opinion).

In addition to diplomatic strife, ATS lawsuits against domestic corporations carry the potential to undermine U.S. economic initiatives. ATS liability poses the potential risk of limiting U.S. efforts to encourage investment in certain developing countries, where “active corporate investment * * * so often is an essential foundation for human rights.” *Jesner*, 138 S. Ct. at 1406 (plurality opinion); see 788 F.3d 946, 950 n.10 (Bea, J., dissenting from the denial of reh’g en banc) (“An embargo by chocolate manufacturers on Ivory Coast chocolate farmers is precisely the predictable economic effect plaintiffs’ successful action would have.”).

Some cases—like this one—may also threaten more specific policies. In an effort to address child slavery in the cocoa industry, members of Congress facilitated the Harkin-Engel Protocol (Protocol), which is a commitment by major chocolate manufacturers to take steps to eliminate the worst forms of child labor. To achieve the Protocol’s objectives, the U.S. Department of Labor has participated in various public-private partnerships, and industry participants, among other things, joined a coalition with a goal of “train[ing] and deliver[ing] improved planting material and fertilizer” to hundreds of thousands of cocoa farmers. Child Labor Cocoa Coordinating Grp., *2018 Annual Report* 4, <https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/CLCCG2018AnnualReport.pdf>. In this case, however, respondents characterize the Protocol as a critical *part* of the alleged misconduct, describing it as a way for petitioners to avoid more intrusive legislation. See J.A. 330-331. And they treat petitioners’ provision of training and supplies to farmers in Côte d’Ivoire as integral to the actus reus of their aiding-and-abetting claim. See, e.g., J.A. 342. In short, respondents’ theory of the case is in serious tension with the policy underlying the Protocol and its implementing initiatives.

At bottom, it is unsurprising that ATS lawsuits against domestic corporations pose risks for U.S. foreign policy. Although the United States condemns human-rights violators and those who aid and abet them, the blunt instrument of ATS liability may be at cross-purposes with the

political branches’ need for flexibility in “calibrat[ing]” diplomatic measures to accomplish foreign-policy objectives. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 376-378 (2000). The President and Congress rely on a variety of tools to promote compliance with international law and respect for human rights, and they are uniquely situated to gauge when a particular foreign-policy goal must be subordinated to other priorities. See, e.g., USAID, *Democracy, Human Rights, and Governance*, <https://www.usaid.gov/cote-divoire/democracy-human-rights-and-governance> (describing initiatives in Côte d’Ivoire). These nuanced foreign-policy choices are precisely the sort of judgments that the Constitution commits to the political branches. See *Jesner*, 138 S. Ct. at 1403 (“The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.”); *Hernandez*, 140 S. Ct. at 744. Civil-damages lawsuits brought by private plaintiffs, in contrast, will virtually never take into account the broader considerations that necessarily inform the political branches’ judgments in this area. Courts applying the ATS must accordingly be “particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.” *Kiobel*, 569 U.S. at 116 (quoting *Sosa*, 542 U.S. at 727).

In an effort to distinguish *Jesner* on this point, respondents contend that the particular claims in *Jesner* “had significant implications for foreign governments and international relations”—unlike here, where the claims “present[] no relevant foreign policy implications.” Br. in Opp. 20-21. Respondents err in both their premise and conclusion.

Even on its own terms, respondents’ argument is dubious. The complaint specifically alleges that “Defendants’ actions were undertaken under the color of foreign authority” and that “several of the cocoa farms in Côte d’Ivoire from which Defendants source are owned” or “protected by government officials.” J.A. 319-320, 341-342. As discussed, respondents’ theory of culpability impugns the Protocol and its implementing initiatives. And nearly all the alleged misconduct, including the child slavery itself, is foreign; the alleged domestic conduct amounts to no more than generic business transactions and oversight of foreign operations. See pp. 33-34, *infra*; see also *Jesner*, 138 S. Ct. at 1406 (“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.”).

In any event, the *Jesner* Court made a *categorical* judgment that foreign-corporation liability is inappropriate under the ATS. See *Jesner*, 138 S. Ct. at 1407 (“[F]oreign corporations may not be defendants in suits brought under the ATS.”). That judgment was not dependent on the facts of any particular case. See *id.* at 1406 (noting that the facts of the case merely “illustrate[d] the perils of extending the scope of ATS liability to foreign multinational corporations”) (emphasis added). As explained above, the foreign-policy reasons the Court gave in support of this categorical holding similarly foreclose liability for domestic corporations.

To be sure, other legal mechanisms, such as the presumption against extraterritoriality, may mitigate the negative foreign-policy implications of domestic-corporation liability in particular cases. But even threshold issues like the presumption against extraterritoriality are likely to be “hotly litigated,” and it “may be years before incorrect initial decisions” can be overturned, *Jesner*, 138 S. Ct. at 1411 (Alito, J., concurring in part and concurring in the judgment)—as in this very case, which has been pending since 2005, see 748 F. Supp. 2d 1057, 1063. And regardless, the mere possibility that some other doctrine may alleviate the potential for adverse consequences in a subset of cases does not change the fact that domestic corporate defendants, just like “foreign” ones, “create unique problems.” *Jesner*, 138 S. Ct. at 1407; see *ibid.* (“Petitioners insist that whatever the faults of this litigation[,] * * * 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.”). The history of ATS suits brought against domestic corporations challenging foreign and foreign-state conduct confirms the point. See p. 15, *supra*. Courts simply “are not well suited to make the required policy judgments that are implicated by corporate liability in cases like this one.” *Jesner*, 138 S. Ct. at 1407.

C. Additional Considerations Counsel Against Domestic-Corporation Liability

Recognizing domestic-corporation liability would also be in serious tension with congressional intent as reflected in analogous statutes. Such statutes provide critical “legislative guidance” in recognizing causes of action under the ATS. *Jesner*, 138 S. Ct. at 1403 (plurality opinion) (quoting *Sosa*, 542 U.S. at 726); see *Hernandez*, 140 S. Ct. at 747 (“It would be ‘anomalous to impute a judicially implied cause of action beyond the bounds Congress has delineated for a comparable express cause of action.’ ”) (brackets, citation, and ellipsis omitted). The “logical place to look for a statutory analogy to an ATS common-law action is the [Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (28 U.S.C. 1350 note)]—the only cause of action under the ATS created by Congress rather than the courts.” *Jesner*, 138 S. Ct. at 1403 (plurality opinion). A “key feature” of the TVPA is that it limits liability to “natural persons,” *id.* at 1404 (plurality opinion), a legislative judgment that “ ‘carries with it significant foreign policy implications,’ ” *id.* at 1403 (plurality opinion) (quoting *Kiobel*, 569 U.S. at 117). “Congress’ decision to exclude liability for corporations in actions brought under the TVPA is all but dispositive of the present case,” as 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.’ ” *Id.* at 1404 (plurality opinion) (quoting *Sosa*, 542 U.S. at 726).

Moreover, in light of *Jesner*’s holding rejecting foreign-corporation liability under the ATS, a contrary rule for domestic-corporation liability would facially discriminate against U.S. corporations. There is no persuasive textual or historical indication that the ATS should be construed to have the counterintuitive effect of exposing U.S. businesses to greater liability risk than foreign businesses engaged in exactly the same conduct. Such a rule would place U.S. corporations at a distinct disadvantage, particularly when operating “in developing economies” where there may be “a history of alleged human-rights violations” and a correspondingly heightened potential for liability exposure. *Jesner*, 138 S. Ct. 22 at 1406 (plurality opinion). And perversely, to the extent the threat of ATS litigation deters domestic corporations from investing in certain nations or prompts them to divest, foreign companies less susceptible to U.S. influence on human rights may take their place. See Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 Geo. L.J. 709, 726 & n.128 (2012).

II. RESPONDENTS FAIL TO STATE A CLAIM OF DOMESTIC AIDING AND ABETTING

Respondents have not pleaded a plausible domestic aiding-and-abetting claim. At the outset, this Court may wish to consider whether aiding-and-abetting liability is cognizable under the ATS, as the analysis of whether and why it is may affect the extraterritoriality analysis and could obviate the need to conduct that analysis at all. And in fact, *Jesner* makes clear that *Sosa*’s second step alone precludes such liability. Even assuming, however, that aiding-and-abetting liability is cognizable, respondents’ allegations do not avoid the bar on extraterritoriality. The primary tort—the child slavery—occurred abroad, and even considering only the secondary tort, respondents’ general allegations of domestic corporate transactions and oversight are insufficient.

A. Aiding And Abetting Is Not Cognizable Under The ATS

To determine whether a particular claim is impermissibly extraterritorial, a court must identify the “focus” of the relevant cause of action. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016); see pp. 26-27, *infra*. Because the focus of a cause of action depends on the contours of that cause of action, see *Morrison v. National Austl. Bank Ltd.*, 561 U.S. 247, 266-268 (2010), the focus inquiry is complicated here by the fact that this Court has never determined whether and how an aiding-and-abetting cause of action is available under the ATS. The Court accordingly may wish to address the availability of aiding-and-abetting liability as a precursor to the extraterritoriality analysis. This Court should conclude—as the government has long argued—that “aiding and abetting liability constitutes an improper expansion of judicial authority to fashion federal common law” under the ATS. Gov’t Amicus Br. at 8, *American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919) (capitalization and emphasis omitted). A ruling that aiding-and-abetting liability is unavailable in this context would also provide critical guidance to the courts of appeals, which have consistently (though erroneously) permitted such liability. See Gov’t Cert. Amicus Br. 17-18, Nos. 19-416, 19-453 (listing cases).

Here, the court of appeals upheld aiding-and-abetting liability based solely on what it perceived to be a norm of international law, *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 748-749 (9th Cir. 2011) (en banc), cert. granted, judgment vacated, 569 U.S. 945 (2013); see 766 F.3d 1013, 1023 (citing *Sarei*), but that analysis is untenable after *Jesner*. Under *Jesner*’s application of *Sosa*’s second step, permitting aiding-and-abetting claims “to proceed” would not represent “a proper exercise of judicial discretion,” 138 S. Ct. at 1399 (plurality opinion), as there are numerous “sound reasons to think Congress might doubt the efficacy or necessity” of aiding-and-abetting liability in ATS suits, *id.* at 1402 (majority opinion) (quoting *Abbasi*, 137 S. Ct. at 1858). As explained further below, aiding-and-abetting liability is properly characterized as a means of allocating secondary responsibility for another’s primary tort, rather than as a separate primary tort. See pp. 28-30, *infra*. Thus, much like *Jesner* declined to extend liability beyond individual perpetrators to foreign corporations, so too this Court should decline to extend liability beyond primary violators to aiders and abettors. Consistent with fundamental separation-of-powers principles, whether a “new form[] of liability” should be imposed on an entire category of actors, *id.* at 1403, is “a question for Congress, not [this Court], to decide,” *ibid.* (quoting *Malesko*, 534 U.S. at 72).

Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994), confirms the point. There, the Court held that “when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant’s violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.” *Id.* at 182. The Court observed that recognizing aiding-and-abetting liability in cases of statutory silence would work a “vast expansion of federal law” and should not be undertaken in the absence of “congressional direction.” *Id.* at 183. The need to respect Congress’s role is only “magnified” where, as here, “the question is not what Congress has done but instead what courts may do.” *Kiobel*, 569 U.S. at 116.5

Central Bank also recognized that, as a practical matter, “the rules for determining aiding and abetting liability are unclear.” 511 U.S. at 188. In private suits asserting aiding-and-abetting claims—including this one—“[t]he issues [are] hazy, their litigation protracted, and their resolution unreliable.” *Id.* at 189 (citation omitted). And in the civil arena, private plaintiffs are able to leverage vague standards “without the check imposed by prosecutorial discretion.” *Sosa*, 542 U.S. at 727; see *Central Bank*, 511 U.S. at 188. Given the immense economic and

reputational costs at stake in ATS litigation, however, this is “an area that demands certainty and predictability.” *Central Bank*, 511 U.S. at 188 (citation omitted).

Respect for the political branches’ authority over foreign affairs similarly counsels against recognizing liability for aiding and abetting. Aiding-and-abetting claims provide plaintiffs with a means for evading the limitations of sovereign immunity and challenging the policies and conduct of foreign states and officials. See, e.g., *Exxon Mobil Corp.*, 654 F.3d at 15-16; see also *Khulumani*, 504 F.3d at 281 (Katzmann, J., concurring) (“[A] private actor may be held responsible for aiding and abetting the violation of a norm that requires state action.”). And even when concerns of sovereign immunity are not directly implicated, aiding-and-abetting claims present many of the same foreign-policy concerns that corporate liability does. See pp. 15-20, *supra*.

Finally, congressional action provides an additional reason to abstain from implying a cause of action for aiding and abetting. The TVPA does not provide for aiding-and-abetting liability, see 28 U.S.C. 1350 note, and “[a]bsent a compelling justification, courts should not deviate from that model.” *Jesner*, 138 S. Ct. at 1403 (plurality opinion). Although Congress authorized a form of secondary liability in the Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, Div. A, 114 Stat. 1466 (22 U.S.C. 7101 *et seq.*), see 18 U.S.C. 1595(a), that merely illustrates “that there are two reasonable choices” and that “Congress, not the Judiciary, must decide whether to expand the scope of liability.” *Jesner*, 138 S. Ct. at 1405 (plurality opinion).

B. Respondents’ Aiding-And-Abetting Claims Are Impermissibly Extraterritorial

Even assuming aiding-and-abetting suits are cognizable under the ATS, respondents’ claims do not satisfy the presumption against extraterritoriality. Because the ATS does not apply extraterritorially, respondents’ allegations must “touch and concern the territory of the United States * * * with sufficient force to” state a domestic claim. *Kiobel*, 569 U.S. at 124-125. In *RJR Nabisco*, the Court clarified that this test is satisfied only if the conduct that forms “the statute’s ‘focus’ ” occurred in the United States. 136 S. Ct. at 2101; see *Kiobel*, 569 U.S. at 126 (Alito, J., concurring).

To identify a statute’s “focus,” courts look to the “object[] of the statute’s solicitude,” including the conduct “the statute seeks to ‘regulate’ ” and the persons and interests it “seeks to ‘protect.’ ” *Morrison*, 561 U.S. at 267 (brackets and citation omitted). In conducting this analysis, courts typically examine the statutory provisions creating and governing the relevant cause of action, standard of conduct, and available remedy. See, e.g., *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2137 (2018) (“If the statutory provision at issue works in tandem with other provisions, it must be assessed in concert with those other provisions.”).

The fact that the ATS “is a jurisdictional statute” that neither creates “causes of action” nor establishes standards of conduct, *Sosa*, 542 U.S. at 724, makes it difficult to conduct the focus inquiry contemplated in *WesternGeco* and this Court’s other extraterritoriality precedents. Nevertheless, the text of the ATS provides at least some guidance: at a high level of generality, the statute’s textual “focus” is “tort[s]” committed in violation of international law. 28 U.S.C. 1350; see *Kiobel*, 569 U.S. at 124; *id.* at 126 (Alito, J., concurring). And *Kiobel* further elaborates that the statute is specifically focused on the conduct underlying those “tort[s].” See 569 U.S. at 124 (“On these facts, all the relevant *conduct* took place outside the United States.”) (emphasis added); see also *id.* at 126-127 (Alito, J., concurring) (“[O]nly conduct that satisfies

Sosa's requirements * * * can be said to have been 'the "focus" of congressional concern.' ") (citation omitted). In short, the focus of the ATS is the tortious conduct.

But neither the text of the ATS nor this Court's precedents provide definitive guidance as to the relevant focus in cases involving *secondary* liability. In those cases, either the defendant's or the primary actor's tortious conduct could potentially represent the proper focus, and those actions may well have occurred in different locations. To identify which actor's conduct is relevant, it is thus necessary to look beyond the text to the focus of the specific common-law cause of action at issue. See *Kiobel*, 569 U.S. at 117 (asking "whether a *cause of action* under the ATS reaches conduct within the territory of another sovereign") (emphasis added). By examining the common-law cause of action—just as it would examine the statutory cause of action in a typical extraterritoriality case, see *WesternGeco*, 138 S. Ct. at 2137—the Court can define the relevant focus with the requisite precision.

1. In deeming respondents' aiding-and-abetting claims domestic, the court of appeals held, without meaningful analysis, that the relevant "focus" is petitioners' conduct. See Pet. App. 35a-36a. That holding was incorrect. To the extent a cause of action for aiding-and-abetting is cognizable under the ATS at all, its "focus" is the underlying principal conduct.

Aiding and abetting is typically characterized as a mode of liability for the principal offense, rather than a standalone wrong. In the domestic criminal context, sources treat aiding and abetting as "a more particularized way of identifying persons" responsible for the underlying offense, rather than "a discrete criminal offense." *Khulumani*, 504 F.3d at 280-281 (Katzmann, J., concurring) (quoting *United States v. Smith*, 198 F.3d 377, 383 (2d Cir. 1999), cert. denied, 531 U.S. 864 (2000)); see 18 U.S.C. 2(a); *Rosemond v. United States*, 572 U.S. 65, 70 (2014) (concluding that the federal aiding-and-abetting statute "reflects a centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission"); *United States v. Johnson*, 319 U.S. 503, 513-515 (1943). The limited civil sources available similarly suggest that aiding and abetting "is a basis for imposing liability for the tort aided and abetted rather than being a separate tort." *Eastern Trading Co. v. Refco, Inc.*, 229 F.3d 617, 623-624 (7th Cir. 2000); see Restatement (Second) of Torts § 876 (1979); *Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983).

In the international realm, various authorities have also taken an approach "consistent with the understanding that aiding and abetting is a theory of liability for acts committed by a third party." *Khulumani*, 504 F.3d at 280 (Katzmann, J., concurring); *id.* at 280-281 (canvassing sources); see *Hamdan v. Rumsfeld*, 548 U.S. 557, 611 n.40 (2006) (plurality opinion). Several major statutes governing international criminal tribunals, including the Rome Statute, treat aiding and abetting as a basis for "individual criminal responsibility" for the enumerated substantive crimes, rather than mentioning it within the catalogue of substantive crimes itself. See Rome Statute of the International Criminal Court (Rome Statute) arts. 5, 25, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90.7 International tribunals have characterized aiding and abetting similarly. See, e.g., *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment, ¶ 391 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) ("As opposed to the 'commission' of a crime, aiding and abetting is a form of accessory liability.").

That characterization finds additional support in the fact that completion of the principal offense is generally a necessary element of an aiding-and-abetting cause of action. See, e.g., Dan B. Dobbs et al., *The Law of Torts* § 435 (2d ed. 2011); 2 Wayne R. LaFare, *Substantive Criminal Law* § 13.3(c), at 498 (3d ed. 2017). That makes sense, as there is often nothing inherently unlawful about the activity alleged to constitute aiding and abetting, such as providing funding or

goods. It is only when such activity is conducted with a particular mens rea in connection with the principal crime or tort that it becomes unlawful. Cf. *Morrison*, 561 U.S. at 266 (“Section 10(b) does not punish deceptive conduct, but only deceptive conduct ‘in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.’”) (citation omitted).

Collectively, these considerations show that the “focus” of an aiding-and-abetting cause of action is the principal tort: it is the principal-tort conduct that the law “seeks to ‘regulate,’ ” and the victim of that tort whom the law “seeks to ‘protect.’ ” *Morrison*, 561 U.S. at 267 (brackets and citations omitted). That conclusion is consistent with this Court’s recognition that even conduct-regulating statutes may have a focus other than the defendant’s conduct. See *id.* at 266 (concluding that the “focus” of a particular federal securities-fraud provision “is not upon the place where the deception originated, but upon purchases and sales of securities”). Here, respondents allege claims of forced labor, torture, and cruel, inhuman, or degrading treatment; and they purport to sue on behalf of individuals “who were trafficked from Mali to any cocoa producing region of Côte d’Ivoire and forced to perform labor as children under the age of 18 on any farm and/or farmer cooperative within any cocoa producing region of Côte d’Ivoire.” J.A. 307-308, 338-342. Because the alleged principal conduct occurred entirely overseas, respondents’ claims are impermissibly extraterritorial.

2. Even if the proper “focus” of an aiding-and-abetting claim were the defendant’s own conduct, respondents’ claims still would fail. The proper standard at the pleading stage would require plaintiffs to plausibly allege, consistent with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007), enough domestic conduct by the defendants to satisfy the actus reus and mens rea for an aiding-and-abetting claim. See *Kiobel*, 569 U.S. at 127 (Alito, J., concurring) (“[A] putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*[].”). The mere existence of *some* domestic conduct is plainly insufficient under this Court’s precedents. See *id.* at 124-125 (“[E]ven 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.”); cf. *Morrison*, 561 U.S. at 266 (“[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.”).

Although this Court has not previously settled the elements of an aiding-and-abetting claim under the ATS, the court of appeals suggested that, at a minimum, international law requires a plaintiff to allege that the defendant provided knowing, “substantial” assistance with the requisite “causal link” “to the commission of a crime.” 766 F.3d at 1023, 1026. The standard for civil aiding and abetting under domestic law appears generally to require a similar showing. See Restatement (Second) of Torts § 876.

In concluding that respondents’ complaint rested on sufficient domestic conduct, the court of appeals emphasized their allegation that petitioners provided “personal spending money to maintain the farmers’ and/or the cooperatives’ loyalty as an exclusive supplier.” Pet. App. 36a. The court characterized these payments as “ ‘kickbacks,’ ” “infer[ring] that the personal spending money was outside the ordinary business contract and given with the purpose to maintain ongoing relations with the farms so that defendants could continue receiving cocoa at a price that would not be obtainable without employing child slave labor.” *Ibid.* (citation omitted). The court also pointed to allegations that petitioners “had employees from their United States

headquarters regularly inspect operations in the Ivory Coast and report back to the United States offices, where these financing decisions * * * originated.” *Ibid.*

This analysis was in error. Nearly all of the supposedly relevant conduct cited by the court of appeals occurred overseas. The alleged farm inspections plainly occurred in Côte d’Ivoire. With respect to the purported “ ‘kickbacks,’ ” “[t]he complaint does not even allege that the funds originated in the U.S., only that they were paid to ‘local farmers.’ ” Pet. App. 21a (Bennett, J., dissenting from the denial of reh’g en banc); see J.A. 316. Overseas conduct, of course, does not help respondents demonstrate a domestic application of the ATS. See *RJR Nabisco*, 136 S. Ct. at 2101 (“[I]f the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application.”).

After excising the foreign conduct, the domestic conduct alleged in the complaint is insufficient to satisfy any reasonable view of the actus reus and mens rea elements of an aiding-and-abetting claim. The fact that employees from petitioners’ domestic headquarters oversaw foreign operations does not imply that they provided “substantial” assistance to the perpetrators of child slavery in Côte d’Ivoire. 766 F.3d at 1026. And even assuming the alleged funding arrangements originated in the United States, the complaint “is devoid of any allegation that the provision of ‘spending money’ was improper or illegal.” Pet. App. 25a (Bennett, J., dissenting from the denial of reh’g en banc). Tellingly, the majority identified no plausible factual support for its characterization of these payments as “kickbacks” for using child labor. *Id.* at 36a; see J.A. 316 (omitting any such allegation). To the contrary, “[t]he *factual* allegations in the complaint show only that Defendants sought to stabilize their supply lines and minimize costs by entering into exclusive-dealing arrangements.” Pet. App. 25a-26a (Bennett, J., dissenting from the denial of reh’g en banc). Courts have acknowledged that “such agreements provide well-recognized economic benefits,” *ibid.* (citation and internal quotation marks omitted), and “merely ‘supplying a violator of the law of nations with funds’ as part of a commercial transaction, without more, cannot constitute aiding and abetting.” 748 F. Supp. 2d at 1099 (discussing cases) (citation omitted).

In short, the well-pleaded facts of the complaint “do not permit the court to infer more than the mere possibility of misconduct.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Respondents’ domestic allegations boil down to the “normal business conduct” that could be associated with any corporate headquarters. Pet. App. 25a (Bennett, J., dissenting from the denial of reh’g en banc). On any plausible understanding of the elements of an aiding-and-abetting claim, that is not enough. See *Kiobel*, 569 U.S. at 125 (“Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.”).

* * * *

3. ***Mutond v. Lewis***

See Chapter 10 for discussion of the U.S. brief in *Mutond v. Lewis*, in the U.S. Supreme Court, a case involving claims under the TVPA in which the court considered applicability of foreign official immunity.

C. ACT OF STATE AND POLITICAL QUESTION DOCTRINES, COMITY, AND *FORUM NON CONVENIENS*

1. *Hungary v. Simon*

On September 11, 2020, the United States filed its *amicus* brief in the U.S. Supreme Court in *Hungary v. Simon*, No. 18-1447. Jewish survivors of the Holocaust and their heirs asserted a claim based on Hungary's collaboration with the Nazis to exterminate Hungarian Jews and expropriate their property, and asserted that the Hungarian railway (MÁV) assisted by transporting Hungarian Jews to death camps and by taking their property. The district court dismissed for lack of subject matter jurisdiction. The U.S. Court of Appeals for the D.C. Circuit affirmed in part, but reversed as to common-law property claims, which it held to be within the expropriation exception to the Foreign Sovereign Immunities Act ("FSIA"). On remand, the district court agreed with Hungary's assertions of international comity and *forum non conveniens* as grounds for dismissal. The D.C. Circuit reversed. The question before the Court in this case is whether, when one of the exceptions to the FSIA applies, a court is barred from invoking the doctrine of international comity to abstain from exercising jurisdiction. Excerpts follow from the U.S. brief in the Supreme Court.** See section C.2., *infra*, and Chapter 10 for discussion of *Germany v. Philipp*, referenced in the U.S. brief in *Simon*.

* * * *

Since long before Congress's enactment of the FSIA, U.S. courts have held and exercised the power to abstain from deciding cases that fall within their proper jurisdiction on the ground that adjudicating them would undermine international comity. Nothing in the FSIA abrogates that authority. Indeed, "far from foreclosing [comity-based abstention]," the text of the "FSIA affirmatively accommodates [it]." *Philipp v. Federal Republic of Germany*, 925 F.3d 1349, 1355 (D.C. Cir. 2019) (per curiam) (Katsas, J., dissenting from the denial of rehearing en banc). And even if the text leaves any doubt on the question, the "presumption favoring the retention of long-established and familiar principles," *United States v. Texas*, 507 U.S. 529, 534 (1993) (citation omitted), requires reading the statute to preserve courts' longstanding authority to abstain based on international comity. The court of appeals' contrary conclusion lacks any sound basis in the statutory text or this Court's precedents, and would meaningfully harm the foreign-relations interests of the United States.

A. United States Courts Have Discretion In Appropriate Cases To Abstain On Comity Grounds From Exercising Jurisdiction

1. This Court has long recognized the doctrine of international comity, which permits U.S. courts to take account of the "legislative, executive or judicial acts of another nation" in ways that show "due regard both to international duty and convenience, and to the rights of its

** Editor's note: On February 3, 2021, the Supreme Court remanded the case to the district court, to be considered in accordance with its opinion in *Germany v. Philipp*.

own citizens or of other persons who are under the protection of its laws.” *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). The doctrine has multiple strands, including “the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere,” and “prescriptive comity,” which reflects “the respect sovereign nations afford each other by limiting the [substantive] reach of their laws.” *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

This case involves the former strand, which is also sometimes referred to as “adjudicatory comity.” *Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014), cert. denied, 136 S. Ct. 690 (2015). Adjudicatory comity arises in a variety of contexts, and is typically invoked “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 (citation omitted). This Court has explained, for example, that in early admiralty cases brought by “foreign seamen suing for wages, or because of ill treatment,” a U.S. court “often” sought the consent of the foreign consul “before the court [would] proceed to entertain jurisdiction; not on the ground that it has not jurisdiction; but that, from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not.” *The Belgenland*, 114 U.S. 355, 363-364 (1885); see *Canada Malting Co. v. Patterson Steamships, Ltd.*, 285 U.S. 413, 421 (1932) (“The rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions in the lower federal courts.”). And while early examples of federal courts abstaining from the exercise of jurisdiction on grounds of international comity arose “most frequently * * * in suits by foreign seamen against masters or owners of foreign vessels,” this Court recognized nearly a century ago that “[c]ourts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal.” *Canada Malting Co.*, 285 U.S. at 421, 423.

Of course, federal courts have a “virtually unflagging obligation * * * to exercise the jurisdiction given to them.” *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). But like other common-law abstention doctrines that this Court has routinely recognized in the domestic context, international-comity-based abstention reflects the recognition that “federal courts may decline to exercise their jurisdiction, in otherwise ‘exceptional circumstances,’ ” when “denying a federal forum would clearly serve an important countervailing interest.” *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 716 (1996) (quoting *Colorado River Water Conservation District*, 424 U.S. at 813); see *id.* at 723 (“Federal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism.”); *Canada Malting Co.*, 285 U.S. at 422 (“Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners.”). Indeed, this Court has made explicit that abstention doctrines reflect “the common-law background against which the statutes conferring jurisdiction were enacted.” *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989).

2. To determine whether international-comity-based abstention is warranted in a particular case, courts focus on protecting the United States’ interests, preserving international harmony, and ensuring fairness for litigants. This Court addressed those considerations in *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522 (1987), where it faced a related question of when U.S. courts should decline to apply U.S. discovery procedures

to cases involving foreign interests. The Court explained that “the concept of international comity” requires courts to consider “the respective interests” of the United States and the foreign state, “the particular facts” of the case, as well as whether the foreign state’s procedures “will prove effective.” *Id.* at 543-544; see *id.* at 544 n.28.

In the decades since *Soci  t   Nationale*, the lower courts have used those same three considerations as the framework for deciding whether to abstain from exercising jurisdiction in individual cases on grounds of international comity. Their decisions have largely cohered around an approach that weighs “(1) the strength of the United States’ interest in using a foreign forum, (2) the strength of the foreign government’s interests [in addressing matters arising within its territory], and (3) the adequacy of the alternative forum.” *Cooper v. Tokyo Electric Power Co.*, 860 F.3d 1193, 1205 (9th Cir. 2017) (citations and internal quotation marks omitted); see *Mujica*, 771 F.3d at 599 (considering (1) the location and character of the conduct at issue, (2) the nationality of the parties, and (3) the U.S. foreign and public-policy interests in the litigation); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004) (considering (1) the strength of the U.S. interest in affording a foreign forum, (2) the strength of the foreign government’s interests, and (3) the adequacy of the forum); see also *Royal & Sun Alliance Insurance Co. of Canada v. Century International Arms, Inc.*, 466 F.3d 88, 94 (2d Cir. 2006) (“In the context of parallel proceedings in a foreign court, a district court should be guided by the principles upon which international comity is based: the proper respect for litigation in and the courts of a sovereign nation, fairness to litigants, and judicial efficiency.”).

3. In applying those principles, U.S. courts have recognized that comity-based abstention, unlike the defense of sovereign immunity, may be appropriate whether or not a foreign state is party to the suit before them. Indeed, because sovereign immunity generally bars U.S. courts from exercising jurisdiction in suits against foreign states, decisions to abstain voluntarily from exercising jurisdiction arise most frequently in suits against private parties. For example, as this Court observed in *Canada Malting Company*, many of the early admiralty cases discussed above involved claims “by foreign seamen against masters or owners of foreign vessels,” 285 U.S. at 421, not against a foreign sovereign. Similarly, in recent cases involving suits against private foreign defendants under the Alien Tort Statute, 28 U.S.C. 1350, several Members of this Court have indicated—without any noted disagreement on the point—that courts “can dismiss [such] suits * * * for reasons of international comity, or when asked to do so by the State Department,” if there is concern that entertaining the suit would create “international friction.” *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1430-1431 (2018) (Sotomayor, J., dissenting, joined by Ginsburg, Breyer, and Kagan, JJ.); see *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 128-129 (2013) (Breyer, J., concurring in the judgment, joined by Ginsburg, Sotomayor, and Kagan, JJ.) (similar); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (acknowledging the “strong argument that federal courts should give serious weight to the Executive Branch’s view” about the “case-specific * * * impact on foreign policy” of exercising jurisdiction over a particular case).

Lower courts have likewise determined that comity-based abstention is appropriate where entertaining suits against private defendants could frustrate the substantive policies of foreign sovereigns or otherwise have significant implications for the foreign relations of the United States. In *Cooper v. Tokyo Electric Power Co. Holdings, Inc.*, 960 F.3d 549 (2020), for instance, the Ninth Circuit held that the district court had appropriately dismissed claims against the owner of the Fukushima Daiichi Nuclear Power Plant on international-comity grounds. See *id.* at 565-569. Although Japan was not a party to the suit, adjudicating claims against the owner of the

plant in a U.S. court could have interfered with Japan's interest in administering a comprehensive claims system for victims of the 2011 Fukushima disaster through the Japanese courts. *Id.* at 568. In light of those "strong, important policy interests" that favored resolution of the claims in a Japanese forum, the Ninth Circuit held that the district court had not abused its discretion in deciding to abstain from the exercise of jurisdiction. *Id.* at 569.

Similarly, in *Ungaro-Benages*, *supra*, the Eleventh Circuit held that the district court had appropriately abstained from deciding claims against two private German banks arising from their alleged participation in Nazi-era seizures of property from German Jews. It held that Germany had, with the encouragement of the United States, established a specialized forum for adjudicating such claims, and that the district court's abstention in favor of that forum was appropriate "based on the strength of our government's interests in using the [alternative forum,] the strength of the German government's interests, and the adequacy of the * * * alternative forum." 379 F.3d at 1239.

B. The FSIA Does Not Foreclose Comity-Based Abstention In Suits Against Foreign States

1. The FSIA does not bar U.S. courts from applying these comity-based abstention principles in cases against foreign states. Indeed, "far from foreclosing [abstention], the FSIA affirmatively accommodates [it]." *Philipp*, 925 F.3d at 1355 (Katsas, J., dissenting from the denial of rehearing en banc). That is because the FSIA "provides that, for any claim falling within an immunity exception, 'the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.'" *Ibid.* (quoting 28 U.S.C. 1606). As explained above, a private individual who was named as a defendant in a suit that threatened to create "international friction" could ask a court to abstain from exercising jurisdiction by moving to "dismiss * * * for reasons of international comity." *Jesner*, 138 S. Ct. at 1430-1431 (Sotomayor, J., dissenting); see pp. 15-17, *supra*. It follows from the straightforward text of the FSIA that a foreign state may also do so. 28 U.S.C. 1606.

That conclusion is consistent with this Court's recognition that the FSIA "does not appear to affect the traditional doctrine of *forum non conveniens*." *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 490 n.15 (1983); accord *Pet. App. 17a* ("[T]he ancient doctrine of *forum non conveniens* is not displaced by the FSIA."). Like comity-based abstention, the doctrine of *forum non conveniens* is not directly addressed in the FSIA. But motions to dismiss on *forum non conveniens* grounds are available to private defendants, and the FSIA likewise preserves their availability in suits against foreign states as well. See 28 U.S.C. 1606. Neither the court of appeals nor respondents have identified any persuasive basis on which the FSIA's text can be read to allow application of *forum non conveniens* doctrine, but not adjudicatory comity, in suits against foreign states.

2. Even if the statutory text could plausibly be understood to displace adjudicatory comity, interpreting the FSIA to do so would conflict with the "longstanding * * * principle that '[s]tatutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles.'" *Texas*, 507 U.S. at 534 (citation omitted; brackets in original); see, e.g., *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1813).

As discussed, see pp. 11-13, *supra*, comity-based abstention was part of the "the common-law background against which the statutes conferring jurisdiction were enacted," *New Orleans Public Service, Inc.*, 491 U.S. at 359, including the FSIA. The FSIA would need to "speak directly" to the question of adjudicatory comity in order to "abrogate [that] common-

law principle.” *Texas*, 507 U.S. at 534 (citation omitted). The FSIA indisputably does not do so. While it speaks to the circumstances in which a foreign state is “immune from the jurisdiction of the courts of the United States and of the States” on grounds of sovereign immunity, 28 U.S.C. 1604 (emphasis added), nothing in the FSIA specifically addresses the distinct question of whether a district court may in appropriate circumstances decline to exercise the jurisdiction that the FSIA confers upon it, see 28 U.S.C. 1330(a), just as it can in appropriate circumstances decline to exercise jurisdiction conferred by other statutes, see 28 U.S.C. 1331-1333. Courts thus retain the same discretionary, common-law authority to abstain from exercising jurisdiction in appropriate cases that they held before Congress enacted the FSIA. Cf. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 20 (1976) (explaining that because the relevant provision of the FSIA “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”).

3. This Court has strongly suggested that comity-based abstention remains available in suits against foreign states following passage of the FSIA. Specifically, in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), this Court indicated that even where an exception to the FSIA applies, courts “might well” defer to a “statement of interest[]” filed by the Executive Branch “suggesting that courts decline to exercise jurisdiction in particular cases” in light of “the implications of exercising jurisdiction over particular [defendants].” *Id.* at 701-702. While the Court did not decisively resolve the deference question there, its discussion necessarily presumed that comity-based abstention remains available in suits that come within one of the FSIA’s exceptions; if such abstention were categorically foreclosed by the statute itself, after all, there would be no occasion even to consider the possibility of deference.

C. The Court Of Appeals’ Contrary Conclusion Is Incorrect

The court of appeals, in the decision below and in its earlier *Philipp* decision, offered several justifications for its conclusion that the FSIA categorically precludes international-comity-based abstention in suits against foreign states. See Pet. App. 14a-16a; *Philipp v. Federal Republic of Germany*, 894 F.3d 406, 414-416 (D.C. Cir. 2018), cert. granted, No. 19-351 (July 2, 2020), and cert. denied, No. 19-520 (July 2, 2020). None is persuasive.

1. The court of appeals placed primary reliance on this Court’s decision in *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134 (2014), which it described as “[t]he key case” in this area, *Philipp*, 894 F.3d at 416. But the decision in *NML Capital* does not preclude courts from weighing international-comity considerations in determining whether to exercise jurisdiction under the FSIA. Rather, this Court addressed there “[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,” displacing the Federal Rules of Civil Procedure applicable in cases between private parties. *NML Capital*, 573 U.S. at 140. The Court stated, in resolving that question, that “any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act’s text.” *Id.* at 141-142. Because the text of the FSIA does not “forbid[] or limit[] discovery in aid of execution of a foreign-sovereign judgment debtor’s assets,” the FSIA itself conferred no statutory immunity to such discovery on the foreign state, and the foreign state was therefore not entitled to relief. *Id.* at 142.

The fact that foreign states lack a sovereign-specific, immunity-based statutory defense to post-judgment discovery has no bearing on whether courts can apply discretionary, generally applicable common-law abstention doctrines in suits against foreign states. See *Philipp*, 925 F.3d at 1356 (Katsas, J., dissenting from the denial of rehearing en banc) (“[F]oreign sovereign immunity—which eliminates subject-matter jurisdiction—is distinct from non-jurisdictional

defenses such as exhaustion and abstention.”). Indeed, the Court in *NML Capital* expressly recognized that, even where there is jurisdiction under the FSIA, a court “may appropriately consider comity interests” relevant to other non-immunity determinations in the litigation. 573 U.S. at 146 n.6 (citations omitted) (expressing the Court’s expectation that “ ‘other sources of law’ ordinarily will bear on the propriety of discovery requests” to foreign sovereigns) (citations omitted). Thus, contrary to the court of appeals’ understanding, *NML Capital* leaves ample “room” for the type of common-law abstention that the district court deemed appropriate under considerations of comity here. Pet. App. 14a-15a.

2. The court of appeals also expressed concern that abstaining to facilitate “ ‘prudential exhaustion’ would in actuality amount to a judicial grant of immunity from jurisdiction in United States courts” because respondents’ “exhaustion of any Hungarian remedy could preclude them by operation of *res judicata* from ever bringing their claims in the United States.” Pet. App. 14a. That, too, is incorrect.

One would not ordinarily describe a private foreign defendant as being “immun[e] from jurisdiction in United States courts,” Pet. App. 14a, merely because a U.S. court abstains from the exercise of jurisdiction on the basis of case-specific considerations, and that description is no more apt for a foreign state that benefits from such a case-specific ruling. That is true for several reasons. In the first place, the requirement that a plaintiff attempt to exhaust foreign remedies will not necessarily foreclose the plaintiff from invoking the assistance of U.S. courts at a later date. As this Court has explained, “the preclusive effect of a foreign judgment in civil litigation * * * is not uniformly accepted in this country,” *Gamble v. United States*, 139 S. Ct. 1960, 1975 (2019), so *res judicata* principles may not preclude a plaintiff from relitigating a claim in the United States. See *id.* at 1975 n.12 (contrasting treaties, which largely endorse recognition of foreign judgments, against federal court of appeals decisions, which hold that such recognition is itself a form of international comity and thus committed to case-specific judicial discretion); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) (noting the capacity of the U.S. reviewing court to set aside foreign judgments “repugnant to the laws or policy of” the United States); *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 852 (7th Cir.) (“If plaintiffs find that future attempts to pursue remedies [in a foreign forum] are frustrated unreasonably and arbitrarily, a United States court could once again hear these claims.”), cert. denied, 576 U.S. 1006 (2015). In this case, for example, the district court noted that “dismissal of a lawsuit on prudential exhaustion grounds would be without prejudice,” such that the court “may be called upon to * * * evaluate the fairness and adequacy of the foreign proceeding,” and potentially “revive[] claims” and “disagree with the outcome” reached in Hungary. Pet. App. 69a-70a.

Even assuming that a particular plaintiff might be precluded from relitigating a particular claim in the United States, moreover, it does not follow that prudential abstention amounts to a grant of sovereign immunity outside the limits of the FSIA framework. Abstaining from jurisdiction on international-comity grounds no more confers immunity on a foreign defendant than does dismissing a suit on grounds of *forum non conveniens* or abstaining on the basis of some other type of comity, which may also “preclude[] relitigation of issues raised * * * and resolved” in the alternative forum. *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 19 (1987). Instead, those doctrines—like comity-based abstention—simply reflect case-specific assessments of the “proper deference [owed] to the [separate] court system” with concurrent jurisdiction over a claim. *Ibid.*

3. The court of appeals also suggested that because the FSIA sets out specific terrorism-related circumstances in which a plaintiff must always “afford[] [a] foreign state a reasonable

opportunity to arbitrate” before bringing suit, 28 U.S.C. 1605A(a)(2)(A)(iii), Congress must not have intended for courts to rely upon comity-based abstention principles to require exhaustion of an arbitral or other forum in other contexts. See *Philipp*, 894 F.3d at 416. That suggestion is misplaced.

Congress’s choice in Section 1605A(a)(2)(A)(iii) to require that U.S. courts *always* afford foreign states an opportunity to arbitrate certain types of terrorism-related claims does not suggest that U.S. courts may *never* require exhaustion based on case-by-case considerations in other types of cases, consistent with the longstanding principles discussed above. And that is especially true given that Congress added the terrorism exception to the FSIA, along with its requirement of an opportunity for arbitration, some 20 years after the statute’s initial enactment. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1241. It is highly unlikely that Congress would have used the enactment of a new pre-litigation arbitration requirement targeted to a limited set of claims as an indirect means by which to foreclose the availability of discretionary, comity-based exhaustion defenses more generally.

Indeed, when Congress wants to preclude courts from engaging in their ordinary consideration of international comity, it has made that intent clear. In the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, Div. A, Tit. XII, § 1226, 133 Stat. 1645, Congress amended 22 U.S.C. 8772(a)(1), providing that Iran’s assets are “subject to execution or attachment in aid of execution * * * without regard to concerns relating to international comity.” 22 U.S.C. 8772(a)(1). The absence of any comparable language in the FSIA confirms that the FSIA does not displace courts’ ordinary consideration of comity-based concerns.

4. Finally, the court of appeals also appears to have been influenced by a broader misunderstanding of the nature of international-comity-based abstention in U.S. courts. While acknowledging “the well-established rule that exhaustion of domestic remedies is preferred in international law as a matter of comity,” *Philipp*, 894 F.3d at 416 (quoting *Fischer*, 777 F.3d at 859), the court of appeals believed that because that rule under international law applies only in “nation vs. nation litigation,” *ibid.* (citation omitted), the private plaintiffs here could not be required to exhaust their remedies in Hungary. See *ibid.* (discussing Restatement (Fourth) of Foreign Relations Law of the United States § 455, Reporters’ Note 9 (Tentative Draft No. 2, 2016)).

As the discussion above illustrates, however, comity-based abstention in U.S. courts is a doctrine of *domestic* U.S. common law that is not limited to the precise application of international-law exhaustion principles. See pp. 11-17, *supra*; see also *Mujica*, 771 F.3d at 597. To be sure, the common-law doctrine is informed by the principles of international law favoring a litigant’s exhaustion of “remedies available in the domestic legal system.” *Sosa*, 542 U.S. at 733 n.21. But U.S. courts have long applied the doctrine in suits brought by private plaintiffs, and nothing in the FSIA purports to deprive U.S. courts of the discretion to continue doing so in appropriate cases.

D. Preserving The Availability Of Comity-Based Abstention Is Important To The Foreign-Policy Interests Of The United States

If allowed to stand, the court of appeals' categorical rejection of international-comity-based abstention likely would be harmful to the foreign-relations interests of the United States. That is true for at least two reasons.

First, domestic litigation against foreign sovereigns, by its nature, often raises serious foreign-policy concerns. To be sure, Congress has determined that not all such suits are inappropriate, and has identified in the FSIA certain limited categories of cases in which foreign states will be treated "in the same manner * * * as a private individual under like circumstances." 28 U.S.C. 1606. Under the court of appeals' interpretation of the FSIA, however, foreign states (and their instrumentalities and agencies) would be treated *worse* than private individuals, unable to invoke ordinary rules of comity-based abstention. That reading of the FSIA would exacerbate the very foreign-relations concerns that the FSIA is intended to mitigate: even if foreign states have no right to demand "immun[ity] from the jurisdiction of [U.S.] courts insofar as their commercial activities are concerned," 28 U.S.C. 1602, for example, they would be understandably upset if they were subjected to that jurisdiction by virtue of their sovereign status even as a U.S. court abstained from exercising jurisdiction over otherwise similarly situated private defendants.

Second, comity-based abstention aids in the United States' efforts to persuade foreign partners to establish appropriate redress and compensation mechanisms for human-rights violations, including for the horrendous human-rights violations perpetrated during the Holocaust. See, e.g., Bureau of European and Eurasian Affairs, U.S. Dep't of State, *Prague Holocaust Era Assets Conference: Terezin Declaration* (June 30, 2009), <https://2009-2017.state.gov/p/eur/rls/or/126162.htm> (emphasizing importance of property restitution and compensation, and supporting national programs to address Nazi-era property confiscations). If U.S. courts were powerless to consider and defer to the availability and adequacy of the alternative fora that foreign states establish at the United States' urging, those foreign states would have less incentive to establish compensation mechanisms in the first place or to maintain their adequacy once established. No reason exists to conclude that the FSIA mandates that counterproductive result.

* * * *

2. Germany v. Philipp

Also on September 11, 2020, the United States filed its *amicus* brief in the U.S. Supreme Court in *Germany v. Philipp*, No. 19-351. The case arises out of the taking of a collection of medieval relics known as the "Welfenschatz" by the German government after World War II, which the heirs of its original Jewish owners sought to recover, bringing suit both against Germany and the Stiftung Preussischer Kulturbesitz ("SPK"), an instrumentality of the German government. The district court denied Germany's motion to dismiss, finding jurisdiction under the FSIA's expropriation exception. The U.S. Court of Appeals for the D.C. Circuit affirmed jurisdiction with respect to the SPK and rejected the argument for abstention under the doctrine of international comity. The questions in the case before the Supreme Court are: (1) whether the expropriation exception to

immunity under the FSIA applies to domestic takings by a state of the property of its own nationals in the context of a human-rights violation; and (2) whether a court may abstain from exercising jurisdiction under the FSIA on the basis of international comity. The U.S. brief is excerpted below.*** See Chapter 10 for discussion of the section of the brief discussing the first question regarding the scope of the expropriation exception.

* * * *

Even if the FSIA’s expropriation exception allowed the district court to exercise jurisdiction over respondents’ claims, a remand would still be required because the court of appeals erred in holding that the FSIA prohibits the application of the doctrine of international comity. As explained more fully in the government’s brief in *Hungary*, No. 18-1447, the FSIA does not foreclose application of the common-law doctrine of adjudicatory comity. Accordingly, the court of appeals should have decided whether comity favors abstention in favor of a German forum in this case.

A. This Court has long recognized a common-law doctrine of adjudicatory comity, under which courts may “decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents, or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal.” U.S. *Hungary* Br. at 12 (quoting *Canada Malting Co. v. Paterson S.S., Ltd.* 285 U.S. 413, 421-423 (1932)). To determine whether international-comity-based abstention is warranted in a particular case, courts apply flexible criteria that focus on protecting the United States’ interests, preserving international harmony, and ensuring fairness for litigants. U.S. *Hungary* Br. at 13-14. Courts have routinely applied this comity framework in a range of different cases involving both private parties and foreign states. *Ibid.*

B. The court of appeals erred in determining that the FSIA bars foreign sovereigns from invoking comity. U.S. *Hungary* Br. at 17-25. Nothing in the FSIA’s text prohibits the application of comity. To the contrary, the FSIA provides that, for any claim falling within an immunity exception, “the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.” 28 U.S.C. 1606. Because a private individual may invoke comity as a defense, so too may a sovereign. U.S. *Hungary* Br. at 17-18. Moreover, interpreting the statute to foreclose the application of the common-law comity doctrine would be inconsistent with the principle that “[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles.” *United States v. Texas*, 507 U.S. 529, 534 (1993) (brackets in original); see, e.g., *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. (7 Cranch) 603, 623 (1813); see also U.S. *Hungary* Br. at 18.

The court of appeals reached a contrary conclusion primarily through its mistaken reliance on *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134 (2014), which it read to foreclose any reliance on comity in cases under the FSIA. But *NML Capital* addresses “[t]he single, narrow question” of whether the FSIA itself confers immunity from post-judgment

*** Editor’s note: The Court issued its unanimous decision on February 3, 2021, holding that the expropriation exception did not cover domestic takings even in the context of a human-rights violation, and did not decide the comity question.

execution. *Id.* at 140. It does not broadly prohibit the application of comity; indeed, *NML Capital* expressly recognizes that, even where there is jurisdiction under the FSIA, a court “may appropriately consider comity interests” relevant to other non-immunity determinations in the litigation. *Id.* at 146 n.6 (citation omitted); see also U.S. *Hungary Br.* at 20-21. And the court of appeals’ other rationales are equally unavailing because nothing in the text of the FSIA suggests that Congress intended to prevent foreign states from invoking comity in appropriate circumstances. U.S. *Hungary Br.* at 21-25.

C. Preserving the availability of comity-based abstention is important to the interests of the United States. Domestic suits against foreign sovereigns often raise serious foreign-policy concerns, and comity provides a means for courts to weigh whether adjudication in an alternate forum might mitigate those concerns. See U.S. *Hungary Br.* at 25-26. Moreover, comity-based abstention aids in the United States’ efforts to persuade foreign partners to establish appropriate redress and compensation mechanisms for human-rights violations, including for the horrendous human-rights violations perpetrated during the Holocaust. See, e.g., Bureau of European and Eurasian Affairs, U.S. Dep’t of State, *Prague Holocaust Era Assets Conference: Terezin Declaration* (June 30, 2009), <https://2009-2017.state.gov/p/eur/rls/or/126162.htm> (emphasizing importance of property restitution and compensation, and supporting national programs to address Nazi-era property confiscations). If U.S. courts were powerless to consider the availability and adequacy of the alternative fora that foreign states establish, those foreign states would have less incentive to establish compensation mechanisms in the first place or to maintain their adequacy.

For example, a comity analysis in this case might consider that respondents already unsuccessfully pressed their claims before a German Advisory Commission established in accordance with the Washington Conference Principles on Nazi-Confiscated Art. ... The United States hosted the Washington Conference and participated in drafting the principles that called for the establishment of mechanisms to resolve disputes regarding cultural assets seized by the Nazi regime. *Ibid.* It therefore has an interest in the success of properly constituted alternate dispute resolution mechanisms that result from the Conference.

D. Because the district court and the court of appeals found that Germany was prohibited from invoking the doctrine of comity, neither court analyzed the factors implicated by the comity analysis—such as Germany’s interest in resolving disputes such as this in its own forums, and any obstacles to such a resolution. See U.S. *Hungary Br.* at 13-14. This Court generally does “not decide in the first instance issues not decided below.” *NCAA v. Smith*, 525 U.S. 459, 470 (1999). The case should therefore be remanded to the lower courts so that they may undertake the comity analysis in the first instance.

* * * *

3. **PDVSA v. MUFG**

On September 16, 2020, the United States filed a statement of interest in U.S. District Court for the Southern District of New York in *Petróleos de Venezuela S.A. (“PDVSA”) v. MUFG Union Bank, N.A.*, No. 19-cv-10023. The U.S. statement responds to the court’s invitation to address the potential applicability of the act of state doctrine to the case, which concerns PDVSA’s 2020 8.5 Percent Bond (the “2020 Bonds”). Excerpts follow from the U.S. statement of interest. The statement, along with the exhibits, are

available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>. For discussion of U.S. relations with Venezuela, see Chapter 9. For discussion of U.S. sanctions related to the Maduro regime, see Chapter 16.

* * * *

I. THE UNITED STATES SUPPORTS THE EFFORTS OF THE INTERIM GOVERNMENT IN VENEZUELA TO RESTORE DEMOCRACY AND SUBSEQUENTLY RECONSTRUCT THE VENEZUELAN ECONOMY, AND HAS UNDERTAKEN EXECUTIVE ACTIONS TO ASSIST THE INTERIM GOVERNMENT

As detailed in the attached letter from Elliott Abrams, Special Representative for Venezuela at the U.S. Department of State, Venezuela is currently in the midst of an “unprecedented humanitarian, political and economic crisis,” with an “illegitimate regime led by Nicolás Maduro and an inner circle of corrupt officials” who have continued a decades-long process “in which the government has destroyed democratic institutions, repressed freedom of expression and committed other serious human rights abuses, and ruined the prosperity Venezuela once enjoyed.” *See* Letter from Elliott Abrams to Jeffrey Bossert Clark dated September 16, 2020, attached hereto as Exhibit A, at 1. The illegitimate regime threatens not only its own citizens, but the security and stability of the region. *See id.* Disturbingly, the Maduro regime has built a close relationship, including military and intelligence ties, with “foreign adversaries of the United States . . . which but for the regime’s existence would have little foothold in South America.” *Id.*

Since January 23, 2019, the United States has recognized the interim government of Venezuela led by Interim President Juan Guaidó, the democratically elected President of the Venezuelan National Assembly. *Id.* at 1-2. The United States has strong foreign policy and national security interests in supporting the interim government’s efforts both to restore democracy to Venezuela with the departure of Maduro, and to reconstruct the Venezuelan economy following Maduro’s departure. *See id.* at 2.

In furtherance of its foreign policy interests, and in response to the abuses of the Maduro regime, the United States has implemented, through executive orders and actions of the Office of Foreign Assets Control (“OFAC”) of the U.S. Department of the Treasury, certain Venezuela-related economic sanctions so as to prevent Venezuela’s key assets from being misused or squandered by the illegitimate Maduro regime. *See, e.g.,* Exec. Order No. 13,835 (May 21, 2018), *as amended by* Exec. Order No. 13,857 (Jan. 25, 2019); 31 C.F.R. pt. 591. The Venezuela sanctions program includes restrictions on certain transactions related to the 2020 Bonds, and it prohibits transactions related to the sale, transfer, or assignment of equity interests in any entity in which the Government of Venezuela has a 50 percent or greater ownership interest, including CITGO Holding, Inc. *See* OFAC Venezuela-related FAQ 595, *available at* <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/595>. At present, sanctions restrict certain transactions relating to the 2020 Bonds until on or after October 20, 2020. *See* OFAC Venezuela-related General License No. 5D (July 15, 2020), *available at* https://home.treasury.gov/system/files/126/venezuela_gl5d.pdf. Accordingly, the United States is currently implementing and will continue to implement U.S. foreign policy concerning Venezuela through, *inter alia*, OFAC’s application of the sanctions regime.

II. THE UNITED STATES TAKES NO POSITION ON THE APPLICABILITY OF THE ACT OF STATE DOCTRINE HERE IN LIGHT OF THE UNRESOLVED ANTECEDENT QUESTIONS OF VENEZUELAN LAW

The parties here dispute, *inter alia*, whether a September 2016 resolution of the Venezuelan National Assembly constitutes an official act of a foreign sovereign that potentially could trigger application of the act of state doctrine, advancing arguments that implicate issues of Venezuelan law and historical legal practice. In the view of the United States, there are myriad factual and legal disputes in this case over the existence and nature of an act of state that appear, in the first instance, to require judicial scrutiny under Venezuelan law.

“The act of state doctrine operates to confer presumptive validity on certain acts of foreign sovereigns by rendering non-justiciable claims that challenge such acts.” *Allied Bank*, 757 F.2d at 520; see *Garcia v. Chase Manhattan Bank, N.A.*, 735 F.2d 645, 650 (2d Cir. 1984) (“[U]nder the act of state doctrine United States courts will not question the validity of the actions of foreign governments carried out within their own borders.”); see also *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

However, the doctrine can only be applied in cases involving the “official act” of a foreign sovereign. *W.S. Kirkpatrick & Co.*, 493 U.S. at 405. Typical cases where the act of state doctrine arises involve undisputedly sovereign acts inside a foreign country by a foreign government with authority to act—for instance, where the parties sought to challenge the validity under international law of formalized, official expropriation decrees of a foreign sovereign. See, e.g., *Sabbatino*, 376 U.S. at 400-01. On the other hand, it is “unnecessary” for a court to analyze the applicability or appropriateness of the act of state doctrine where “the factual predicate for application of the act of state doctrine does not exist.” *W.S. Kirkpatrick & Co.*, 493 U.S. at 405; see *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 690, 694-95 (1976).

Here, the parties present an array of legal and factual disputes as to whether there has been an act of state at all, based on contested questions of Venezuelan law and practice. These disputes appear to center on whether a September 2016 resolution of the Venezuelan National Assembly rendered PDVSA’s issuance of the 2020 Bonds and/or the pledge of collateral for the 2020 Bonds void *ab initio*. Thus, as framed by the parties, the dispute over the nature of the claimed act of state appears itself to require an inquiry into matters controlled by Venezuelan law.

A party asserting that relevant conduct constitutes an act of a foreign state to be given effect in U.S. courts has the burden to prove the claimed act. *Alfred Dunhill*, 425 U.S. at 691. “That the acts must be *public* acts of the *sovereign* has been repeatedly affirmed.” *Republic of Philippines v. Marcos*, 806 F.2d 344, 358 (2d Cir. 1986) (emphasis in original). Thus, in *Alfred Dunhill*, the Supreme Court rejected the assertion of an act of state because “nothing in the record reveal[ed] an act of state” beyond a party’s argument during litigation, and “[n]o statute, decree, order, or resolution” of the foreign government was offered as evidence of a sovereign action. 425 U.S. at 690, 694-95. By contrast, in other cases such as *Underhill v. Hernandez*, 168 U.S. 250 (1897), *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918), and *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918), “the facts were sufficient to demonstrate that the conduct in question was the public act of those with authority to exercise sovereign powers and was entitled to respect in our courts.” *Alfred Dunhill*, 425 U.S. at 694. In this case, among other things, the parties dispute whether certain conduct of different branches of the Venezuelan government in

2016 constitute a “public act of those with authority to exercise sovereign powers,” *id.*, with respect to the issuance of, and/or the pledge of collateral for, the 2020 Bonds.

The parties also dispute whether—assuming the existence of a valid sovereign act—an action claiming to render the 2020 Bonds, or the pledge of collateral for the 2020 Bonds, void *ab initio* could qualify for deference under the act of state doctrine, which “does not extend to property located within the United States.” *Bandes v. Harlow & Jones, Inc.*, 852 F.2d 661, 666 (2d Cir. 1988). Although the enforceability of the 2020 Bonds and the validity of the pledge of collateral for the 2020 Bonds are in dispute, the parties appear to agree that if the 2020 Bonds are valid, payments are to be made in New York in U.S. dollars. Under Second Circuit law, a foreign government’s actions prohibiting payment of notes sited in New York generally constitutes an extraterritorial act rendering the act of state doctrine inapplicable. *See Allied Bank*, 757 F.2d at 521-22. Plaintiffs’ argument that the act of state doctrine nonetheless controls here is also dependent on arguments regarding the substance and effect of National Assembly resolutions under Venezuelan law. *See* Dkt. No. 117 (plaintiffs’ summary judgment brief) at 22; Dkt. No. 160 (defendants’ summary judgment opposition) at 8-10.

The Court’s resolution of these disputes would necessarily implicate issues of Venezuelan law, as well as factual disputes, concerning the nature of the actions taken by the National Assembly. Because the resolution of these issues of fact and Venezuelan law appears to be a necessary precondition before considering whether the act of state doctrine applies here, in the view of the United States it would be premature to opine on the application of that doctrine.

III. RESOLVING THIS CASE IN ACCORD WITH U.S. LAW AND POLICY APPEARS TO TURN ON QUESTIONS OF FACT AND OF VENEZUELAN LAW

As to whether “recognition of the Venezuelan National Assembly’s denunciation and invalidation of the 2020 Bond Indenture [is] consistent with the law and policy of the United States,” Dkt. No. 144, United States foreign policy generally favors ensuring that the Maduro government cannot squander Venezuela’s key assets, as well as the “negotiated and consensual resolution of sovereign debt disputes,” *see* Letter from Special Representative Abrams, Ex. A, at 2. The United States supports the efforts of the interim government in Venezuela to restore democracy and to reconstruct the Venezuelan economy after Maduro steps aside. *See id.* Due to “years of mismanagement through the regimes of former Presidents Chávez and Maduro, Venezuelan financial assets have been imperiled,” at the same time as these corrupt leaders have engaged in a pattern of destruction of democratic institutions, abuse of human rights, and erosion of economic stability in Venezuela. *Id.* at 1-2. The illegitimate Maduro regime threatens its own citizens, builds close relationships with adversaries of the United States, and undermines regional stability. *See id.* at 1.

As the Government has stated in past litigation concerning sovereign debt, the United States also has a substantial interest in avoiding the adverse effects that uncertainty in contract enforcement could have on international financial markets and on efforts to restructure sovereign debt. Where “legal principles require enforcement of international loan agreements,” any “[s]ubstantial alteration of these legal principles changes expectations in a way that renders contractual relations less certain,” which may “discourag[e] needed further lending.” Brief for the United States as Amicus Curiae at 6-7, *Allied Bank Int’l v. Banco Credito Agrícola de Cartago*, No. 83-7714 (2d Cir. filed July 30, 1984); *see* Statement of Interest of the United States at 6-8, *Macrotecnic Int’l Corp. v. Republic of Argentina*, No. 02 Civ. 5932 (TPG) (S.D.N.Y. filed Jan. 12, 2004). The United States is “a major source of private international credit,” and

“has an interest in maintaining New York’s status as one of the foremost commercial centers in the world.” *Allied Bank*, 757 F.2d at 521-22.

As set forth above, the parties before the Court present legal and factual disputes regarding the validity of the 2020 Bonds and of the pledge of collateral for the 2020 Bonds, which appear to turn on questions of fact and of Venezuelan law and practice. In particular, the parties dispute whether the issuance of the 2020 Bonds and the associated pledge of collateral constituted a contract in the national public interest that required the approval of the Venezuelan National Assembly. *See, e.g.*, Dkt. No. 117 (plaintiffs’ summary judgment brief) at 29-38; Dkt. No. 135 (defendants’ summary judgment brief) at 37-43; *see also* Dkt. No. 165 (plaintiffs’ summary judgment opposition) at 19-36; Dkt. No. 160 (defendants’ summary judgment opposition) at 27-34. Plaintiffs also assert that bondholders were on notice of a risk that the 2020 Bonds, and/or the pledge of collateral for the 2020 Bonds, would be invalidated in light of the issuance procedure followed here, *see* Dkt. No. 117, at 10-14, while defendants dispute this contention, *see* Dkt. No. 135, at 12-15. The United States is not in a position to express a view regarding these questions, which may ultimately require resolution by the Court in its determination of the validity and enforceability of the 2020 Bonds and the associated pledge of collateral.

Finally, as stated above, the United States’ foreign policy concerning Venezuela is being effectuated in part through OFAC’s implementation of the U.S. sanctions regime, without regard to the act of state or comity doctrines. Even if a judgment were to be entered against PDVSA in this case, sanctions restrictions currently prohibit certain transactions related to the 2020 Bonds, as well as all transactions related to the sale or transfer of shares of CITGO Holding, Inc., absent OFAC’s specific authorization. *See* OFAC Venezuela-related FAQ 595, *supra*.

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D. RENEGOTIATING COMPACTS OF FREE ASSOCIATION

As discussed in *Digest 2019* at 158-59, the United States began renegotiations to extend compacts of free association with the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau. On April 22, 2020, the State Department announced the selection of Ambassador Karen B. Stewart and Department of the Interior Assistant Secretary for Insular and International Affairs Douglas W. Domenech as negotiators for agreements to amend the Compacts of Free Association with the Republic of the Marshall Islands and the Federated States of Micronesia, and to engage in discussions with the Republic of Palau regarding its compact. *See* April 22, 2020 State Department press statement, available at <https://2017-2021.state.gov/selection-of-u-s-negotiators-for-the-compacts-of-free-association/>.

Cross References

Germany v. Philipp, **Ch. 10.A.3**

CHAPTER 6

Human Rights

A. GENERAL

1. Country Reports on Human Rights Practices

On March 11, 2020, the Department of State released the 2019 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/reports/2019-country-reports-on-human-rights-practices/>. Assistant Secretary for Democracy, Human Rights, and Labor Robert A. Destro provided a special briefing on the release of the 2019 Country Reports, available at <https://2017-2021.state.gov/assistant-secretary-for-democracy-human-rights-and-labor-robert-a-destro-on-the-release-of-the-2019-country-reports-on-human-rights-practices/>. Secretary of State Michael R. Pompeo also delivered remarks on the release of the 2019 Reports, available at <https://2017-2021.state.gov/secretary-michael-r-pompeo-on-the-release-of-the-2019-country-reports-on-human-rights-practices/>.

2. Universal Periodic Review

On November 9, 2020, the United States participated in the Human Rights Council's 36th session of the Universal Periodic Review ("UPR") Working Group. The United States presented its national report on human rights and responded to questions. See State Department November 9, 2020 media note, available at <https://2017-2021.state.gov/the-united-states-presents-its-universal-periodic-review-national-report/>.

Acting Legal Adviser Marik String delivered a statement at the November 9, 2020 U.S. UPR presentation. His remarks are excerpted below and available at <https://geneva.usmission.gov/2020/11/09/upr-of-the-united-states-statement-by-marik-string-acting-legal-adviser-us-department-of-state/>.

* * * *

The United States strongly supports this process, which, consistent with the purposes of the United Nations as set forth in the UN Charter, provides a clear example of how international cooperation can promote and encourage respect for human rights and fundamental freedoms for all.

The United States is proud of its human rights record, and we are committed to strengthening and deepening human rights protections within our country in the continuous pursuit of a more perfect union. We welcome your suggestions in this regard.

Let me first address the suggestions raised by a number of States about treaty ratification and reservations.

We are already, as a nation, party to many human rights treaties. We take our obligations under those treaties very seriously and are committed as a government, to their good faith implementation.

The importance of treaty obligations within our domestic system is enshrined in our founding documents. In particular, the U.S. Constitution provides that “Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.”

It is because of the great weight that we place on complying with our treaty obligations that we engage in an exhaustive process of considering any potential U.S. ratifications, across multiple branches of government. The reasons for not ratifying a treaty can depend on the specific treaty at issue and the results of this process.

Of particular note is the role the United States Senate plays. In accordance with the U.S. Constitution, our Executive Branch decides whether to sign a treaty and then our Senate has the sole authority to provide its advice and consent to ratification through an affirmative vote by two-thirds of Senators.

In addition, that the United States has not ratified a particular human rights treaty should not be regarded as a proxy for the importance we attribute to the rights recognized therein. In many cases, our domestic protections are even stronger than such treaties require. For example, while we have not yet ratified the Convention on the Rights of Persons with Disabilities, few other countries have adopted stronger laws, policies, and programs designed to protect the rights of persons with disabilities.

While underscoring that the United States has a sovereign prerogative to decide which treaties to ratify, we welcome suggestions with respect to exploring whether and how to ratify additional treaties.

Let me next address the issues raised by a number of member states about our domestic implementation efforts. We are committed to effective implementation of our human rights obligations and welcome continued input on how to improve it.

Although we do not have a national human rights institution, we have multiple complementary protections and mechanisms to reinforce our ability to guarantee respect for human rights, including through actions taken by our domestic federal agencies, our independent judiciary at both federal and state levels, and through numerous state and local human rights institutions.

The federal government continuously engages with state, local, tribal, and territorial governments on our human rights obligations, and has sought their involvement in human rights treaty reports and presentations.

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Assistant Secretary Destro also delivered remarks at the U.S. UPR presentation on November 9, 2020. Assistant Secretary Destro's remarks are excerpted below and available at <https://2017-2021.state.gov/remarks-at-the-united-states-third-universal-periodic-review/>. Other remarks delivered at the presentation on November 9, 2020 include: those of Alexander V. Maugeri, deputy assistant attorney general and chief of staff of the U.S. Department of Justice's civil rights division, available at <https://geneva.usmission.gov/2020/11/09/us-upr-maugeri-2/>; those of Charles Allen, deputy general counsel for international affairs at the U.S. Department of Defense, available at <https://geneva.usmission.gov/2020/11/09/upr-usa-allen/>; those of Alison Kilmartin, deputy assistant secretary for policy at the U.S. Department of Labor, available at <https://geneva.usmission.gov/2020/11/09/upr-usa-kilmartin/>; those of Dorothy Fink, M.D., deputy assistant secretary for women's health at the U.S. Department of Health and Human Services, available at <https://geneva.usmission.gov/2020/11/09/upr-usa-fink/>; those of Lynn Grosso, director of enforcement, in the Office of Fair Housing at the U.S. Department of Housing and Urban Development ("HUD"), available at <https://geneva.usmission.gov/2020/11/09/upr-usa-grosso/>; those of James McCament, deputy under secretary in the Office of Strategy, Policy and Plans at the U.S. Department of Homeland Security, available at <https://geneva.usmission.gov/2020/11/09/upr-usa-mccament/>; those of Attorney General of Utah Sean Reyes, available at <https://geneva.usmission.gov/2020/11/09/upr-usa-reyes/>; and those of Andrew Bremberg, permanent representative of the United States to the UN in Geneva, available at <https://geneva.usmission.gov/2020/11/09/upr-of-the-united-states-statement-by-ambassador-andrew-bremberg/>. Ambassador Bremberg also addressed the recommendations in response to the U.S. UPR on November 13, 2020. His November 13, 2020 remarks are available at <https://geneva.usmission.gov/2020/11/13/press-statement-by-ambassador-andrew-bremberg-on-the-universal-periodic-review-of-the-united-states/> and <https://geneva.usmission.gov/2020/11/13/statement-by-ambassador-andrew-bremberg-at-the-adoption-of-the-upr-report-on-the-united-states/>.

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Our report represents not just the work of the Department of State, but also the Departments of Interior, Justice, Homeland Security, Labor, Housing & Urban Development, Health & Human Services, Education, Defense, and others.

As you will see throughout our presentation, our system of government frequently prioritizes decision-making at state, tribal, territorial, and local levels. This distribution of authority reflects the insight of our Founders that public servants who are closest to the populations they serve, best represent their needs, concerns, and interests. This means that our state, local, tribal, and territorial laws vary, and reflect local needs and priorities. We welcome that variance as a natural and powerful aspect of our democracy.

We are proud to participate on behalf of the United States today. Our presence in this process demonstrates our nation's commitment to human rights. We appear not only to explain how our domestic policies and practices promote and protect the human rights of our own people, but also to advance the universal human rights that this body is intended to elevate.

Promoting human rights is a U.S. foreign policy priority that furthers our national interests of stability and democracy. The United States is committed to using its voice and its position on the world stage to draw attention to violations and abuses of human rights, no matter where or when they occur. We are committed to advancing human rights worldwide, as well as accountability for those who abuse those rights.

We are aware of challenges facing our country and the world at large. We act to meet these challenges armed with the values and principles contained in the founding documents that have shaped our nation, as well as our commitment to the principles outlined in the Universal Declaration of Human Rights.

In the United States, our identity is fundamentally linked to the foundational freedoms enshrined in the Bill of Rights in our Constitution, including especially freedom of religion or belief, freedom of speech, freedom of the press, freedom of association, and the freedom to petition the Government for a redress of grievances.

Americans are committed to the proposition that we are “endowed by our Creator” with certain unalienable rights. It follows from these principles that the legitimacy of any government rests on the consent of its people, freely given in open and fair elections. As a result, we do not hesitate to question our government's actions. We actively form civil society organizations to advocate for specific causes. We participate actively and freely in our government, and insist that our local, state, and federal governments answer to the people—and not the other way around.

Our commitment to transparency and a free press, and our insistence on impartial justice, allow the world to witness our struggles and openly engage in our efforts to find solutions. The United States has a long history of public debates, demonstrations, and activism that led to—and which will continue to foster—landmark improvements in human rights law and policy.

The aspiration to form the “more perfect union” referenced in the Preamble to our Constitution is real. The United States is firmly committed to finding meaningful remedies that address claims of injustice in our society. The demonstrations over the tragedy of George Floyd's death this year have shown the world that Americans understand that they have the inherent right to raise their voices, individually and collectively, to demand that their government

address their grievances.

And by adhering to our democratic principles, Americans are pursuing accountability for Mr. Floyd's death through the criminal and civil justice systems, while also debating and discussing the claims of systemic injustice at the heart of our current discourse.

I would now briefly like to address two topics that arose during our review of recommendations from and engagement with U.S. civil society, which we view as an essential part of this process.

Regarding the issue of privacy: The United States carefully addresses privacy concerns arising at the federal level in accordance with the U.S. Constitution and other federal laws, all of which are consistent with applicable international obligations. We recognize that all persons have legitimate privacy interests in the handling of their personal information.

We address privacy and digital freedom issues raised by the conduct of non-state actors, such as Google and Facebook, through the U.S. legal and regulatory systems, and via private litigation. Some states have enacted or are considering their own privacy laws as well.

With regard to freedom of religion or belief for all: In the United States, freedom of religion or belief is guaranteed by our Constitution's ban on religious test for public office and the First Amendment and a variety of other federal and state laws. Read together, all of these provisions demonstrate that the United States is, as a nation, fully committed to advancing this freedom. We also vigorously enforce federal hate-crimes laws to protect members of religious groups and houses of worship from private threats and violence. The federal government has protected, and continues to protect, the right of Americans to determine and practice their religion or belief.

I thank you again for the opportunity to participate in this important process. The United States is proud of its own human rights record and of the role our nation has played in defending and advancing human rights and fundamental freedoms around the world. We support the UPR process as an opportunity to reflect upon and listen to your suggestions on how we can improve our own human rights record.

We ask all member states to be equally open to both the process and to the suggestions we propose to them. We sincerely hope that the UPR process will encourage a strong reaffirmation of the commitments that governments have made to protect the human rights and freedoms that are our common birthright.

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The 2020 U.S. UPR national report, submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, responds to recommendations submitted during its 2015 UPR process. The U.S. UPR national report was drafted with input from departments and agencies across the U.S. Government, as well as civil society organizations. The 2020 national report of the United States is excerpted below (with footnotes and citations to recommendations by number omitted) and is available in full at <https://www.ohchr.org/EN/HRBodies/UPR/Pages/USindex.aspx>.

* * * *

A. Treaties, international mechanisms, and domestic implementation**Treaties ratified**

7. Th[e] recommendations suggest that the United States should ratify several additional human rights treaties to which it is not yet a party. The power to bind the People of the United States to the obligations of a treaty is divided between the President, who has the sole power to negotiate and sign treaties, and the United States Senate, which must give its advice and consent before U.S. ratification of them. U.S. ratification of a treaty proposed by the President requires the concurrence of two-thirds of the Senators present when the vote is taken.

8. The United States is a party to five (5) of the nine (9) human rights treaties described by the Office of the High Commissioner as “Core International Human Rights Instruments.” The United States has also ratified other important human rights instruments, including the Convention on the Prevention and Punishment of the Crime of Genocide; and the Protocol Relating to the Status of Refugees.

9. Among the treaties signed and submitted to the Senate by the President, but not ratified, are: the Convention on the Rights of Persons with Disabilities (submitted May 17, 2012; Convention No. 111 concerning Discrimination in Respect of Employment and Occupation, 1958 (International Labour Organisation) (submitted May 18, 1998); and the Convention on the Elimination of All Forms of Discrimination against Women (submitted November 12, 1980). The United States has signed the International Covenant on Economic, Social, and Cultural Rights and the Convention on the Rights of the Child, but the President has not transmitted them to the U.S. Senate for its advice and consent.

Domestic implementation of treaty obligations

10. The legal obligations of the United States under any treaty arise from its consent through ratification pursuant to the constitutionally-prescribed procedure and are limited by the terms of ratification. As the United States has previously stated, it is for each nation state to decide as an exercise of its sovereignty to assume treaty obligations which, once entered into, it has a legal obligation to fulfill. No state, organization, or tribunal, including the committees that monitor implementation of treaties, has any authority to impose, change, or expand through interpretation any treaty obligation to which the United States is a party.

11. The United States is a federal republic in which its international and domestic human rights obligations are implemented through a comprehensive system of laws, administrative regulations and enforcement actions. Judicial proceedings at all levels of government also provide invaluable interpretive guidance legal precedent.

12. Federal, state and local laws provide for enforcement of human rights obligations in a variety of settings (e.g., workplace, housing, public accommodation, education, and law enforcement) through formal and informal dispute resolution procedures. These laws also permit individuals and groups to file complaints with federal, state, tribal, and local human rights agencies and commissions. These administrative agencies use their investigatory and enforcement powers to enforce the rule of law. State and federal laws also provide access to the courts, where independent judiciaries at the state and federal levels are authorized to award monetary damages, equitable relief and attorneys’ fees. Statistics are readily available and widely reported.

13. On July 8, 2019, Secretary of State Michael R. Pompeo announced the formation of a Commission on Unalienable Rights. The Commission, composed of academics, philosophers, and activists, provides advice and recommendations on human rights to the Secretary of State,

grounded in U.S. founding principles and the 1948 Universal Declaration of Human Rights. The Commission's charge is not to discover new principles, but to furnish advice to the Secretary for the promotion of individual liberty, human equality, and democracy through U.S. foreign policy.

B. Civil rights and non-discrimination

Racial profiling and excessive use of force by police, and establishing improved police-community relations

14. [Several] recommendations assume[]—wrongly in our view—that the United States and federal, state and local governments engage in “systemic” racial discrimination, racial profiling, and that federal, state and local law enforcement officers are regularly engaged in excessive uses of force. We reject the notion that law enforcement in the United States is “systemically” racist. Every day in the United States, tens of thousands of police officers respect, protect, and uphold the rule of law and the civil rights of individuals and communities across the country, while carrying out the difficult and dangerous work of keeping our communities safe.

15. That is not to deny that more must be done to ensure fairness to all citizens, particularly members of the African American community, for whom it is understandable given our nation's history and recent events that there is some ambivalence and often distrust of the police. In recognition of this fact, on June 16, 2020, President Trump signed an executive order on “Safe Policing for Safe Communities” to develop and incentivize critical policing reforms. The order directs the Attorney General to create a credentialing process on which police departments' eligibility for federal grants will depend. Credentialing will depend on having policies and training regarding use-of-force and de-escalation techniques; performance management tools, such as early warning systems that help to identify officers who may require intervention; and best practices regarding community engagement. The order also directs the Attorney General to create an information sharing database to track information related to use of excessive force, including such information as the termination or decertification of law enforcement officers, criminal convictions of law enforcement officers, and instances in which an officer under investigation related to the use of force resigns or retires. Finally, the Attorney General is directed to consult with the Secretary of the Department of Health and Human Services (HHS) to develop strategies for law enforcement encounters with persons who suffer from mental health issues, including strategies to incorporate social workers or mental health professionals when responding to such situations.

16. Where there is misconduct by police officers or law enforcement agencies, state and federal laws provide effective remedies. For example, from FY 2016-FY 2019, DOJ charged 256 defendants with willfully violating constitutionally protected rights (or conspiring to do so) while acting “under color of law” and obtained convictions of 172 defendants for these charges. In FY 2019, alone, DOJ charged 83 defendants with color-of-law offenses, obtaining convictions (by trial or plea) of 46 defendants. As of January 2020, DOJ had opened 70 civil investigations since 1994 into police departments that might be engaging in a pattern or practice of conduct that deprives persons of their rights, such as use of excessive force, improper searches, or improper stopping of persons for questioning.

17. The United States is also dedicated to eliminating racial discrimination and the use of excessive force in policing. The Department of Justice has issued guidance stating unequivocally that racial profiling is wrong, and has prohibited racial profiling in federal law enforcement practices, in many cases imposing more restrictions on the consideration of race and ethnicity than the Constitution requires.¹⁵ Many states have done the same. Furthermore, The Office of

Civil Rights and Civil Liberties with the Department of Homeland Security (DHS) works to promote respect for civil rights and civil liberties in policy creation and implementation by advising Department leadership and personnel, and state and local partners.

18. At the federal level, the Constitution and federal government policy prohibit profiling and all levels of the U.S. Government have laws against and take active measures to prevent excessive use of force. There are more than 18,000 police departments in the United States whose officers' behavior is governed by the laws of the state, city, county, municipality, or tribal governments they serve. They are also subject to federal law.

19. The United States works to ensure that law enforcement officers are aware of and comply with applicable consular notification rules. The Department of State has published a *Manual on Consular Notification and Access* setting forth the rules for consular notification and provides a number that can be called for assistance.

Ending discrimination, including discrimination based on race, sex, and religion; hate crimes

20. State and federal laws prohibit all forms of racial discrimination. Discrimination on the basis of sex and religion is forbidden in most employment and education programs, and in all public accommodations and market transactions.

21. It is a crime to cause or to incite violence or injury to persons or property. Government may restrict speech intended to cause, and likely to result in, lawless action, and it can and does forbid "true threats." Speech-related conduct that constitutes harassment or intimidation is also illegal.

22. The United States federal government and most states have hate crime laws. State hate crime laws vary, but almost all hate crime laws prohibit violence motivated by race, color, religion, and national origin. Federal law, and some state laws, also prohibit violence motivated by gender, disability, sexual orientation, and gender identity. The federal government, like many states, has enacted substantive hate crime laws. Other jurisdictions choose to add a penalty enhancement to the sentence a defendant would otherwise receive, if it can be proved that the defendant was motivated by bias. Hate crimes generally cover violent acts like assault, stalking, murder, sexual assault, arson, robbery and other serious offenses. Hate crime laws also cover threats to commit violent conduct. DOJ aggressively prosecutes cases involving hate crimes, and its annual reports on hate crimes statistics provide law enforcement authorities with important information that assists in combatting such crimes.

23. The United States does not, however, criminalize speech, expressive conduct, or publication that others find extremely offensive or harmful. The rights to speak, publish, associate, and petition for a redress of grievances could not be protected if the government could punish individuals because of differences of opinion, or if government could prohibit speech on the basis of its content or the speaker's viewpoint. Our state and federal courts have consistently held that government bans on speech are inconsistent with robust protections for individual rights, including freedom of expression and religion for all.

24. U.S. constitutional and statutory law and practice provide strong and effective protections against discrimination based on race, sex, religion, national origin and disability by government agencies at all levels and by private actors. Federal, state, and tribal laws authorize individuals and governments to take active measures to counter violence and discrimination. Federal non-discrimination laws are enforced by DOJ and other federal agencies and by private

parties. State antidiscrimination laws are enforced by state attorneys general, by other state and local agencies with law enforcement authorities, and by private parties.

25. Religious freedom is guaranteed by state and federal law, and protecting religious freedom is a high priority. As the President has explained, “Federal law protects the freedom of Americans and their organizations to exercise religion and participate fully in civic life without undue interference by the Federal Government,” and “[t]he executive branch will honor and enforce those protections.” In September 2019, the President put religious freedom on center stage at the United Nations and hosted the Global Call to Protect Religious Freedom, calling on the international community, religious, and business leaders to work to protect religious freedom. Consistent with this policy, the federal executive branch has taken several recent actions to protect religious freedom. Pursuant to an Executive Order published on October 6, 2017, the Attorney General released a memorandum on religious-liberty protections in federal law that guides all federal executive departments and agencies as they seek to fulfill their duties in a manner that is consistent with religious-freedom protections. DOJ has also filed briefs and statements of interest in numerous cases to support religious-liberty claims—a practice that has expanded during the past three years. Its vigorous enforcement of federal hate-crimes laws—including its prosecution of defendants who have planned or carried out attacks on synagogues—has protected religious individuals and houses of worship from private threats and violence. Other executive agencies and departments have also taken action to protect religious freedom. ... In June 2020, the President signed an Executive Order on Advancing International Religious Freedom, to promote universal respect for this right. Further, the United States created the first ever International Religious Freedom Alliance promoting this most fundamental of all rights with over thirty nations to oppose religious persecution around the world.

C. Criminal justice, violence against women, and human trafficking

The death penalty, life sentences without parole, and juvenile life sentences without parole

26. There is a robust debate in the United States about the morality of the death penalty and the fairness of the sentencing process. Currently, twenty-eight (28) states and the federal government authorize the death penalty; twenty-two (22) states and the District of Columbia do not authorize the death penalty; and the Governors of three (3) states that authorize the death penalty have placed a moratorium on executions.

27. The death penalty is legal under federal law for specified crimes involving, *inter alia*, murder; for various other violent crimes (such as terrorism, kidnapping, arson, or carjacking) that both result in death and were committed with the requisite mental state; for treason, which, under the Constitution, “consist[s] only in levying war against the [United States], or in adhering to their enemies, giving them aid and comfort;” and espionage in time of war or that results in the death of an agent of the United States or the compromise of major weapons or defensive systems. In the states, the death penalty is reserved for murder or, in some situations, causing death while committing other serious crimes such as kidnapping. In all cases, the court or jury must find the circumstances of the crime to be particularly heinous, and convictions are subject to multiple levels of appellate court review. After judicial review is complete, both federal and state laws provide for review by the executive branch (President or Governor) prior to the execution of any death sentence.

28. In July 2019, the Attorney General directed the Federal Bureau of Prisons (BOP) to schedule the executions of five federal death row inmates, each of whom was convicted of

murdering children and each of whom had exhausted their appellate and post-conviction remedies. After last-minute legal proceedings were concluded, three were executed in July 2020: Daniel Lewis Lee, a white supremacist, who murdered a family of three, including an eight-year-old girl; Wesley Ira Purkey, who violently raped and murdered a 16-year-old girl, and then dismembered, burned, and dumped her body in a septic pond; and Dustin Lee Honken, who murdered five people—two men who planned to testify against him in a drug trafficking case, and a single, working mother and her ten-year-old and six-year-old daughters. Lezmond Mitchell is scheduled for execution on August 26, 2020, after being sentenced to death for stabbing to death a 63-year-old grandmother and forcing her nine-year-old granddaughter to sit beside her lifeless body for a 30 to 40-mile drive before slitting the girl's throat, crushing her head with 20-pound rocks and severing and burying both victims' heads and hands. The execution of Keith Dwayne Nelson, who kidnapped a 10-year-old girl rollerblading in front of her home, and in a forest behind a church, raped and strangled her to death with a wire, is scheduled for execution on August 28, 2020.

29. The federal government and the twenty-eight (28) states that permit the death penalty also permit, subject to significant limitations (such as a unanimous jury verdict), the imposition of a life sentence without parole. Of the twenty-two (22) states that do not permit the death penalty, twenty-one (21) and the District of Columbia permit the imposition of life sentences without parole. Alaska does not permit either the death penalty or life imprisonment without parole.

30. Mandatory life sentences without parole for juveniles have been unconstitutional in the United States since the U.S. Supreme Court's 2012 decision in *Miller v. Alabama*.

31. Because the United States is a federal republic, decisions regarding abolition of the death penalty and life sentences without parole are reserved, in the case of federal crimes, for Congress, and in the case of all other crimes, to the state legislatures or to the People themselves. The state and federal courts maintain an active role in assuring that all necessary procedural protections are available to those convicted of capital crimes or sentenced to a life term without parole.

Investigations, sentencing, and detention

32. The United States seeks to ensure that all levels of the state and federal justice systems operate fairly and effectively for all. In December 2018, President Trump signed into law the First Step Act, ... [which] gives non-violent offenders the chance to reenter society as productive, law-abiding citizens. ...

33. The Civil Rights of Institutionalized Persons Act (CRIPA) gives DOJ tools to investigate and correct prison conditions and conditions in other public institutions where there is reason to believe that a pattern or practice of deprivation of constitutional rights of individuals may exist. For example, in April 2019, DOJ announced it had found reasonable cause to believe that conditions in Alabama's prisons for men violated the Eighth Amendment of the U.S. Constitution because they did not provide safe conditions and failed to protect prisoners from prisoner-on-prisoner violence and prisoner-on-prisoner sexual abuse. DOJ provided Alabama written notice of the supporting facts for these alleged conditions and the minimum remedial measures necessary to address them. In July 2020, DOJ made similar findings with regard to the use of excessive force in Alabama prisons.

Gun violence

34. The Second Amendment to the Constitution of the United States protects the individual right to keep and bear arms, subject to certain long-standing prohibitions such as those forbidding the possession of firearms by felons or restrictions on the carrying of particularly dangerous and unusual weapons. Federal, state, and local governments are all therefore limited in how they may regulate firearms. In addition, the right to keep and bear arms is embodied in forty-four (44) state constitutions, which may further limit official action on a state-by-state basis. At the same time that the United States supports the right of individuals to bear arms lawfully, it is engaged in a variety of efforts to ensure that criminals, especially those who use firearms in the commission of their crimes, are pursued and appropriately punished.

35. Since 2001, DOJ has implemented Project Safe Neighborhoods (PSN), bringing together law enforcement and the communities they serve to reduce violent crime and make neighborhoods safer. DOJ reinvigorated PSN in 2017 as part of its renewed focus on targeting violent criminals, including those committing gun violence, directing all U.S. Attorneys' Offices to work in partnership with federal, state, local, and tribal law enforcement and the local community to develop effective, locally based strategies to reduce violent crime.

36. The Attorney General announced in November 2019 the launch of Project Guardian, a new initiative designed to reduce gun violence and enforce federal firearms laws across the country. Project Guardian's implementation is based on five principles: (1) coordinated prosecution, (2) enforcing the background check system, (3) improved information sharing, (4) coordinated response to mental health denials, and (5) crime gun intelligence coordination.

Violence against women

37. The United States seeks to safeguard and protect women and girls and strongly supports eliminating violence against them. The United States introduced its Strategy on Women, Peace, and Security (WPS Strategy) in June of 2019. The WPS Strategy responds to the Women, Peace, and Security Act of 2017, which President Trump signed into law on October 6, 2017. The Act is the first legislation of its kind globally, which makes the United States the first country in the world with a comprehensive law to prevent, mitigate, and resolve violence against women internationally. The United States remains a strong defender of women, men, and their children, and is a major funder of programs, both at home and abroad, to improve the health, life, dignity, and well-being of women, their children, and their families.

38. DOJ's Office on Violence Against Women (OVW) provides federal leadership in developing the national capacity to reduce violence against women and administer justice for and strengthen services to victims of domestic violence, dating violence, sexual assault, and stalking. In 1994, Congress passed the Violence Against Women Act (VAWA) in recognition of the severity of crimes associated with domestic violence, sexual assault, and stalking. Created in 1995, OVW administers financial and technical assistance to communities across the country that are developing programs, policies, and practices aimed at ending domestic violence, dating violence, sexual assault, and stalking. OVW administers both formula-based and discretionary grant programs, established under VAWA and subsequent legislation, that support efforts to provide services to victims and hold perpetrators accountable through promoting a coordinated community response. Funding is awarded to local, state, and tribal governments, courts, non-profit organizations, community-based organizations, secondary schools, institutions of higher education, and state and tribal coalitions. Grants are used to develop effective responses to violence against women through activities that include direct services, crisis intervention,

transitional housing, legal assistance to victims, court improvement, and training for law enforcement and courts. Since its inception, OVW has awarded over \$8.1 billion in grants and cooperative agreements and has launched a multifaceted approach to implementing VAWA. By forging state, local, and tribal partnerships among police, prosecutors, judges, victim advocates, health care providers, faith leaders, and others, OVW grant programs help provide victims with the protection and services they need to pursue safe and healthy lives, while simultaneously enabling communities to hold offenders accountable for their violence.

39. OVW administers the Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program, which supports institutions of higher education in implementing comprehensive, coordinated responses to violent crimes on campuses. This federal grant program supports the development and strengthening of effective security and investigation strategies to combat domestic violence, dating violence, sexual assault, and stalking on campuses, development and strengthening of victim services in cases involving such crimes on campuses, which include partnerships with local criminal justice authorities and community-based victim services agencies, and the development and strengthening of prevention education and awareness programs.

40. In 2013, DHS established an agency-wide Council on Combating Violence against Women to coordinate DHS's efforts to stop crimes against women and ensure the effective administration of laws aimed at preventing violence against women. In 2016, the Department approved a grant of \$9.2 million from DOJ and the Department of Housing and Urban (HUD) for stable housing to victims of domestic violence living with HIV/AIDS, and the 2016 launch of a research and evaluation initiative to develop a peer support group model.

41. In 2016, HUD issued guidance on local nuisance ordinances that may lead to discrimination under the Fair Housing Act against survivors of domestic violence and other persons in need of emergency services. HUD also published final rules under VAWA 2013, enhancing housing protections for victims of domestic violence, dating violence, sexual assault, and stalking.

Human trafficking

42. The U. S. Government is actively engaged in activities to combat human trafficking in all its forms, including sex and labor trafficking through the President's Interagency Task Force to Monitor and Combat Trafficking in Persons. President Trump has signed nine pieces of anti-trafficking legislation into law, including the Trafficking Victims Protection Reauthorization Act of 2017, the Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 and the Stop Enabling Sex Traffickers Act of 2017.

43. The President honored the 20th Anniversary of the landmark Trafficking Victims Protection Act (TVPA) at a White House Summit on Human Trafficking on January 31, 2020. During the Summit, the President signed the Executive Order on Combating Human Trafficking and Online Child Exploitation in the United States Strengthening Federal Responsiveness to Human Trafficking.

44. In FY2019, DOJ brought 220 human trafficking prosecutions, charged 343 defendants, and secured federal convictions against 475 traffickers. In FY 2019, OJP's Bureau of Justice Assistance made awards of more than \$100 million for human trafficking programs, including programs that provide a comprehensive range of direct services for victims of human

trafficking. In FY 2019, Office for Victims of Crime (OVC) programs served 8,375 victims and trained over 82,000 professionals to better identify and serve victims of trafficking. In FY 2019, OVC, in partnership with Bureau of Justice Assistance (BJA), funded a total of 15 Enhanced Collaborative Model Human Trafficking Task Forces. In FY 2019, DOJ continued investing in research to develop new knowledge and tools to combat human trafficking more effectively.

45. DHS Immigration and Customs Enforcement Homeland Security Investigations (ICE/HSI) identified and assisted 428 human trafficking victims and initiated 1,024 human trafficking criminal cases in FY 2019 and reported 2,197 criminal arrests, 1,113 criminal counts charged in indictments, and 691 criminal counts in federal, state, and local convictions. HHS continued to fund an NGO to operate the national human trafficking hotline. In FY 2019, the hotline received 136,990 calls, texts, chats, online tips, and emails, identified 11, 852 potential human trafficking cases, and provided resources and referrals to 3,828 potential victims.

46. DOT and DHS/CBP lead the Blue Lightning Initiative (BLI), an element of DHS's Blue Campaign that trains airline personnel to identify potential traffickers and human trafficking victims, and to report their suspicions to federal law enforcement. To date, more than 100,000 personnel in the aviation industry have been trained through the BLI, and actionable tips continue to be reported to law enforcement.

47. In FY 2019, DHS/U.S. Citizenship and Immigration Services (USCIS) approved 500 applications for nonimmigrant status for victims of severe forms of trafficking in persons, and approved 491 applications for their eligible family members.

48. In FY 2018 and 2019, the DHS/Federal Law Enforcement Training Centers (FLETC) trained over 5,500 federal law enforcement officers through its basic training programs on indicators of human trafficking. FLETC has developed a one-day Introductory Human Trafficking Awareness Training Program for federal, state, local, and tribal law enforcement agencies, designed to instill awareness of indicators of human trafficking for the broader law enforcement community.

49. The Department of Interior's Bureau of Indian Affairs (BIA) provided victim services to 13 tribes for detection of and response to human trafficking in Indian Country. The Department of Labor (DOL) funded several projects to combat forced labor, including a \$2 million, four-year project to combat forced labor and human trafficking in the cocoa supply chain and other sectors in Ghana, and a new \$5 million four-year project to combat forced labor and human trafficking on fishing vessels in Indonesia and the Philippines. DOL also released the mobile and web application *Comply Chain: Business Tools for Labor Compliance in Global Supply Chains*, which provides companies and industry groups practical guidance on how to identify risks of forced labor in their supply chains and mitigate or mediate abuses. Companies that implement compliance systems are less likely to risk importing goods made by forced labor and run afoul of U.S. law.

50. The Department of State's Office to Monitor and Combat Trafficking in Persons (TIP) issued its most recent Trafficking in Persons Report in June 2020, where the United States comprehensively assesses what governments around the world are doing to combat this crime. The TIP Report is an invaluable tool the United States uses to arm ourselves with the latest information and guides our actions both domestically and abroad.

Human rights education, training, and community engagement

51. Respect for human rights is reflected in the Constitution, laws, regulations, and policies. Many schools feature human rights education, and some of them have centers focused

on the study of human rights. Professional organizations and others have educational programs. Law enforcement and immigration screening personnel receive training on prohibitions against unlawful discrimination and racial and ethnic profiling. In 2019, DOJ/CRD and the U.S. Attorney's Office hosted a roundtable on sexual harassment in housing, while the DOJ Community Relations Service works with communities to address conflict related to discrimination and similar matters.

D. Economic, social and cultural rights and measures; indigenous issues; and the environment

Indigenous issues and violence against indigenous women

52. Members of indigenous communities who are born or naturalized in the United States are citizens of the United States and residents of the state in which they live. Those who are also members of tribes or villages recognized by federal or state law have additional rights defined by those laws, and by the laws of their respective communities.

53. The U.S. Government has primary responsibility for administering the social programs that provide a variety of education, health care, and social services.

54. Federal and state laws and policy call for consultation with tribes on many issues, and multiple consultations with tribal leaders are held each year on activities and policies affecting tribes or tribal lands.

55. The U.S. Government works aggressively to end violence disproportionately affecting American Indian and Alaska Native communities. On May 3, 2019, President Trump issued a proclamation establishing May 3 as Missing and Murdered American Indians and Alaska Natives Awareness Day and announcing that federal agencies are increasing their efforts to address violent crimes in Indian country. This work includes improving public safety, expanding funding and training opportunities for law enforcement in Indian country, and better equipping law enforcement with needed tools, such as access to databases.

56. On November 26, 2019 the President signed an executive order establishing the Task Force on Missing and Murdered American Indians and Alaska Natives. This order is the culmination of numerous discussions where federal officials heard directly from Indian Country. Attorney General Barr and Interior Secretary Bernhardt serve as co-chairs of the Task Force and members include the FBI Director, DOI Assistant Secretary – Indian Affairs, Director of DOJ's Office on Violence Against Women, DOI Director of the Office of Justice Services, Chair of the Native American Issues Subcommittee of the Attorney General's Advisory Committee, and Commissioner of the Administration for Native Americans (ANA) within the Department of Health and Human Services (HHS).

57. In all of this work, the federal government consults with tribes multiple times each year on actions and policies affecting tribes or tribal lands.

Homelessness

58. The American economic system of free people and free markets has lifted millions of people out of poverty and been a model for other nations. Those who struggle with poverty and other mental, behavioral, and health problems that lead to homelessness have access to a wide variety of social programs sponsored by families, communities, businesses, nonprofit organizations, including faith-based organizations, and federal, state and local government. HUD, HHS, Department of Education (ED), the Department of Veterans Affairs (VA) and other members of the U.S. Interagency Council on Homelessness (USICH) have worked closely with state and local governments to alleviate the personal and social problems that lead to

homelessness. In April of 2020, USICH and partner agencies launched a process to develop an updated comprehensive federal strategic plan to prevent and end homelessness using extensive stakeholder and direct provider input.

59. Through its 2019 Continuum of Care Program Competitions, HUD increased local flexibilities and enhanced provider ability to better help our vulnerable homeless populations. In order to increase self-sufficiency among homeless populations, HUD provided new flexibilities for grantees to implement service participation requirements such as employment training, mental health care, substance abuse treatment after a person has been stably housed.

60. HUD estimates homelessness across the United States has declined by 11% since 2010. Homelessness among veterans is half of what was reported in 2010.

61. The Federal Interagency Council on Crime Prevention and Reentry, led by DOJ, has supported efforts to reduce recidivism and prepare individuals for successful reentry into society. USICH also released guidance to reentry service providers, corrections agencies, and state and local governments on removing barriers to housing and services for individuals with criminal records who are experiencing homelessness.

Health care and education

62. There is considerable debate in the United States about the best ways to make quality, affordable health care available to all. HHS' Title V Maternal and Child Health Services Block Grant Program seeks to improve maternal health outcomes, including rates of severe morbidity and maternal mortality.⁶⁸ National and state level performance measure data is publicly accessible on the Title V Information System website. In 2019, HHS awarded \$351 million to support families through the Maternal, Infant, and Early Childhood Home Visiting Program, which serves families living in almost one-third of U.S. counties.⁶⁹ States and territories can tailor the program to serve the specific needs of their communities, targeting services to communities with concentrations of risk, such as premature birth, low-birth-weight infants, and infant mortality. A multi-pronged evaluation of the program found home visiting services result in positive effects for families. Additionally, results suggest that home visiting may improve maternal health. HHS also supports Tribal Maternal, Infant, and Early Childhood Home Visiting Program development grants. Evaluations are in progress and a release date will be forthcoming.

63. The Preventing Maternal Deaths Act of 2018⁷¹ authorizes, amends, and expands the Safe Motherhood Initiative within the HHS Centers for Disease Control and Prevention, including authorizing support for state and tribal Maternal Mortality Review Committees, and directs HHS to make grants available to states to better track and examine the problem of maternal deaths; to establish maternal mortality review committees; and to ensure that state health departments have plans to educate healthcare providers about the findings of the review committees. CDC is now funding 25 states to conduct Maternal Mortality Review in the United States.

64. The United States remains committed to equal opportunity in education and, working with states and communities, helping students succeed in school and careers. In 2015, Congress enacted the Every Student Succeeds Act (ESSA), which revised and reauthorized the Elementary and Secondary Education Act. Its support for states and communities includes investing in evidence-based and innovative local programs; providing intervention and support for schools and students that need the most help; and preserving protections for economically disadvantaged students, children with disabilities, English learners, and other vulnerable students. Consistent with the commitment to equal access, it is unlawful to deny elementary and secondary-level

school children in the United States an education on the basis of actual or perceived immigration status.

65. Corporal punishment is governed by state law. In 2019, as a broader tool to help parents and educators create and maintain safe and positive learning environments in school, ED produced a guide on school climate resources for parents and educators. ED also has two centers that offer free assistance and resources related to school climate for states, school districts, schools, institutions of higher learning, and communities: (1) the National Center of Safe and Supportive Learning Environments, and (2) the Technical Assistance Center on Positive Behavioral Interventions and Supports.

Women and health

66. As the world's largest bilateral donor to global health programs, the U.S. Government is committed to supporting health programs around the world, including life-saving services and helping women and children thrive, particularly in countries where the need is greatest. The United States remains resolute in its commitment to preventing conflict-related sexual violence and providing resources and support for survivors to address the trauma and stigma they experience as a step toward healing those afflicted, as well as mending their communities. As the United States has noted on many occasions, there is no international human right to abortion, whether under that name or under other terms like "sexual and reproductive health." Rather, as President Trump has stated, "our Nation proudly and strongly reaffirms our commitment to protect the precious gift of life at every stage, from conception until natural death." The United States believes in the sovereign right of nations to make their own laws to protect the unborn, and rejects any interpretation of international human rights to require any State to provide access to abortion. ...

Gender equality in the workplace

67. The United States promotes a non-discriminatory, inclusive, and integrated approach to work that ensures that all women and men are treated with human dignity. It is the policy of the United States to support and promote efforts that reinforce respect for the inherent dignity of both women and men, advance women's equality and promote and protect these rights.

68. Wage discrimination based on sex is illegal under the Equal Pay Act of 1963, 29 U.S.C. § 206(d) and Title VII of the Civil Rights Act of 1964, as amended.⁸⁰ The National Security Strategy of the United States clearly identifies women's equality and empowerment worldwide as integral to our national security and a priority for the United States. We believe that investing in women's economic empowerment has a cascading effect for women, men, families, and communities, and is a key component to our national security approach.

69. U.S. law allows, but does not require, private employers to offer paid maternity leave. The Family and Medical Leave Act entitles eligible employees to 12 workweeks of unpaid, job-protected leave in a year for the birth and care of newborn or adopted/foster children. On December 20, 2019, President Trump signed into law the Federal Employee Paid Leave Act, which provides up to 12 weeks of paid parental leave for over two million Federal civilian employees. The new law will apply to leave taken for births or adoption/foster placements that occur on or after October 1, 2020.

Protections for migrant workers

70. Alien agricultural workers in the United States are protected by the Migrant and Seasonal Agricultural Worker Protection Act of 1983. This Act requires employers to disclose or make available upon request the terms of employment and to comply with those terms, to

confirm that Farm Labor Contracts are registered with and licensed by DOL, to pay each worker when wages are due and provide workers with itemized statements of earnings and deductions, and to post worker protection laws at the worksite. The Act also requires that housing and transportation meet federal and/or state standards. Since 1966, the minimum wage and record-keeping provisions, but not the overtime pay provisions, of the Fair Labor Standards Act (FLSA) have also applied to most agricultural workers and employers.

Protection of the environment

71. The United States and each of the fifty states has strong policies governing the protection of the environment. Federal and state laws create both government and private enforcement mechanisms and significant remedies are available against those who violate them. The United States advances an approach that balances energy security, economic development, and environmental protection⁸⁸ and will remain a global leader in reducing traditional pollution, as well as greenhouse gases, while continuing to expand our economy.

E. National security and other matters Migrants in detention

72. The U.S. Government draws from a wide range of resources to process alien children safely. When alien children are placed in government custody, we ensure they are treated in a safe, dignified, and secure manner. Under the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), unaccompanied alien children generally are transferred from the custody of DHS to that of HHS.

73. Recent years have seen a humanitarian and security crisis caused by a dramatic increase in the number of aliens encountered along or near the U.S. border with Mexico, including unaccompanied children. The majority come from Guatemala, Honduras, and El Salvador, where poor economic conditions and high levels of generalized violence, while not grounds for asylum or protection under the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment or U.S. laws implementing it, are important “push factors.” At the same time, certain U.S. laws, judicial rulings, and policies—including the TVPRA—contribute to “pull factors.”

74. As a result of the crisis, DHS has since 2012 referred an increasing number of unaccompanied alien children to HHS. Since FY 2012, this number has jumped dramatically, with 13,625 referrals in FY 2012, 24,668 in FY 2013, 57,496 in FY 2014, 33,726 in FY 2015, 59,170 in FY 2016, 40,810 in FY 2017, and 49,100 in FY 2018 and 52,000 in FY 2019.

75. To address this crisis, on July 1, 2019, the United States enacted the Emergency Supplemental Appropriations for Humanitarian Assistance and Security at the Southern Border Act, which provides an additional \$4.5 billion in emergency supplemental funding for humanitarian assistance and security at the U.S. southern border. In addition, the U.S. administration has sought legislative changes to address the pull factors and has sought to exercise existing legal authorities to reduce them.

Guantanamo Bay

76. Executive Order 13823 of January 18, 2018, Protecting America through Lawful Detention of Terrorists, requires detention operations at U.S. Naval Station Guantanamo Bay to continue to be conducted consistent with all applicable U.S. and international law. The United States has no plans to close the detention facilities at Guantanamo Bay.

77. Currently 40 individuals are detained in U.S. detention facilities at Guantanamo Bay. Since 2015, 68 individuals have been transferred from Guantanamo Bay to other countries,

including Cabo Verde, Ghana, Italy, Kuwait, Mauritania, Montenegro, Oman, Senegal, Serbia, the Kingdom of Saudi Arabia, and the United Arab Emirates.

78. The detainees at Guantanamo are held and treated humanely and in accordance with applicable law. All U.S. military detention operations, including those at Guantanamo Bay, comply with all applicable international and domestic laws, and the United States takes very seriously its responsibility to provide for the safe and humane care of detainees at Guantanamo Bay.

Torture

79. Federal and State laws prohibit torture or cruel, inhuman or degrading treatment or punishment and related misconduct. The Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishment for individuals convicted of crimes. What constitutes cruel and unusual punishment is a fact-specific determination that may include uncivilized and inhumane punishments, punishments that fail to comport with human dignity, and punishments that include physical suffering, including torture. The Fifth and Fourteenth Amendment Due Process Clauses prohibit, *inter alia*, governmental action that “shocks the conscience,” including acts of torture and cruel treatment, as well as punishing persons without first convicting them under appropriate standards. It also includes the intentional use of objectively unreasonable force against those detained while awaiting trial. The Fourteenth Amendment applies both of these Amendments to the conduct of state officials.

80. Coincident with the entry into force of the Convention Against Torture, the United States enacted the Torture Convention Implementation Act, 18 U.S.C. § 2340A, which helps implement U.S. obligations under Article 5 of the Convention Against Torture. As provided in the statute, whoever commits or attempts or conspires to commit torture outside the United States (as defined in the statute) can be subject to federal criminal prosecution if the alleged offender is a national of the United States or the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

81. In the context of military commissions against alien unprivileged enemy belligerents, the Military Commissions Act (MCA) of 2009, codifies, *inter alia*, the offenses of torture and cruel or inhuman treatment as crimes triable by military commission. In addition, the MCA of 2009 prohibits the admission of any statement obtained by the use of torture or by cruel, inhuman, or degrading treatment, as defined by the Detainee Treatment Act of 2005, in a military commission proceeding, except against a person accused of torture or such treatment as evidence that the statement was made. This prohibition is also incorporated into Rule 304(a)(1) of the Military Commission Rules of Evidence.

82. Consistent with international obligations and domestic law, the United States has conducted and will continue to conduct thorough, independent investigations of credible allegations of torture, and to prosecute persons where appropriate.

Privacy

83. The United States collects, maintains, uses, and disseminates information in accordance with the U.S. Constitution and U.S. laws, regulations, and policies, consistent with applicable international obligations. Presidential Policy Directive 28, which applies to signals intelligence activities, states that all persons should be treated with dignity and respect, regardless of nationality or place of residence, and that all persons have legitimate privacy interests in the handling of their personal information. The United States has multiple layers of oversight, ranging from individual privacy officers embedded in agency operations, to

congressional committees, and offices of inspector general, to independent oversight agencies such as the Privacy and Civil Liberties Oversight Board (PCLOB). PCLOB is an independent agency within the Executive Branch established by the Implementing Recommendations of the 9/11 Commission Act of 2007 to ensure that the federal government's efforts to prevent terrorism are balanced with the need to protect privacy and civil liberties.

84. Our foreign intelligence oversight system is robust and transparent, and includes executive, legislative, and judicial bodies. The foreign intelligence activities of the U.S. Government are conducted in accordance with applicable legal authorities.

85. In January 2017, the CIA Office of Privacy and Civil Liberties (OPCL) published revised E.O. 12333 Attorney General Guidelines designed to ensure that the CIA continues to handle information appropriately in the digital age. The review sought to ensure that the Guidelines appropriately incorporated the protection of privacy and civil liberties in the conduct of the CIA's authorized intelligence activities, with improvements that included protections for unevaluated information, restrictions on queries, exceptional handling requirements for electronic communications and other similarly sensitive information, and compliance and oversight. OPCL conducts reviews to ensure compliance with the Privacy Act and other requirements related to the protection of personal information from unauthorized use, access, or disclosure. Complaints may be filed for alleged violations of civil liberties in the administration of CIA programs and operations.

86. Privacy and digital freedom issues raised by the conduct of non-state actors, such as Google and Facebook, are addressed through the U.S. legal and regulatory systems, including by the DOJ, the Federal Trade Commission (FTC), state attorneys general, and private litigation. Some states have enacted or are considering state privacy laws, and the FTC provides annual updates on its privacy and data security work with regard to non-state actors.

Sexual violence in the military

87. The United States is committed to preventing sexual violence. The United States issues an annual report that provides updates on programs and efforts at the Department of Defense (DoD) to combat sexual violence in the military. DoD's programs focus on preventing sexual assault, promoting advocacy and assistance, and addressing sexual-assault-related retaliation.

88. DoD's FY 2018 Annual Report on Sexual Assault in the Military, issued in April 2019, estimates that 20,500 service members, experienced some kind of sexual assault in 2018. Over the past decade, reporting rates have quadrupled, allowing the Department to connect a greater share of victimized service members with restorative care and services.

89. In April 2019, DoD established the Sexual Assault Accountability and Investigation Task Force (SAAIT) to identify, evaluate, and recommend immediate and significant actions to improve further the accountability process and ensure due process for both victims and accusers. The Task Force published a, first-of-its-kind, comprehensive set of recommendations to help commanders, further enhance victim support, and ensure fair and just support for the accused.

90. To address this issue further, DoD issued a Prevention Plan of Action (PPOA) in April 2019, providing a coordinated approach to optimize the Department's prevention system with targeted efforts towards the youngest military members and others at increased risk for victimization. In addition, DoD is committed to training supervisors of junior enlisted personnel to ensure better promotion of respectful workplace conduct. The Secretary of Defense is committed to justice for victims of sexual assault and is doing everything within his authority to

eliminate sexual harassment and assault in the military. The Secretary thus directed the Department to implement the recommendations of the SAAITF Report, develop new assessment tools, launch a new program to catch serial offenders, and execute the DoD Sexual Assault PPOA.

Migration policies and treatment of migrant adults and children

91. In accordance with its law, policy, and international obligations, the United States maintains the sovereign right to detain aliens who violate its laws, pose a danger to the community, or pose a flight risk in order to protect public safety and to ensure their compliance with its immigration procedures. Primary responsibility for the enforcement of immigration law within DHS rests with ICE, Customs and Border Patrol (CBP), and USCIS. CBP enforces immigration laws at and between the ports of entry, ICE is responsible for interior enforcement and for detention and removal operations, and USCIS adjudicates applications and petitions for immigration and naturalization benefits. Under the TVPRA of 2008, unaccompanied alien children generally are transferred from the custody of DHS to that of HHS. As noted above, the United States is experienced a crisis along its southern border due to increases in illegal immigration in 2019 and has considered numerous ways to address this situation. Aliens facing removal from the United States receive procedural protections.

92. The United States limits its collection of information in the visa application relevant to a visa adjudication. The questions asked in the visa application process are designed to solicit the information necessary to determine whether an applicant is eligible for the visa applied for under U.S. law. Information obtained from applicants in the visa application process is considered confidential under U.S. law, and with limited exceptions, is to be used only for the formulation, amendment, administration, or enforcement of the immigration, nationality, and other U.S. laws.

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3. UN Third Committee

a. General Statement

The 75th session of the UN Social, Humanitarian and Cultural Affairs Committee, or Third Committee, concluded on November 19, 2020 with 50 resolutions adopted, 31 by consensus. Due to the COVID-19 pandemic, negotiations and debate occurred virtually. On November 13, 2020, the U.S. Mission to the UN submitted for the record a general statement by Jason Mack, counselor for economic and social affairs, at the UN Third Committee. The statement appears below and is available at <https://usun.usmission.gov/general-statement-in-a-meeting-of-the-third-committee/>.

* * * *

I would like to start by thanking the Third Committee Bureau and our colleagues for the spirit of cooperation. We take this opportunity to make brief but important points of clarification on some of our key priorities for the Third Committee. We underscore that these and other UN General

Assembly resolutions are non-binding documents that do not create rights or obligations under international law. The United States understands that General Assembly resolutions do not change the current state of conventional or customary international law. We do not read resolutions to imply that Member States must join or implement obligations under international instruments to which they are not a party, and any reaffirmation of such Conventions or treaties applies only to those States that are party to them. Moreover, U.S. co-sponsorship of, or our joining consensus on, resolutions does not imply endorsement of the views of special rapporteurs or other special procedures mandate-holders as to the contents or application of international law.

Points of Clarification

COVID-19: The United States is leading the global response to COVID-19. The U.S. Government has allocated \$20.5 billion for the development of vaccines and therapeutics, preparedness efforts, and foreign assistance. Our global efforts build upon decades of U.S. investment in life-saving health and humanitarian assistance, and we continue to ensure that the substantial U.S. funding and scientific efforts remain a central and coordinated part of the worldwide effort against this deadly virus. We are achieving real results by helping nations around the world respond to COVID-19 and therein protecting the United States.

Universal Health Coverage: The United States aspires to help increase access to high-quality health care, both for improved health outcomes and for better preparedness as we see with the COVID-19 pandemic. However, as made clear in the 2019 UNGA Political Declaration on Universal Health Coverage (UHC), it is important that each country should develop its own approach to achieving UHC within its own context. Another critical aspect of successful UHC we wish to highlight is the necessary role of partnerships with the private sector; civil society organizations, including faith-based organizations; and other stakeholders. As we said at the time of the adoption of the Political Declaration, patient control and access to high-quality, people-centered care are key.

Women's Equality and Empowerment: Consistent with the Geneva Consensus Declaration, the United States is committed to promoting women's equality and to empowering women and girls. The United States is leading through our Women's Global Development and Prosperity Initiative, which seeks to enhance opportunities for women to participate meaningfully in the economy and advance both prosperity and national security, as well as through the Women, Peace, and Security (WPS) agenda. Accordingly, when the subject of a resolution text is "women," or in some cases "women and girls," our preference in this context is to use these terms, rather than "gender," for greater precision. The United States does not consider the outcome documents from the 63rd session of the Commission on the Status of Women to be the product of consensus.

International Criminal Court (ICC): The United States does not and cannot support references to the International Criminal Court and the Rome Statute that do not distinguish sufficiently between Parties and Non-Parties, or are otherwise inconsistent with U.S. positions on the ICC, particularly our continuing and longstanding principled objection to any assertion of ICC jurisdiction over nationals of States that are not parties to the Rome Statute, absent a referral from the UN Security Council or consent of such a State. Our position on the ICC in no way diminishes our commitment to supporting accountability for atrocities.

Sexual and Reproductive Health: Consistent with the Geneva Consensus Declaration, signed by countries representing every region of the world, we assert that there is no

international right to abortion, and each nation has the sovereign right to legislate its own position on the protection of life at all stages, absent external pressure, especially from the UN.

The United States defends human dignity and supports access to high-quality health care for women and girls across the lifespan. We do not accept references to “sexual and reproductive health,” “sexual and reproductive health and reproductive rights,” or other language that suggests or explicitly states that access to legal abortion is necessarily included in the more general terms “health services” or “health care services” in particular contexts concerning women. The United States believes in legal protections for the unborn and rejects any interpretation of international human rights to require any State Party to provide safe, legal, and effective access to abortion. As President Trump has stated, “Americans will never tire of defending innocent life.” Each nation has the sovereign right to implement related programs and activities consistent with their laws and policies. There is no international “right to abortion,” nor is there any duty on the part of States to finance or facilitate abortion. Further, consistent with the 1994 International Conference on Population and Development Programme of Action and the 1995 Beijing Declaration and Platform for Action, and their reports, we do not recognize abortion as a method of family planning, nor do we support abortion in our global health assistance. We also do not recognize references to non-UN negotiated conferences, summits or their respective outcome documents. We believe that the General Assembly should only include references to conferences and summits clearly mandated through UN modalities resolutions — such as this year’s Beijing+25 — and other ones, such as the Nairobi summit, have no direct or indirect place in any UN resolutions.

Refugees and Migrants: The United States maintains the sovereign right to facilitate or restrict access to its territory, in accordance with its national laws and policies, subject to our existing international obligations. The United States does not endorse or affirm the Global Compact for Migration or the New York Declaration.

2030 Agenda for Sustainable Development: The United States recognizes the 2030 Agenda as a voluntary global framework for sustainable development that can help countries work toward global peace and prosperity. 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. The 2030 Agenda recognizes that each country must work toward implementation in accordance with its own national policies and priorities, and we will interpret calls that reaffirm the 2030 Agenda or call for the full implementation of its Sustainable Development Goals to be aspirational.

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 prejudice or serve as precedent for decisions and actions underway in other fora. 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 World Trade Organization agreement or decision, including the Agreement on Trade-Related Aspects of Intellectual Property.

Further, citizen-responsive governance, including the respect for human rights, sound economic policy and fiscal management, government transparency, and the rule of law are essential to the implementation of the 2030 Agenda.

Finally, the 2030 Agenda states that “no one” will be left behind. We believe any alteration from the 2030 language, such as “no country left behind,” erodes the people-centered focus of the Agenda and distracts from the many multi-faceted and multi-stakeholder efforts to advance sustainable development.

Climate Change: With respect to the Paris Agreement and climate change language, we note that U.S. withdrawal from the Agreement took effect on November 4, 2020. Therefore, references to the Paris Agreement and climate change are without prejudice to U.S. positions. We affirm our support for promoting economic growth and improving energy security while also protecting the environment. The United States does not support references to climate change in resolutions that are inconsistent with this approach and those that do not respect national circumstances and approaches.

Trade: The United States believes that each Member State has the sovereign right to determine how it conducts trade with other countries. Moreover, it is our view that the UN must respect the independent mandates of other processes and institutions, including trade negotiations, and must not involve itself in or comment on decisions and actions in other fora, including 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 understand recommendations made by the UN General Assembly on these issues to be binding.

The “Right to Development”: The “right to development,” which is not recognized in any of the core UN human rights conventions, does not have an agreed international meaning.

Economic, Social, and Cultural Rights: The United States is not a Party to the International Covenant on Economic, Social, and Cultural Rights 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. We therefore believe that resolutions should not try to define the content of those rights, or related rights, including those derived from other instruments.

International Covenant on Civil and Political Rights (ICCPR): The ICCPR sets forth the conditions for permissible restrictions on certain human rights, including conformity with law and necessity in a democratic society for, inter alia, the protection of public health. The ICCPR likewise establishes the conditions under which derogation from some obligations under the Covenant may be permitted. The language in these resolutions in no way alters or adds to those provisions, nor does it inform the United States’ understanding of its obligations under the ICCPR.

Education: As educational matters in the United States are primarily determined at the state and local levels, when resolutions call on States to strengthen various aspects of education, including with respect to curriculum, we understand them consistent with our respective federal, state, and local authorities.

And finally, it is our intention that this statement applies to action on all agenda items in the Third Committee. We request that this statement be made part of the official record of the meeting. Thank you, Chairperson.

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b. *Other thematic statements at the UN Third Committee*

On November 17, 2020, the United States called for a vote and voted no on a resolution in the Third Committee sponsored by Cuba entitled, “Human Rights and Unilateral Coercive Measures” (regarding sanctions). See Chapter 16 for a discussion of human rights-related U.S. sanctions programs. The U.S. explanation of vote follows.

* * * *

This resolution does not advance the promotion and protection of human rights. Simply put, it is not sanctions that are undermining human rights. Sanctions are not punitive; they are a tool to change behavior. U.S. sanctions are designed to promote accountability for human rights violations and abuses, and those who point to sanctions as the problem advance a false narrative like the one in this resolution.

The text of this resolution inappropriately challenges the sovereign right of States to determine their economic relations and protect legitimate national interests, including taking actions in response to national security concerns. Relatedly, we will not allow those who endanger the national security of the United States and the international community to exploit the COVID-19 emergency to achieve sanctions relief. The resolution also attempts to undermine the international community's ability to respond to acts that are offensive to international norms. Economic sanctions are a legitimate way to achieve foreign policy, security, and other national and international objectives, and the United States is not alone in that view or in that practice.

Our sanctions programs are focused on constraining the ability of bad actors to take advantage of our financial system or threaten the United States, our allies and partners, or civilians, not on bona fide humanitarian-related trade, assistance, or activity. Rather, we often, and in many circumstances proactively, exclude this type of activity from our sanctions programs. The United States actively seeks to facilitate the provision of legitimate aid to Syria and Venezuela, while Assad and Maduro actively work to restrict it. Indeed, we have provided billions of dollars of humanitarian assistance to the Venezuelan and Syrian people.

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4. *Country-specific Concerns*

The United States supported country-specific resolutions in the Third Committee addressing grave human rights concerns in Burma, Crimea, Iran, North Korea (DPRK), Syria, and the Peoples Republic of China (PRC). The United States also signed on to a Third Committee joint statement on the deteriorating human rights situation in Belarus.

a. *Burma*

The Burma resolution, which was drafted by Saudi Arabia on behalf of the Organization for Islamic Cooperation, passed with extensive support (131 countries voting “yes”). The resolution emphasizes the importance of international, independent, fair, and

transparent investigations into gross human rights violations and recalls the Secretary General's calls for a global ceasefire, end to all hostilities, and addressing grievances through political dialogue. The United State provided a general statement on Burma and cosponsored the resolution on Burma. The U.S. general statement follows.

* * * *

Thank you, Madame Chair. As a decades-long partner of the people of Myanmar in their pursuit of democracy, peace, and prosperity, the United States is proud to co-sponsor this important resolution on the human rights situation in Myanmar.

The United States condemns continuing serious human rights violations and abuses across Myanmar, including in Rakhine, Chin, Kachin, and Shan States. Consistent with this resolution, the United States calls on Myanmar authorities to deepen democratic reforms; ensure full participation in elections and civic life without discrimination; take steps to establish civilian control of the military; ensure accountability for those responsible for human rights violations and abuses, including for the ethnic cleansing of Rohingya Muslims from northern Rakhine State; protect and promote human rights and fundamental freedoms, including freedoms of expression on and off line, religion or belief, association, and peaceful assembly; allow unhindered access across Myanmar for UN, humanitarian, and human rights organizations, and media groups; implement the recommendations of the Annan Advisory Commission in Rakhine State, including those related to access to citizenship and freedom of movement; work to establish conditions that will allow all displaced persons to voluntarily return to their places of origin in safety and dignity; and address victims' calls for justice.

The United States welcomes the work of the Independent Investigative Mechanism for Myanmar and echoes the resolution's call for all countries to grant the IIMM access and provide it with every assistance in the execution of its mandate. We also hope to see Myanmar authorities cooperate with the Special Rapporteur on the situation of human rights in Myanmar, Mr. Tom Andrews.

The United States reaffirms the resolution's urgent call to ensure the full protection of human rights and fundamental freedoms of all persons in Myanmar, including Rohingya and persons belonging to other minority groups, in an equal and non-discriminatory manner. This is vital to achieving the Myanmar people's goal of a more peaceful, stable, and prosperous nation.

We strongly condemn the ongoing violence in Myanmar and urge all involved to demonstrate restraint and respect for the human rights of members of affected populations. While we do not take a position on whether ongoing violence there could be legally characterized as an armed conflict, we support all credible efforts to advance peace and national reconciliation.

In addition, we recognize that Myanmar's parliamentary elections on November 8 mark an important step in the country's democratic transition. While we are concerned by problems in the electoral process, such as disenfranchisement of members of ethnic minority groups, including through the cancellation of voting in several regions, we remain a dedicated partner of the people of Myanmar in their pursuit of democracy, peace, and national reconciliation.

The United States strongly supports the resolution's urgent call for justice and accountability. We note that international human rights law does not define what constitutes an "effective remedy" in a particular situation. We do not consider anything in this resolution to

have bearing on matters of self-determination under international law. We also refer to our global general statement made on November 13, 2020.

In closing, we reiterate our longstanding support to the people of Myanmar and encourage all delegations to co-sponsor and vote in favor of this resolution. Thank you.

* * * *

b. *Crimea*

Ukraine's Crimea resolution passed with 63 "yes" votes, including that of the United States.

c. *Iran*

The resolution on human rights in Iran, facilitated by Canada, calls on Iran to end torture and systematic use of arbitrary arrests and detention, and passed with 79 "yes" votes, including that of the United States.

d. *North Korea*

The Third Committee resolution on human rights in North Korea was adopted by consensus, as in previous years. In line with key U.S. objectives, the resolution calls for accountability for human rights violations and abuses and places responsibility for improving the human rights situation squarely on the DPRK government. The EU, UK, and U.S. delegates underscored a lack of improvement in the human rights situation in the DPRK.

e. *Syria*

The resolution on Syria, drafted for the first time by the United States, received strong support in the Third Committee, with 99 countries voting "yes." The new text of the annual Syria resolution draws attention to the closure of the Bab al Salam and al-Yaroubiya border crossings and urges the Security Council to re-authorize these as well as calls on the Commission of Inquiry to report to the Third Committee at the next session of the UN General Assembly for the first time.

f. *China's coercive family planning policies in Xinjiang*

On June 29, 2020, the State Department issued a press statement condemning the practices—including forced sterilization, forced abortion, and coercive family planning--by the Chinese government against Uyghurs and other minorities in Xinjiang. The statement is available at <https://2017-2021.state.gov/on-chinas-coercive-family-planning-and-forced-sterilization-program-in-xinjiang/> and follows:

The world received disturbing reports today that the Chinese Communist Party is using forced sterilization, forced abortion, and coercive family planning against Uyghurs and other minorities in Xinjiang, as part of a continuing campaign of repression. German researcher Adrian Zenz's shocking revelations are sadly consistent with decades of CCP practices that demonstrate an utter disregard for the sanctity of human life and basic human dignity. We call on the Chinese Communist Party to immediately end these horrific practices and ask all nations to join the United States in demanding an end to these dehumanizing abuses.

5. Treaty Bodies

On June 2, 2020, Sofija Korac, adviser for the U.S. Mission to the United Nations delivered the U.S. statement at the first meeting on UN treaty body reform. Her remarks are excerpted below and available at <https://usun.usmission.gov/statement-by-the-united-states-of-america-for-the-first-meeting-on-treaty-body-reform-via-vtc/>.

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The United States has been integrally involved in conversations about treaty body reform since well before Resolution 68/268. The treaty body system plays a critical role in holding States accountable for their human rights obligations. We firmly support efforts to strengthen it and to enhance coordination among the bodies.

We welcome the progress the treaty bodies have made over the last year to improve working methods and enhance coordination. The present discussion is rightly focused on the value the General Assembly can add to reforms that fall, for the most part, to the treaty bodies themselves to make.

In this regard, the vision statement of the Chairs from last July, which largely reflected the Costa Rica elements paper that we and many other States supported, provides a roadmap for steps the treaty bodies can and should take, such as coordinated and predictable calendars, and focused and limited concluding observations and follow-up communications. The Human Rights Committee set the example through its decision last July to put these ideas into practice. This is the type of real action the Assembly should encourage other treaty bodies to replicate without further delay, something it could do through preambular language in a successor resolution.

We agree with other participants that there is a core set of additional elements the cofacilitators should look at in developing the operative portion of such a resolution. These include revisiting the formula for allocating meeting time, the universalization of “opt-out” simplified reporting, and facilitating access to modern case-management technology to help reduce the ever-growing backlog of individual communications.

Discussions should also explore how to improve the selection and election process of members to ensure they are both substantively qualified and demonstrably independent. We must

also improve safeguards against intimidation and reprisals against individuals and groups cooperating with treaty bodies.

Finally, as many other colleagues have said, we welcome and encourage a transparent process that engages all stakeholders, in particular civil society organizations throughout the entire process. As my colleague from the EU said, we also welcome that this meeting has been webcast.

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At the Geneva Consultation on Treaty Body Review, held August 28, 2020 and September 2, 2020, the United States and Canada organized and delivered two joint statements, which follow.

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Distinguished co-facilitators, I have the pleasure of reading this cross-regional joint statement. This statement covers agenda items 1, 2, and 3. This is the first of two joint statements, and is joined by 21 countries including my country the United States. We will read the second statement at the beginning of agenda item 4. Many of the ideas shared today reinforce views set forth in the position paper coordinated by Costa Rica in June 2019 and now endorsed by approximately 50 countries.

To begin, before discussing the agenda items, we ask your indulgence to briefly highlight what we view as two key points that undergird many other aspects of this discussion:

- First, on the continued importance of Resolution 68/268: Resolution 68/268 was a remarkable achievement that has strengthened the treaty body system and made it more coherent over the past six years. The most important outcome of this review should be a reaffirmation of the continued relevance of the framework that resolution established for the efficiency and effectiveness of the treaty bodies.

- Second, on the General Assembly's competence in this area: As an additional introductory point, we recognize that the vast majority of the items on today's agenda fall within the purview of the treaty bodies themselves to implement through their internal procedures. The GA certainly has a role to play in evaluating the system and in encouraging positive reform, but we must remain mindful of the respective competences of the GA and the independent treaty bodies and not allow those lines to be blurred. Most of our comments today concern actions that fall to the treaty bodies themselves to take.

Moving to Agenda Item 1, simplified reporting procedures, we applaud the steps the treaty bodies have taken to offer simplified reporting procedures to States. This is consistent with Resolution 68/268 and the commitment of the treaty body Chairs, as expressed in their July 2019 position paper, to offer simplified reporting procedures to all States for periodic reports. Simplified reporting procedures reduce the burden on States and improve the efficiency of the treaty bodies' review process. By using simplified reporting, treaty bodies also help improve compliance with States' reporting obligations, which is a significant challenge to the current system. We are pleased, in particular, by the steps the Human Rights Committee has taken by making "opt-out" simplified reporting universal, even for initial reports. We would encourage the treaty body chairs to consider means of building on this progress, including, for instance, by

making “opt-out” simplified reporting universal across the treaty bodies and ultimately phasing out the “opt-out” mechanism after one or two reporting cycles.

With regard to agenda item 2, harmonization and working methods, we encourage treaty bodies to continue harmonizing their working methods. Such harmonization would help eliminate duplication of work, while maximizing the number of issues that could be discussed. Treaty bodies should accordingly work to eliminate as much duplication as possible, while recognizing that there may be situations in which it is difficult to avoid some overlap given that human rights treaties occasionally cover similar ground.

Treaty bodies should also strive for greater coordination in their reviews of a particular State Party under their respective treaties. To this end, we recommend exploring the idea of designating members from each treaty body to be responsible for liaising with counterparts in other treaty bodies about the reporting of each State Party.

Finally, with regard to agenda item 3, an aligned methodology for constructive dialogue, treaty body members must have the ability to seek and receive information that allows them to better understand situations related to specific human rights issues in each country. This would facilitate the formulation of fact-based recommendations to effectively improve human rights situations on the ground. We reiterate the importance of treaty bodies providing States with concise and focused lists of issues prior to reporting, which greatly enhances the value of States’ reports. Such a practice should remain universal across treaty bodies.

We encourage treaty bodies to also provide advanced notification of topics to be discussed in the oral dialogue. This practice would enable State Parties to include those officials most qualified to speak to the particular topics treaty body members wish to discuss as part of their delegations, further enhancing the quality and specificity of the dialogue.

Thank you, co-facilitators, for this opportunity. Delegations joining this statement may have supplementary comments as we move through the first half of this morning’s agenda. The list of countries joining this statement follows.

Countries joining Statement 1: Netherlands, Israel, Australia, New Zealand, Belgium, United Kingdom, Croatia, Japan, Iceland, Czech Republic, Canada, United States, Estonia, Luxembourg, Republic of Korea, Norway, Sweden, Denmark, Finland, Liechtenstein, Albania

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Cross-Regional Joint Statement 2: Agenda Items 4, 5, and 6

Thank you distinguished co-facilitators. I have the pleasure of reading this second joint statement on behalf of my country, the United States, and 21 additional countries. The full version and signatories to this statement addressing agenda items 4, 5 and 6 follow below.

Regarding agenda item 4, fixed calendar, we encourage treaty bodies to develop coordinated and predictable calendars, harmonizing their cycles with one another and that of the Universal Periodic Review. Coordinated calendars that attempt, as far as possible, to spread out reviews of a particular State across different treaty bodies would help States and civil society better prepare for and engage in the review process and result in more efficient and complete reports and oral dialogues.

With respect to agenda item 5, periodicity of the treaty bodies’ sessions, while States’ implementation of their obligations under the treaties needs to be evaluated reasonably

frequently, we must also recognize the reality of the treaty bodies' heavy workload and backlogs. On balance, a 5- to 8-year review cycle appears realistic and reasonable for most treaty bodies, and consistent with what they have shown themselves to be capable of handling over the past few cycles. We would, however, strongly caution against a periodicity of longer than 8 years as too infrequent for the treaty bodies to be able to effectively conduct their work.

Finally, as concerns agenda item 6, concluding observations and recommendations, treaty bodies should follow through on the commitment in their July 2019 position paper to keep concluding observations and recommendations as short, concrete, and focused as possible, following an aligned methodology. Recommendations should be measurable, achievable, and strategically focused on a limited set of pressing human rights concerns in the State in question.

We further encourage the treaty bodies to follow through on the several other commitments made in their July 2019 position paper. We again welcome the decisive steps the Human Rights Committee has already taken in this direction, and urge further progress by the other committees in the short term.

To conclude, we would like to offer two final points:

- First, on the selection and independence of treaty body members: The effectiveness of the treaty bodies, and the quality of their work, is a direct reflection of the quality of their membership and their members' independence. It is imperative that States nominate candidates who are substantively qualified to serve on the treaty body in question, particularly those experienced in the field of human rights, and who are demonstrably independent of their government. Geographic diversity, gender balance, and nominating candidates belonging to marginalized groups—for example, persons with disabilities—is critical.

- Second, on participation by other stakeholders: Civil society, human rights defenders, and other stakeholders must continue to be included in this consultation as well as the treaty body reviews themselves. Civil society organizations and human rights defenders provide the treaty bodies with unvarnished information about the situation on the ground in the State under review, which allows the treaty bodies to have a much fuller picture of the human rights landscape. If a State disagrees with information provided by these stakeholders, it is always free to refute it, but civil society organizations must not be silenced—they are a critical part of how treaty bodies effectively monitor implementation of States' obligations under the treaties. We therefore welcome the involvement of these stakeholders in the consultation process, and we welcome the consultation that will occur here this afternoon. More crucially, the treaty bodies must continue to be allowed to receive the unfiltered views of these stakeholders in all their work.

Thank you again, co-facilitators, for leading us through this important dialogue, and we stand ready to assist you further in any way we can. As in the first half of the agenda, delegations joining this statement may wish to provide supplementary comments.

Countries joining Statement 2: Netherlands, Israel, Australia, New Zealand, Belgium, United Kingdom, Croatia, Japan, Iceland, Czech Republic, Canada, Liechtenstein, Albania, Colombia

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The United States provided a written submission to the co-facilitators in response to a questionnaire they sent out about treaty body reform. The U.S. submission follows.

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The United States welcomes your invitation of June 17, 2020, to provide this written contribution setting forth our views on the UN treaty body system review process. The 18 issues set forth in your letter identify most of the major areas around which we believe this discussion should focus. In formulating our response we have, as you suggested, used these 18 issues as a guide. This response does not address the issues one by one, but instead groups them together in a manner designed to more effectively convey the points we wish to highlight.

The United States strongly supports the work of the treaty bodies in general and regards them as an important component of the promotion and protection of human rights globally. We have been integrally involved in conversations about treaty body reform since well before Resolution 68/268, and played an active role in the negotiation of that landmark resolution that has already brought many needed innovations. We therefore welcome the current review, anticipated in Resolution 68/268, as an opportunity to look comprehensively and critically at the benefits brought by Resolution 68/268 as well as areas where it may have fallen short or where updates may be warranted.

This response, as your letter solicited, covers a broad range of issues implicated in reviewing the treaty body system. To be sure, the General Assembly has an important role to play in this process including, as necessary, by adopting in the near term a successor resolution reaffirming and updating Resolution 68/268. We note, however, that the responsibility for changing practices and procedures falls in most respects to the treaty bodies themselves, guided by the provisions of the relevant treaty. We applaud the commitment expressed by the Chairs of the ten treaty bodies in July 2019 (Annex III, A/72/256) to implement, in a coordinated fashion, a series of reforms aimed at harmonizing and streamlining the system, as well as the decision made by the Human Rights Committee in July 2019 to put many of these reforms into actual practice.

The Chairs' position paper, in turn, largely paralleled recommendations made in the June 20, 2019, paper coordinated by the Permanent Mission of Costa Rica on behalf of over 40 Geneva Missions, which was also endorsed by the United States. Those elements continue to be among the most relevant for consideration in the current discussion, and we touch upon several of them below.

1. Selection, election, and conduct of treaty body members

The effectiveness of the treaty bodies, and the quality of their work, is a direct reflection of the quality of their membership. It is imperative that States nominate candidates who are substantively qualified to serve on the treaty body in question and demonstrably independent of their government. States generally must also nominate candidates with legal expertise, given the treaty bodies' primary role in reviewing implementation of States' treaty obligations and, in the process, evaluating the State's domestic legal regime to identify areas where it may fall short. While the treaty bodies may also benefit from non-lawyer experts in the substantive areas

covered by the treaty in question, the preponderance of members should be recognized experts in international and relevant domestic law.

In regards to the practice of “vote trading” on treaty body candidates, while certain other considerations, such as regional and gender diversity, may be appropriate, the most relevant criterion should be substantive expertise so that the treaty bodies can effectively fulfil the important roles envisioned for them in the relevant treaties.

Recognizing the importance of impartiality and objectivity to the functioning of the treaty body system, we would also encourage the cofacilitators to consider whether the development and implementation of a code of conduct for treaty body members, similar to the Codes of Conduct for Special Procedures Mandate Holders of the Human Rights Council or for the Judges of the UN Dispute and Appeals Tribunals, could improve the effectiveness of the treaty bodies. Of course, any such code would need to be appropriately tailored to the unique situation of the treaty bodies and respectful of their independence and respective mandates.

2. Individual communications

While the United States has not recognized the competence of any of the treaty bodies to review individual communications alleging violations by the United States, as the most significant financial contributor to the United Nations, including to OHCHR., we have a keen interest in ensuring that the treaty bodies are able to process individual communications in a speedy and efficient manner; expeditiously resolve communications, either at the admissibility or merits stage, as appropriate; and avoid the accumulation of backlogs of communications, which strain the treaty bodies’ limited time and resources.

In their report, the cofacilitators should explore options for introducing greater efficiencies into the processing of communications, such as splitting communications among “chambers” of a handful of members, which some treaty bodies have already adopted. The cofacilitators should also examine how case-management technology, uniform across the treaty bodies, along with staff appropriately trained in the use of the technology, might be introduced in a manner that takes into account the finite resources available. It is unacceptable that case management continues to be performed primarily through paper files, which has contributed to the accumulation of significant backlogs. By all accounts, treaty bodies now spend far too much of their time processing these communications at the risk of falling behind in their reviews of States parties, which is their primary function.

3. Simplified reporting

The United States welcomes the steps that the treaty bodies have taken to offer simplified reporting procedures to States consistent with Resolution 68/268 and the commitment of the treaty body Chairs, as expressed in their July 2019 position paper, to offer simplified reporting procedures to all States for periodic reports. Simplified reporting procedures were at the forefront of the reforms Resolution 68/268 sought to advance because, by reducing the burden on reporting States and improving the efficiency of the treaty bodies’ review process, simplified reporting procedures can help to improve compliance with States’ reporting obligations, which is a significant challenge to the current system. We are pleased, in particular, by the steps the Human Rights Committee has taken by making “opt-out” simplified reporting universal, even for initial reports, and we would encourage the cofacilitators to explore means of building on this progress, including, for instance, by making “opt-out” simplified reporting universal across the treaty bodies and ultimately phasing out the “opt-out” mechanism after one or two reporting cycles.

We are similarly encouraged by the progress that States have made in submitting, and updating as appropriate, common core documents to the treaty bodies and believe that these efforts have made States' reports more focused and, in turn, have made the treaty body reporting process more efficient and effective. The cofacilitators should encourage all States to continue to submit common core documents and to update them regularly as appropriate.

4. Coordinated and predictable calendars

The treaty bodies should, as they committed to do in the July 2019 position paper, put in place a coordinated and fixed calendar that takes into account the review of all UN Member States under the Universal Periodic Review (UPR). With the certainty that comes from a predictable calendar, States will be in a better position to plan and draft their reports, and prepare for the oral review, knowing far in advance when these items will need to be completed. States will be able to better focus their energy and resources if the due dates for the reports are as spread out as possible considering the number of treaties to which the State in question is a party. States' reports should, as a result, be better and more complete, and the oral review more substantive and efficient.

States should be held to account for the reporting obligations they have voluntarily undertaken by ratifying human rights treaties. It is regrettably a common practice among many States to ratify a large number of human rights treaties without any intention of abiding by all the obligations contained therein, or an appreciation for the significance of the reporting obligations undertaken. In an effort to encourage compliance with their reporting obligations, the treaty bodies should review these States parties just as they do States parties that submit reports. Like the UPR, reviews should be universal for the membership of a particular treaty.

While there is understandable reluctance among some to the idea of spacing out reviews by all treaty bodies to as much as eight years, the reality of the challenges facing the treaty body system leave few, if any, viable alternatives. In that vein, the United States welcomes the commitment of the Covenant Committees, expressed in the treaty body Chairs' July 2019 position paper and the Human Rights Committee's July 2019 decision, to review countries on an 8-year cycle and synchronize the timing of their reviews. However, recognizing the increasing number of treaty ratifications and the generally low reporting compliance rate among States, the cofacilitators should urge the Convention Committees to consider adopting longer cycles than 4 years. Even where the relevant treaty may call for a shorter review cycle, there is precedent for treaty bodies to request consolidated periodic reports and presentations, as appropriate. Accordingly, we would encourage the cofacilitators to explore similarly flexible approaches.

5. Alignment of other working methods

The treaty body chairs' July 2019 position paper sets forth numerous other commitments toward alignment of working methods that represent a positive step forward. Among other things, lists of issues prior to reporting will be limited to 25 to 30 issues; concluding observations and recommendations will follow an aligned methodology and be short, concrete, and focused on the most pressing human rights concerns; and treaty bodies will communicate and coordinate with each other regularly in an effort to avoid unnecessary overlap or duplication in States parties' respective reviews under different treaties.

While these are laudable goals, the treaty bodies should be urged to sharpen their focus as much as possible by restricting lists of issues prior to reporting and restricting concluding observations and recommendations to no more than 20 issues. We would note, moreover, that most of this cross-treaty body alignment has yet to occur, as most treaty bodies have not yet

implemented these commitments in their internal procedures. The treaty bodies should be urged to follow through with implementation of the July 2019 position paper without further delay.

On the question of how the treaty bodies may achieve better communication and coordination, the cofacilitators should explore the idea of designating members from each treaty body to be responsible for liaising with counterparts in other treaty bodies about the reporting of each State party. While each treaty body is and should remain independent, the human rights issues they cover—especially when viewed through the expansive lens that many of the treaty bodies have adopted—implicate obligations across human rights treaties. Experience has shown that the treaty bodies are far less effective and the reporting process far less productive when the treaty bodies operate in isolation from one another and stray from the core issues implicated by the treaty obligations each body is responsible for monitoring.

6. Participation of civil society

While States parties, as the entities that bear obligations under the human rights treaties, are the primary interlocutors with the treaty bodies, civil society organizations also play an indispensable role. Most importantly, civil society organizations provide the treaty bodies with information about the situation on the ground in the State under review, allowing the treaty bodies to have a much fuller picture of the human rights landscape. Civil society's role is not, and should not be seen as, adversarial with respect to the State under review. Their roles are complementary, and the State always retains the ability to respond to or refute any information provided by civil society it views as erroneous or incomplete. Reprisals against civil society for participation in UN treaty body reviews are unacceptable and should be reported to UN leadership.

The cofacilitators should detail in their report the ways in which civil society adds value to the work done by the treaty bodies. They should also emphasize that it is imperative that States engage in no acts of intimidation or retaliation against civil society members or human rights defenders who provide information to treaty bodies, and that other States should not tolerate any acts of intimidation or retaliation.

7. Other matters

The cofacilitators should look closely at the feasibility and cost implications of some of the other ideas that have been proposed in the course of the current review and the dialogues that preceded it in Geneva and New York over the past year. For example, the July 2019 treaty body Chairs' position paper and the Human Rights Committee's July 2019 decision raise the prospect of *in situ* reviews. While these may be appealing in theory because they bring the treaty body members closer to the individuals affected by possible human rights violations and abuses, the resource implications and logistical burdens of regular *in situ* reviews may prove prohibitive, especially in the current environment. States parties' and treaty bodies' energies should be focused on those solutions most likely to result in greater efficiency and effectiveness.

The possibility of updating or revisiting the formula for allocating meeting time set out in Resolution 68/268 has also been raised during the course of this review and the preceding dialogues. We note, for instance, that the Secretary General addressed this issue in his January 2020 report and that the Human Rights Committee recommended adjustments to the formula in its July 2019 decision. We are cognizant of the growing demands on the treaty bodies, given the increasing number of ratifications by States and increasing number of individual communications received by the relevant committees, while mindful of the finite resources available to the treaty body system and the potential resource implications of any proposed

modifications to the formula. Accordingly, the co-facilitators may wish to explore with States whether the formula in Resolution 68/268 remains the most appropriate one.

Excellencies, we stand ready, with our counterparts in Geneva, to continue to engage in these discussions with you in advance of your upcoming report. We welcome your stated commitment to consult widely with civil society and the treaty body members themselves, as both are critical stakeholders in this review process and their voices must also be heard.

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Attorney-Adviser Brian Kelly delivered the intervention of the United States during the September 11, 2020 meeting with co-facilitators of the 2020 treaty body review process in New York. The U.S. intervention follows.

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Thank you your excellencies for your work on this process. We know how important it is and we express our appreciation for your work. We look forward to seeing the report next week.

The United States strongly supports the work of the treaty bodies in general and regards them as an important component of the promotion and protection of human rights globally. We have been integrally involved in conversations about treaty body reform since well before Resolution 68/268, and we welcomed this review process as an opportunity to look comprehensively at the benefits brought by 68/268 as well as areas where it may have fallen short or where updates may be warranted.

We would take this opportunity once again to emphasize the importance of the independence and neutrality of the treaty bodies and note that a number of the issues discussed during this process are within the purview of the treaty bodies themselves to undertake. Throughout this process, we have expressed our view that it not be used as an excuse by States to encroach on the independence of the treaty bodies or to evade appropriate scrutiny of their compliance with their human rights obligations.

We are pleased to hear the emphasis on a number of the issues you summarized at the outset of your briefing, including with respect to the alignment and harmonization of working methods, fixed calendars, a modernized case management system, and accessibility, including for persons with disabilities, and ensuring that critically important voices from civil society and human rights defenders are heard in the treaty review process.

Civil society plays an indispensable role in State Party reviews, as we and others have repeatedly explained in this process. States have nothing to fear from a full airing of views by civil society or treaty body members themselves—they may always refute any assertions they disagree with. Dialogues should be open and transparent; no participant should be silenced.” We again emphasize that reprisals against civil society for participation in treaty body reviews are unacceptable.

We look forward to the release of the report and reading it in more detail. Thank you.

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B. DISCRIMINATION

1. Race

a. *CERD Committee assertion of jurisdiction over Palestinian communication against Israel*

On January 6, 2020, the United States issued a statement on the decision of the Committee on the Elimination of Racial Discrimination (“CERD Committee”) to exercise jurisdiction over the inter-state communication submitted by the “State of Palestine” against Israel under Article 11(2) of the CERD Convention. The U.S. statement is excerpted below and available at <https://geneva.usmission.gov/2020/01/06/statement-on-the-decision-of-cerd-regarding-jurisdiction-over-an-inter-state-communication-against-israel/>.

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Shortly after the deposit of an instrument of accession to the CERD with respect to the “State of Palestine,” Israel communicated to the depositary that “[t]he Government of Israel does not recognize ‘Palestine’ as a State, and wishes to place on record, for the sake of clarity, its position that it does not consider ‘Palestine’ a party to the Convention and regards the Palestinian request for accession as being without legal validity and without effect upon Israel’s treaty relations under the Convention.”

The Committee has rightly “acknowledge[d] that under general international treaty law, a State Party to a multilateral treaty may exclude treaty relations with an entity it does not recognize, through a unilateral statement.” However, in determining nonetheless that it has jurisdiction to consider the communication, the Committee has wrongly asserted that this principle of treaty law does not apply, on the grounds that human rights treaties, and the CERD in particular, are for “the common good.” This legally incorrect assertion ignores established rules of treaty interpretation, a conclusion also reached by five members of the Committee in a dissenting opinion.

Ambassador Andrew Bremberg, noting his concern with the decision, stated, “The Committee’s disregard for treaty law raises serious questions about the legitimacy of this process. The United States will continue to advocate for fair treatment for Israel in this and other international fora.”

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b. *Resolution on the “International Day for People of African Descent”*

The U.S. Mission to the UN delivered an explanation of position on the “International Day for People of African Descent” resolution during the meetings of the Third

Committee in November 2020. The United States dissociated from consensus on preambular paragraph 5 of the resolution, but supported the resolution otherwise. The U.S. explanation of position follows.

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The United States remains firmly committed to addressing issues of racism and racial discrimination, both within our borders and around the world. No one should be denied their fundamental freedoms and human rights because of their race or ethnicity. We look forward to continuing to work with the UN to promote respect for the human rights and fundamental freedoms of all persons.

However, the United States must dissociate from preambular paragraph 5, because it distracts from the intent of this important resolution by focusing on the Human Rights Council's divisive June 2020 resolution that targeted the United States' record on policing and race. In his June 20 statement, Secretary Pompeo criticized the Council's failure to urge authoritarian regimes to hold their nations to the same high standards of accountability and transparency as the United States applies to itself. As Secretary Pompeo said, the United States "is serious about holding individuals and institutions accountable, and our democracy allows us to do so."

In addition, we are concerned with this resolution's reference to and incorporation of language from the Durban Declaration and Programme of Action, which includes endorsement of overbroad restrictions on freedom of expression and gives vent to anti-Israel and anti-Semitic voices. The United States recognizes the pernicious effects of racism throughout society and is committed to working fully with the multilateral system to continue to make progress in this area in more inclusive, non-divisive, and constructive ways.

With regard to this resolution's references to the 2030 Agenda for Sustainable Development, we addressed our concerns in a previous statement on Third Committee resolutions that we delivered on November 13.

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c. Resolution on the Durban Declaration and Program of Action

On November 19, 2020, Acting U.S. Representative to ECOSOC Courtney R. Nemroff provided the explanation of the U.S. "no" vote for the resolution on the Durban Declaration and Program of Action. The U.S. statement outlines long-standing concerns regarding anti-Semitism and freedom of expression restrictions in the underlying Durban documents, the resolution's avoidance of China's mistreatment of Uyghurs, and the new High Level Week event at the next session of the UN General Assembly to commemorate the 2001 Durban Conference. The U.S. explanation of vote follows and is available at <https://usun.usmission.gov/explanation-of-vote-on-a-resolution-on-the-durban-declaration-and-program-of-action/>. The Third Committee adopted the resolution on the Durban Declaration.

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The United States remains firmly committed to countering racism and racial discrimination in all its forms. Indeed, we recognize a special obligation to do so given historical injustices perpetrated during past eras of colonial expansion into indigenous communities, slavery, and the Jim Crow period. Our transparency, commitment to a free press, and insistence on ensuring that justice is served allow the world to witness our challenges and contribute to our efforts to find solutions. These values, often discussed in multilateral organizations, are fundamental to our nation. We pledge to continue our work with civil society, international mechanisms, and all nations of goodwill to combat the consequences of this legacy of injustice.

As a State Party to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the United States believes the CERD provides comprehensive protections in this area and constitutes the most relevant international framework to address all forms of racial discrimination. We 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 discrimination, hostility, or incitement to violence. From our own experience and history, the United States remains convinced that the best antidote to offensive speech is not a ban and punishment, but a combination of robust legal protections against discrimination and hate crimes; proactive government outreach to racial and religious minority communities; and the vigorous protection of freedom of expression, both on- and off-line.

As in similar years, however, we regret that we cannot support this resolution—on such an important topic—because the text is not genuinely focused on countering 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), the outcome of the Durban review conference and its endorsement of overbroad restrictions on freedom of speech and expression. We reject any effort to advance the “full implementation” of the DDPA. We believe this resolution serves as a vehicle to prolong the divisions caused by the original Durban conference and its follow-up mechanisms, rather than providing a comprehensive and inclusive way forward for the international community to counter the scourge of racism and racial discrimination.

In addition, the United States cannot accept the resolution’s call for States to consider withdrawing reservations to Article 4 of the CERD. We note, further, 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.

The United States notes with concern that the resolution remains silent on the issue of oppression of members of ethnic minority groups in the People’s Republic of China, which regularly oppresses its own people, including members of minority groups of Asian, Turkic, and other descent. In Xinjiang, a merciless crackdown has resulted in the mass arbitrary detention of more than one million Uyghur Muslims and members of other ethnic and religious minority groups, forced labor, forced sterilizations, and other serious human rights abuses.

In addition to our longstanding concerns with this resolution, we are troubled that it would also create a new High-Level Week official event during the 76th General Assembly commemorating the Durban Declaration and Program of Action. It is inappropriate for the General Assembly to host this divisive and costly event.

For these reasons, we must again vote against this resolution, and we urge other delegations to do the same.

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2. Gender

a. Women, Peace, and Security

On June 11, 2020, the Department of State released its plan to implement the U.S. strategy on Women, Peace, and Security. The implementation plan is available at <https://2017-2021.state.gov/the-department-of-states-plan-to-implement-the-u-s-strategy-on-women-peace-and-security/>. The press statement announcing the release of the plan is available at <https://2017-2021.state.gov/state-department-releases-women-peace-and-security-implementation-plan/>. On June 12, 2020, Ambassador-at-Large for Global Women's Issues Kelley E. Currie held a special briefing on the implementation plan, which is available at <https://2017-2021.state.gov/briefing-with-ambassador-at-large-for-global-womens-issues-kelley-currie-on-the-women-peace-and-security-implementation-plan/>.

b. Commission on Status of Women

On March 9, 2020, Ambassador Cherith Norman Chalet, acting deputy permanent representative for the U.S. Mission to the UN, delivered the U.S. explanation of position on the political declaration at the 2020 Commission on the Status of Women ("CSW"). A longer U.S. statement was posted online, at <https://go.usa.gov/xdssF>. Ambassador Chalet's remarks are available at <https://usun.usmission.gov/csw-2020-u-s-eop-for-political-declaration-as-delivered/> and excerpted below.

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Enhancing women's participation in power structures across economic, political, and social spheres is critical to advancing human dignity and enabling societies to prosper. The United States is proud to be leader in the promotion and protection of human rights of women and girls, at home and abroad.

We are working to ensure that women worldwide enjoy the opportunity to participate fully in their communities and nations, just as women do in our country.

We hope today's declaration will advance global cooperation toward these goals. The declaration is not perfect but largely captures our priorities and commitments to continued progress in enhancing women's rights around the world.

The United States is committed to ensuring women all around the world can hold and lead from both unofficial and official seats of power in their communities and on the

international stage. We strongly supported the passage of Security Council Resolution 1325 20 years ago, which recognized women's essential contributions to establishing and maintaining global peace and security. Although this is not specifically mentioned in the declaration, my delegation notes this of our efforts to level the playing field.

A range of stakeholders play a critical role in realizing the human rights of women and girls, including faith-based and civil society organizations, the family, the private sector, academia, unions, and media. Civil society including those who fight for human rights continue to be important partners for all of us. To this end, we will continue to press for recognition in future declarations and UN documents.

In closing, as we mark 25 years since the Beijing Declaration we still have work to do as to ensure that every woman and girl has the opportunity to succeed. The United States will continue to lead, through the empowerment of its own citizens and in partnership with countries who recognize the wisdom and value of empowering all of their citizens.

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On July 14, 2020, the United States submitted an explanation of position for the record on the CSW resolution entitled, "Release of Women and Children Taken Hostage in Armed Conflicts." The U.S. statement is excerpted below and available at <https://usun.usmission.gov/explanation-of-position-for-the-commission-on-the-status-of-womens-resolution-titled-release-of-women-and-children-taken-hostage-including-those-su/>.

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We are pleased that this resolution contains not only the abuses and violations of international law that women and children taken hostage face but also specific recommendations for addressing them, including through accountability measures and prosecution of perpetrators.

The United States is also pleased that the final resolution text contains an explicit reference to UN Security Council Resolution 1325. This resolution has remained pivotal to addressing issues women taken hostage face in the 20 years since the adoption of the Women, Peace and Security agenda.

While we join consensus, my delegation also takes this opportunity to express some concerns we have with the final text.

The United States understands that this resolution does not change the current state of conventional or customary international law, and we do not read it to imply that states must join or implement obligations under international instruments to which they are not a party. 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.

Women and children bear a number of vulnerabilities when taken hostage, some of which include starvation, restriction from practicing their religion, physical abuse, forced labor, exposure to violence, including sexual violence, and/or forced radicalization. The United States

encourages a broad view of women's needs and vulnerabilities, including but not limited to "sexual violence and reproductive health concerns."

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c. *Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family*

On October 22, 2020, Secretary Pompeo participated in a signing ceremony of the "Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family" at the Department of Health and Human Services ("HHS"), hosted by HHS Secretary Alex Azar. The Geneva Consensus Declaration is available at <https://www.hhs.gov/sites/default/files/geneva-consensus-declaration-english.pdf>. The United States, Brazil, Egypt, Hungary, Indonesia, and Uganda co-sponsored the non-binding declaration, which was signed by 34 countries. Paragraph 4 of the Geneva Consensus Declaration follows:

*[We, ministers and high representatives of Governments,] Emphasize that "in no case should abortion be promoted as a method of family planning" and that "any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process"; Reaffirm that "the child... needs special safeguards and care... before as well as after birth" and "special measures of protection and assistance should be taken on behalf of all children," based on the principle of the best interest of the child;**

3. Age

On November 13, 2020, Jason Mack, counselor for economic and social affairs for the U.S. Mission to the UN, delivered the U.S. explanation of position on a resolution entitled "Follow-Up to the Second World Assembly on Ageing." He also delivered an abbreviated version of the general statement for the United States on cross-cutting issues (the full version of which is included in section A.3., *supra*, and is referred to as the general statement of November 13, 2020). The portion of the statement on aging is excerpted below and the statement as delivered is available at <https://usun.usmission.gov/explanation-of-position-on-a-resolution-entitled-follow-up->

* Editor's note: On January 28, 2021, President Biden issued a "Memorandum on Protecting Women's Health at Home and Abroad," which, among other things, directs the State Department and HHS to "withdraw co-sponsorship and signature from the Geneva Consensus Declaration ...and notify other co-sponsors and signatories to the Declaration and other appropriate parties of the United States' withdrawal." The Presidential Memorandum is available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/28/memorandum-on-protecting-womens-health-at-home-and-abroad/>.

[to-the-second-world-assembly-on-ageing-and-general-statement-on-cross-cutting-issues/](#).

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We thank the G-77 for its resolution on “Follow-Up to the Second World Assembly on Ageing.” The U.S. is pleased to join consensus on the resolution.

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 (OP 38). 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.

The United States would like to underscore the importance of promoting the Fundamental Principles and Rights at Work for all workers.

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C. CHILDREN

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 2020 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 2020 report are the governments of Afghanistan, Burma, Cameroon, the Democratic Republic of the Congo, Iran, Iraq, Libya, Mali, Nigeria, Somalia, South Sudan, Sudan, Syria, and Yemen.

The CSPA list is included in the TIP report, available at <https://www.state.gov/reports/2020-trafficking-in-persons-report/>. 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 October 14, 2020, 85 Fed. Reg. 69,117 (Oct. 30, 2020), the President determined that:

it is in the national interest of the United States to waive the application of the prohibition under section 404(a) of the CSPA with respect to Afghanistan, Cameroon, Iraq, Libya, and Nigeria; to waive the application of the prohibition in

section 404(a) of the CSPA with respect to the Democratic Republic of the Congo to allow for the provision of International Military Education and Training (IMET) and Peacekeeping Operations (PKO) assistance, to the extent that 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 Somalia to allow for the provision of IMET and PKO assistance and support provided pursuant to 10 U.S.C. 333, to the extent that 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 the provision of PKO assistance, to the extent that the CSPA would restrict such assistance; and, to waive the application of the prohibition in section 404(a) of the CSPA with respect to Yemen to allow for the provision of PKO and IMET assistance and support provided pursuant to 10 U.S.C. 333, to the extent that the CSPA would restrict such assistance or support...

On February 12, 2020, Ambassador Chalet delivered remarks at a UN Security Council briefing on children and armed conflict. Her remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-children-and-armed-conflict/>.

* * * *

There is perhaps no group of people harmed more by the absence of peace and security than children. In most cases, they are the most vulnerable among us. And so, we deeply appreciate the efforts of Belgium to highlight global child protection, including through leading consensus on conclusions on Syria, Burma, and Sudan, and by chairing the Security Council's Working Group on Children and Armed Conflict since last year.

We also thank Secretary-General Guterres, and Commissioner Chergui, and Ms. Becker, for your briefings today. Yesterday, Ambassador Craft noted how we allocate our time defines what we believe is important, and your presence here today affirms the importance of integrating the Children and Armed Conflict agenda into our discussions on peace processes and conflict prevention, and we thank you. The importance of doing so was also reaffirmed by the Council this past August, as it has been by members in numerous resolutions and presidential statements since 1999. In August, we reiterated that those who suffer the most in war are often children and that our discussions about armed conflict cannot ignore the devastating impact it has on them. We are hopeful that both the frequency of the Council's Working Group meetings and SRSG Gamba's engagement and advocacy with parties to armed conflict will increase. Continued meetings, signed action plans, and briefings like today will all help generate needed progress.

We should see the Council's unity on this issue as an opportunity to better protect children from armed conflict. By engaging with armed groups, building trust, and offering alternatives to violence as allowed by our mandate, the UN and other regional organizations – including the AU and the EU – can create new possibilities for sustainable peace. Today's

adoption of a Presidential Statement recognizes just that. As we see in countries around the world, conflict prevents children from achieving their potential and saddles them with burdens that no young person should have to carry. For example, in South Sudan, most children have never known peace – only the threat of violence, abduction, and abuse. A pause in political violence has created space for advocacy, including the Action Plan signed last week. But the best protection for children in South Sudan will not come from an action plan. It will come from President Kiir and Dr. Machar sitting down and negotiating a lasting peace. Today, we call on South Sudan’s leaders to finally put aside their differences and prioritize the hopes of their nation’s children.

In Colombia, the United States is dismayed by continuing violations and abuses against children. Yet recent trends give reason for optimism, as the Final Peace Agreement and the demobilization of the FARC are clearly improving circumstances for the nation’s young people. Amid the regional fallout of the crisis in Venezuela, we also applaud President Duque’s efforts to protect the children of Venezuelan refugees, including by granting citizenship to those born in Colombia. Additionally, in the DRC, UN efforts to extricate child combatants from armed groups have led to the signing of agreements to disarm and demobilize. And in the Central African Republic, MINUSCA’s engagement with armed groups appear to offer the same inroads for education and change.

Beyond country situations on the Children and Armed Conflict agenda, we are deeply concerned that at least 600,000 children in Cameroon have not been able to safely attend schools in the country’s English-speaking regions for more than three years. This is a stark reminder that mediation requires follow-through to prevent children from once again falling prey to the deadly cycles of violence. This Council has a duty to speak out on behalf of children, for they are our future, and our hope. But to realize a future of greater safety and prosperity for all children, there must be meaningful action. This is what makes the Children and Armed Conflict agenda so critical, and we are grateful for the opportunity to discuss its implementation today.

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Ambassador Chalet delivered further remarks on September 10, 2020 at a UN Security Council open debate on children and armed conflict. Those remarks are available at <https://usun.usmission.gov/remarks-at-a-un-security-council-open-debate-on-children-and-armed-conflict-2/> and excerpted below.

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The United States remains fully committed to supporting the UN’s critical work to address the effects of conflict on children. There is no issue more important than those affecting the next generations of leaders and citizens in the world. It is only when we support every child in reaching their fullest potential that we will create a safer and more secure world.

Our support also extends to the protection of families, teachers, and schools whenever possible so that children can retain safe and equitable access to quality education.

As Rimana highlighted earlier, schools should provide a safe space free from the threat of violence. When protected, schools also serve as a hub for other life-saving and life-sustaining services. Furthermore, safe access to education is critical to breaking the cycles of poverty and social grievance that underpin countries' vulnerability to violent extremism and future conflict. Therefore, we cannot approach the pursuit of peace and international security without considering the consequences of failures to uphold the laws that protect children and schools.

The irony, of course, is that terrorists often deliberately target or use schools because schools are critical to building resilient communities and also represent government institutions. This lack of respect for the civilian character of schools can place them at heightened risk of attack. In some cases, malign actors use education to perpetuate prejudice, intolerance, and distorted views of history or of others in their community. Meanwhile, armed groups also target schools and routes to schools to abduct children and youth, often for the purpose of recruiting them as soldiers or into forced marriage, sexual slavery, or other horrific activities.

In this regard, I do want to highlight that women and girls are disproportionately affected by sexual violence and early and forced marriage amid conflict, and tend to be deliberately targeted by groups that oppose gender equity in education. The threat of rape, sexual assault, and abduction on their way to school, or because they want to seek an education severely constrains women's and girls' mobility and, along with other harmful gender norms, often compels them to stay home.

We note the Council's Working Group on Children and Armed Conflict has made progress on numerous conclusions documents, including those recently finalized on Iraq, Colombia, and Somalia. We very much appreciate Belgium's work on this area. This important work goes on as we continue to discuss Sudan. We also appreciate Special Representative Gamba's ongoing commitment to preparing the reports including important details on abuses and violations against children. As we know, however, our work is far from over.

In the Central Sahel, for example, attacks on children continue to increase; close to 5 million children are in need of humanitarian assistance. The surge of violence across Burkina Faso, Mali, and Niger is having a devastating impact on children's survival, education, protection, and development. Hundreds of children, as we've heard even this morning, in the region have been killed, maimed, or forcibly separated from their families, while thousands of school closures have affected almost 650,000 children. The violence prompting these closures must stop immediately, its perpetrators must be brought to justice, and children's access to education must be restored.

These tragedies in the Sahel illuminate the fact that armed conflict impacts children in ways beyond affecting their immediate safety. These children require holistic interventions that support their ability to contribute to peaceful societies, including the provision of equal access to education, age-appropriate vocational training, and job opportunities for both boys and girls. They also need familiar, safe, and nurturing routines – particularly within families and in supportive school environments – to heal, build resilience, and cope with stress and trauma.

That is why the U.S. government prioritizes not only life-saving child protection programming but efforts that support children's longer-term recovery, including through education. To demonstrate the U.S. government's commitment to the children, families, and communities of the Sahel in this regard, we recently provided \$2.3 million to extend Education Cannot Wait's Burkina Faso First Emergency Response program to sustain education services in conflict-affected communities.

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D. SELF-DETERMINATION

On September 14, 2020, the U.S. explanation of vote on a resolution to support non-self-governing territories was delivered by Jason Mack, counselor for economic and social affairs. His statement is excerpted below and available at <https://usun.usmission.gov/explanation-of-vote-on-the-resolution-on-support-to-non-self-governing-territories-by-the-specialized-agencies-and-international-institutions-associat/>.

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The resolution now before the Council is similar to resolutions considered by ECOSOC since 2006 and identical to the one considered in the 2019 ECOSOC year. The United States will maintain its past practice and abstain on this vote.

We agree in principle that UN funds, programs, and specialized agencies can provide useful support to territories that are not UN members. However, the Administering Power has the sovereign responsibility to determine the manner in which its territories can participate in the UN system. We reiterate that the domestic laws and policies of a territory's Administering Power determine whether such support is allowed.

In the United States, the Constitution states that the sole authority for the conduct of foreign relations, including the foreign relations of U.S. territories, rests with the federal government. Consequently, we object to language in this resolution that is inconsistent with U.S. constitutional arrangements, and therefore cannot support the resolution as it currently stands.

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On November 19, 2020, Courtney R. Nemroff, acting U.S. representative to the Economic and Social Council, delivered the U.S. explanation of vote on a resolution on the universal right to self-determination. Her statement follows, and is available at <https://usun.usmission.gov/explanation-of-vote-on-a-resolution-on-the-universal-right-to-self-determination/>.

The United States recognizes the importance of the right of peoples to self-determination 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.

We also refer to our general statement made on November 13.

E. ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

1. Safe Drinking Water and Sanitation

On November 24, 2020, the United States provided a statement on a Second Committee resolution on “Water for Sustainable Development,” which is excerpted below and available at https://usun.usmission.gov/explanation-of-position-on-a-resolution-on-water-for-sustainable-development/?_ga=2.84185050.2100943753.1613669895-1488883581.1611183416.

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The United States appreciates the outstanding work of the co-facilitators—Tajikistan and the Netherlands—and is happy to co-sponsor this resolution, which lays out the modalities for the 2023 conference. We also appreciate the efforts of the co-hosts to ensure the conference will be open to participation of all members of civil society, in recognition of the important role they play in achieving results on the ground, and the valuable voice they can contribute to intergovernmental dialogues. You will find the United States [a] ready and willing partner to ensure this event is a success.

The United States joins consensus on this resolution with the express understanding that PP8 does not imply that States must implement obligations under human rights instruments to which they are not a party. The United States is not a party to the International Covenant on Economic, Social, and Cultural Rights (ICESR), and the rights contained therein are not justiciable in U.S. courts. In addition, we do not believe that a State’s duty to protect the right to life under the International Covenant on Civil and Political Rights (ICCPR) would extend to addressing general conditions in society or nature that may eventually threaten life or prevent individuals from enjoying an adequate standard of living.

Finally, regarding references to the 2030 Agenda for Sustainable Development, the Addis Ababa Action Agenda, the Paris Agreement, climate change, reports of the Intergovernmental Panel on Climate Change, the characterization of technology transfer, and build back better we addressed our concerns in our General Statement delivered on November 18, 2020.

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2. Food

On November 17, 2020, Mordica Simpson, U.S. advisor for economic and social affairs for the U.S. Mission to the UN, provided the U.S. explanation of vote on a resolution on the right to food. Her statement is excerpted below and available at <https://usun.usmission.gov/explanation-of-vote-on-a-resolution-on-the-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. And now, for communities already experiencing poverty and hunger, the COVID-19 pandemic is disproportionately affecting lives by harming how people provide for themselves and feed their families – both today and long after the pandemic subsides. More than 35 million people in South Sudan, Somalia, the Lake Chad Basin, and Yemen are facing severe food insecurity exacerbated by the global pandemic, and in the case of Yemen, potential famine. The United States remains fully engaged and committed to addressing these complex crises.

This resolution rightfully acknowledges the hardships millions of people are facing, and importantly calls on States to support the emergency humanitarian appeals of the UN. However, the resolution also contains many unbalanced, inaccurate, and unwise provisions the United States cannot support. This resolution does not articulate meaningful solutions for preventing hunger and malnutrition or avoiding their devastating consequences.

The United States is concerned that the concept of “food sovereignty” could justify protectionism or other restrictive import or export policies that will have 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 by governments, including regulatory and market reforms, that is consistent with international commitments.

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,” which we do not recognize and has no definition in international law.

For these reasons, we request a vote and we will vote against this resolution.

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F. LABOR

Postponing the International Labor Conference to June 2021

Due to the COVID-19 pandemic, the Director-General of the International Labor Organization (“ILO”) recommended postponing the 2020 International Labor Conference (“ILC”) to June 2021. The ILO Secretariat drafted a paper justifying postponement on the basis of force majeure; noting that available alternatives—such as a virtual or reduced ILC—were not feasible; and citing, as precedent, the postponement of the 26th Session of the ILC from 1940 to 1944 due to World War II. Postponement was approved by a vote of 88 in favor, one abstention, and no votes against, with 33 members not responding.

The United States issued the following explanation of vote (“EOV”), available at <https://geneva.usmission.gov/2020/04/24/u-s-explanation-of-vote-in-favor-of-postponing-the-international-labor-conference-to-june-2021/>:

Through our vote today, as a Governing Body member, the United States expresses its agreement with the recommendation to postpone the 109th Session of the International Labor Conference until June 2021. We concur that the unforeseeable situation prevailing globally as a result of the COVID-19 pandemic renders it materially impossible to hold the Conference this year, not least owing to the practical inability of conducting virtually a conference that involves the participation of thousands of government, employer, and worker representatives from nearly all 187 ILO member States. Our vote in favor of postponement should be understood in this unique context, and should not be regarded as support for the idea that the Governing Body possesses a general implied power to dispense with annual sessions of the Conference notwithstanding Article 3 of the ILO Constitution. We look forward to the day when we can again convene as an Organization to address the many important issues in the world of work.

G. TORTURE AND EXTRAJUDICIAL KILLING

On June 26, 2020 (the anniversary of the date on which the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment came into effect), the State Department again issued a statement in support of the International Day in Support of Victims of Torture. That statement is available at <https://2017-2021.state.gov/international-day-in-support-of-victims-of-torture-2/>.

On November 19, 2020, Courtney R. Nemroff, acting U.S. representative to the Economic and Social Council, delivered the U.S. explanation of position on a resolution on extrajudicial killing in the UN Third Committee. Her statement is excerpted below and available at <https://usun.usmission.gov/explanation-of-position-on-a-resolution-on-extrajudicial-killings/>. Due in part to U.S. advocacy, the resolution on extrajudicial killing was adopted with 122 countries voting “yes.” The United States succeeded in defeating an Egypt-tabled oral amendment that would have deleted references to protecting victims targeted solely because of their sexual orientation and gender identity.

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We join the sponsors of the text in condemning extrajudicial, summary, or arbitrary executions against any persons, irrespective of their background or status. We continue to stress that all states have obligations to protect human rights and fundamental freedoms. As such, we agree that all states should take effective action to combat all extrajudicial, summary, or arbitrary executions, including fully and transparently investigating suspected cases and by prosecuting and punishing the perpetrators in accordance with the law.

We also strongly support the existing language on civil society and human rights defenders and further welcome the new additions this year on democracy, civil society, and protection of journalists and media workers. Moreover, we strongly support the language

condemning extrajudicial, summary, or arbitrary executions that target members of marginalized or vulnerable groups, including members of the LGBTI community and human rights defenders. We applaud the sponsors' ongoing effort to reflect this support in OP7 for over a decade.

Furthermore, we agree that countries that have capital punishment must abide by their international obligations, including those related to fair trial guarantees and use of such punishment for only the most serious crimes, as outlined in the International Covenant on Civil and Political Rights (ICCPR). The United States' understanding of this resolution is that it is not an effort to reflect or change the current state of customary law or to interpret treaty law, in particular Articles 2 and 6 of the ICCPR.

With regard to this resolution's references to the International Criminal Court, we have addressed our concerns separately, including in a U.S. statement on November 13, 2020. As was done during Third Committee this year, the United States has consistently voted against the Resolution on the Moratorium on the Use of the Death Penalty, and we refer you to our Explanation of Vote on that resolution.

The United States fully supports the use of less-than-lethal devices when appropriate, and we have federal programs in place to encourage their use under appropriate circumstances. Many subnational law enforcement agencies also employ them. However, we cannot agree that the use of less-than-lethal devices may decrease the need to use any kind of weapon in all circumstances. In some situations, the use of less-than-lethal devices can increase the risk of injury or death to law enforcement officers. We support a balanced approach that recognizes that situations are fact-specific and that some situations may not be appropriate for less-than-lethal devices.

The use of force by law enforcement officers in peacetime in the United States is governed by the "objective reasonableness" standard set forth by the U.S. Supreme Court. Additionally, we note that use of the terms "conform" and "to ensure" suggest, incorrectly, that Member States have undertaken obligations to apply the Mandela Rules, the Code of Conduct for Law Enforcement Officials, and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which are non-binding.

While we reaffirm our belief that country visits are an important human rights tool, U.S. federal and state prison officials cannot in all contexts grant to the Special Rapporteur the kind of access being sought.

While this resolution covers a variety of situations in which extrajudicial, summary, or arbitrary executions occur, we do not want to lose sight of the fact that there are not one, but two, bodies of international law that regulate unlawful killings of individuals by governments – international human rights law and international humanitarian law. As the resolution notes, these two bodies of law are complementary and mutually reinforcing, and set forth two legal frameworks on this issue. We also recognize that determining which international law rules apply to any particular government action can be highly fact-specific. However, international humanitarian law is the *lex specialis* during situations of armed conflict and, as such, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims; and we read this text on that basis.

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H. BUSINESS AND HUMAN RIGHTS

On July 1, 2020 the State Department issued a press statement, available at

<https://2017-2021.state.gov/issuance-of-the-xinjiang-supply-chain-business-advisory/>, and a fact sheet, available at <https://2017-2021.state.gov/issuance-of-xinjiang-supply-chain-business-advisory/>, regarding the issuance of a supply chain advisory to caution against engaging in transactions with entities linked to human rights abuses in China, including forced labor in Xinjiang. The Departments of State, Treasury, Commerce, and Homeland Security jointly issued the business advisory. The fact sheet identifies three types of entities posing potential supply chain exposure, namely, those:

Assisting in developing surveillance tools for the PRC government in Xinjiang;

Relying on labor or goods sourced in Xinjiang, or from factories elsewhere in China implicated in the forced labor of individuals from Xinjiang in their supply chains, given the prevalence of forced labor and other labor abuses in the region; and

Aiding in the construction of internment facilities used to detain Uyghurs and members of other Muslim minority groups, and/or in the construction of manufacturing facilities that are in close proximity to camps operated by businesses accepting subsidies from the PRC government to subject minority groups to forced labor.

Further information is available at www.state.gov/xinjiang-supply-chain-business-advisory/.

To follow up on the business advisory, Under Secretary of State for Economic Growth, Energy and the Environment Keith Krach co-authored with Acting Deputy Secretary for Department of Homeland Security Ken Cuccinelli an op-ed published in The Hill on July 17, 2020, entitled, “U.S. Businesses Must Take a Stand Against China’s Human Rights Abuses.” The article is available at <https://2017-2021.state.gov/us-businesses-must-take-a-stand-against-chinas-human-rights-abuses/> and excerpted below.

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Many American brands have become household names around the globe, renowned for their exceptional quality and value. But with that visibility and consumer trust come great responsibility. American companies increasingly realize that corporate responsibility isn’t just social responsibility, it is also national security. As part of this, companies must perform human rights due diligence and ask themselves tough questions to make sure their foreign deals do not, in the words of Secretary of State Pompeo, “tighten a regime’s grip of repression.”

This is particularly true when it comes to doing business in the People’s Republic of China (PRC), given [its authoritarian surveillance practices](#) and egregious human rights abuses against its citizens, particularly against [Uyghurs and members of other Muslim minority groups in Xinjiang](#).

Businesses, countries, and citizens around the world are waking up to the truth about the Chinese Communist Party (CCP) and its efforts to coopt intellectual property and technology systems for their own pernicious ends. We have seen this from the COVID-19 pandemic to the

crackdown in Hong Kong, to the skirmish at the Indian border. Now more than ever, U.S. companies that do business with Chinese companies must make sure their commerce and investments do not enable and perpetuate the PRC's human rights abuses.

To help our companies navigate this difficult landscape, the State Department and Department of Homeland Security have joined with the Departments of the Treasury and Commerce to issue a business advisory on the risks and considerations for businesses with potential supply chain exposure to entities engaged in forced labor and other human rights abuses in Xinjiang. By following this guidance, businesses can be more confident that they are not contributing to human rights abuses in China. Specific to Xinjiang, we see at least three major risks for U.S. companies.

First, businesses may inadvertently assist the PRC government in developing surveillance tools for use in abusive practices. While most attention in recent months has focused on the million-plus Uyghurs and members of other Muslim minority groups held in internment camps, we must also remember that millions more living in the region are effectively prisoners in what can best be described as a vast, open-air detention center. These individuals are under constant watch from ubiquitous cameras that use artificial intelligence-based facial and gait recognition technologies, while local authorities monitor internet activity and collect DNA samples. There is no escape and no due process. Big Brother is always watching. And what he sees determines who goes to the camps.

A second risk is relying on labor or goods sourced in or from Xinjiang from entities implicated in the forced labor of individuals in their supply chains. The [Australian Strategic Policy Institute reported that 27 factories in nine Chinese provinces](#) — collectively claiming to be part of supply chains of more than 80 global brands — have placed Uyghurs in “potentially abusive labor transfer programs” since 2017. In early May, additional reports showed that the PRC was dramatically expanding this program far beyond its original limits.

To mitigate risks and reduce unwanted exposure, U.S. businesses can look for potential indicators of forced labor and other abuses from Chinese business partners including very few employees paying into the government social security insurance program, the hiring of workers through government recruiters, and connections to cotton manufacturing.

This introduces the third risk. Hard currency is the lifeblood of the CCP. It is not difficult to imagine how companies that do business in China may have unknowingly funded the CCP's authoritarian machine, entirely unbeknownst to their shareholders. Your boards at a minimum should disclose to your constituents the Chinese companies in which you invest, and consider divesting from or exiting businesses that pose a risk of financing China's human rights violations.

The repressive environment in Xinjiang presents unique challenges to conducting human rights due diligence. Businesses should consider the risks and determine if it is possible to mitigate them. Any U.S. business with potential supply chain links to Xinjiang should implement reasonable human rights due diligence in line with the UN Guiding Principles on Business and Human Rights and other relevant guidance.

Earlier this year when talking about the China challenge, Secretary Pompeo told Silicon Valley tech executives that it is critical that American principles and values are not sacrificed for profits. This is advice worth remembering.

Ask yourself: With whom am I dealing? And with whom are they dealing? What is a true risk-return calculus to doing business in Xinjiang, or China writ large?

Am I educating my senior executives, my board, my employees, and most of all my shareholders and investors about the choices my company faces?

What is my moral obligation and perhaps even a fiduciary duty to: a) disclose investments or involvement in Chinese companies that may be complicit in human rights abuses and b) divest from or exit these businesses?

Do human rights due diligence. Get the answers. Businesses can reaffirm corporate America's role as a powerful force for good around the world. Your companies can make a profound and enduring difference in this human rights tragedy.

* * * *

On September 30, 2020, the State Department issued "Guidance on Implementing the 'UN Guiding Principles' for Transactions Linked to Foreign Government End-Users for Products or Services with Surveillance Capabilities," available at <https://www.state.gov/key-topics-bureau-of-democracy-human-rights-and-labor/due-diligence-guidance>.

This guidance is a first-of-its-kind tool intended to provide practical and accessible human rights guidance to U.S. businesses seeking to prevent their products or services with surveillance capabilities from being misused by government end-users to commit human rights abuses.

It is meant to be an easy-to-use roadmap in line with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for assessing the human rights impacts of relevant products or services, and evaluating a series of considerations before engaging in transactions with governments. The guidance also recommends human rights safeguards if a U.S. business considers proceeding with a transaction, such as developing a grievance mechanism, and publicly reporting on sales practices.

Businesses that implement this guidance will be better positioned to demonstrate to their stakeholders and the public at large their commitment to respect human rights. They will be better suited to minimize reputational and operational risk. And, most importantly, they will be able to undertake more rigorous measures to mitigate the risk that their products or services will be misused to infringe on the rights of others.

On October 26, 2020, the U.S. Mission to International Organizations in Geneva issued a press release on the U.S. government's opposition to the process of working on a business and human rights treaty. The press release is excerpted below and available at <https://geneva.usmission.gov/2020/10/26/the-u-s-governments-opposition-to-the-business-and-human-rights-treaty-process/>.

* * * *

The U.S. government will not participate in the Open-Ended Intergovernmental Working Group (OEIGWG) session this week on the articulation of a business and human rights treaty. We continue to oppose this treaty based on its substance and the process around its development.

These treaty negotiations have been contentious and run contrary to the consensus-based, multi-stakeholder approach laid out by the UN Guiding Principles on Business and Human Rights (UNGPs) – a framework for preventing and addressing adverse human rights impacts that involve business activity. There remain a host of substantive concerns with the treaty including, but not limited to, its imposition of binding obligations on all parties; its extraterritorial application of domestic laws; and its broad criminal liability for an undefined range of human rights abuses.

We appreciate the concerns raised by some civil society participants, including those regarding access to remedy, that have motivated support for the treaty process. However, we believe that the one-size-fits-all, heavy-handed, and prescriptive approach set out by this draft treaty is not the best way to address these legitimate issues. The U.S. government is open to exploring alternative approaches that align with the UNGPs developed in collaboration with, and that ultimately reflect a broad consensus of, businesses, civil society, and other relevant stakeholders. Anything less risks undermining, rather than furthering, the important work the international community has made on the UNGPs.

June 2021 will mark one decade since the UNGPs were endorsed by consensus at the UN Human Rights Council. In this time, governments, civil society, and business have built strong foundations for the UNGPs and made important advances in disseminating good practice. The U.S. government looks forward to collaborating with the UN Business and Human Rights Working Group in its project to assess existing gaps and challenges and develop a strong vision for the next decade. We are confident that this concerted effort will help shape a strong agenda for years to come and that we will continue to build upon the remarkable progress made possible by the consensus-based approach of the UNGPs.

The U.S. government released public statements in 2018 and 2019 on the margins of the OEIGWG treaty negotiations articulating our opposition to this treaty process.

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I. INDIGENOUS ISSUES

On November 19, 2020, Mordica Simpson, advisor for economic and social affairs for the U.S. Mission to the UN, delivered the U.S. explanation of position on a resolution on indigenous peoples. Her statement follows and is available at <https://usun.usmission.gov/explanation-of-position-on-a-resolution-on-indigenous-peoples/>.

* * * *

The United States thanks Ecuador and Bolivia for their resolution entitled “Rights of Indigenous Peoples.” We are pleased to join consensus on the resolution.

The United States commends Ecuador and Bolivia for their leadership in strengthening the text this year to acknowledge the disproportionate impact of the COVID-19 pandemic on indigenous peoples, in particular those belonging to other minority groups, as well as the importance of integrating indigenous languages into global sustainable development frameworks and mechanisms and in public policies across social, economic, and political spheres. We also appreciate support for the new emphasis in operative paragraph 31 on eliminating forced labor. Because of discrimination, marginalization, poverty, and other factors, indigenous persons throughout the world continue to be subjected to forced labor.

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 supports the elimination of ambiguity surrounding the use of “health services” in the context of women’s health, because too often the term is used by some UN agencies to promote abortion. We wish to make clear that the United States supports providing holistic health care to indigenous peoples, including in this period of COVID-19 when health needs are considerable.

Concerning OP 14, we note that in the UN, data is disaggregated by sex rather than by gender.

With regard to OP 21, the United States notes that sexual harassment, while condemnable, is not necessarily violent. In U.S. law, the term violence refers to physical force or the threat of physical force.

Finally, with regard to this resolution’s references to the 2030 Agenda for Sustainable Development; the Global Compact for Safe, Orderly, and Regular Migration; and the non-consensus based Conclusions of the Commission on the Status of Women’s 63rd session, we addressed our concerns in a previous statement on Third Committee resolutions that we delivered on November 13.

* * * *

J. FREEDOM OF ASSOCIATION AND PEACEFUL ASSEMBLY

The Human Rights Committee issued draft General Comment No. 37 on Article 21 of the International Covenant on Civil and Political Rights (“ICCPR”) regarding peaceful assembly in 2019. The United States submitted its observations on February 14, 2020. The observations of the United States are excerpted below (with most footnotes omitted) and available at

<https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GCArticle21.aspx>. On July 23, 2020, the Committee adopted General Comment No. 37 during its 129th session (held online). General Comment No. 37 is available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11.

* * * *

2. The United States agrees, as the Committee states in paragraph 1 of its draft General Comment, that peaceful assembly, “[t]ogether with other rights related to political freedom,[] . . . constitutes the very foundation of a system of participatory government based on democracy.” The United States maintains protection for peaceful assembly, as provided for in the U.S. Constitution and the law of the United States.¹¹

A. General Observations

Authority and Capacity of the Committee

3. As the United States has stated previously, it is for each State to decide as an exercise of its sovereignty to assume treaty obligations which, once entered into, it has a legal obligation to fulfill.¹² Treaty parties could, through provisions in the treaty, agree to allow another entity to render authoritative treaty interpretation or to resolve definitively legal disputes or questions relating to their obligations, but States Parties to the ICCPR have not given authority to the Human Rights Committee or to any other entity to fashion or otherwise determine their treaty obligations.

4. The United States repeatedly has expressed concerns with the Committee’s interpretive practice generally, explaining in detail our view that this practice is beyond the Committee’s authority and mandate and contrary to international law. The United States reiterates this view here with regard to draft General Comment No. 37.

5. The United States urges the Committee to make explicit at the beginning of any final general comment that it reflects the Committee’s views, which are not legally binding, and that the purpose of the general comment is to provide recommendations to States Parties with regard to their implementation of the Covenant and in fulfilling their periodic reporting requirements under Article 40 and to refrain from providing its recommendations in imperative (“must”) or mandatory (“required”) terms. As the United States stated in its Observations on General Comment No. 36, “To the extent that the Committee undertakes to express its views regarding States Parties’ obligations or how it believes a provision should be interpreted beyond the terms contained in the treaty text, we urge the Committee to frame any such interpretation as Committee views regarding best practices, and to ensure that the opposing views of States Parties, including the United States, are also reflected in the text of the general comment, in order to avoid the impression that the interpretation advanced is authoritative, legally-binding, or otherwise accepted by the States Parties.”

Relevance of Regional Jurisprudence and Guidance and Other Nonbinding Documents

6. Throughout the Draft Comment, the Committee relies on regional jurisprudence and guidance as the basis for its positions and views, a significant departure from the Committee’s

¹¹ Because, as the United States declared upon ratification, the provisions of articles 1 through 27 of the Covenant are not self-executing, the United States generally meets its obligations regarding Article 21 through the United States Constitution and other domestic laws. *See* United Nations Treaty Collection Depository, Chapter IV Human Rights, 4. International Covenant on Civil and Political Rights, “United States of America”, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en.

¹² *See* Statement of Robert K. Harris to the UN Human Rights Committee, July 17-18, 2006, reprinted in Digest of United States Practice in International Law 2006 pp. 284-287 at p. 285, paragraph 2, available at <https://2009-2017.state.gov/s/l/c24878.htm>.

past practice. In some cases, this is true even when a more obvious citation to the ICCPR itself is available. For example, in paragraph 8, footnote 11, the Comment cites to a European Court of Human Rights (ECtHR) judgment for the proposition that States Parties have an obligation “to respect and ensure the exercise of this right.” But Article 2(1) of the ICCPR states that States Parties to the ICCPR “undertake[] to respect and to ensure . . . the rights recognized in the present Covenant.” The United States reminds the Committee that the ECtHR is interpreting Article 11 of the European Convention on Human Rights (ECHR), rather than Article 21 of the ICCPR. Article 11, while similar to Article 21 in some regards, contains different language than the Covenant and is interpreted by a Court that was established under the ECHR to ensure the observance of the obligations by its States Parties and that binds States Parties to abide by its final judgment in any case to which they are party. Further, only a small subset of ICCPR States Parties are also party to the ECHR and are bound by final judgments of the ECtHR. The United States is not a party to the ECHR and the ECtHR does not have authority to interpret U.S. treaty obligations. Thus, the United States encourages the Committee in its final text to refrain from categorical statements regarding State Party obligations unless grounded in and referring to the specific text of the Covenant or other relevant sources of treaty interpretation under international law.

7. The United States is also concerned about the Committee’s use of other non-authoritative materials as the basis for statements about the meaning of Covenant provisions. In a number of places, the Committee makes statements about the meaning of terminology in the ICCPR for which the only authority cited is a nonbinding, nonauthoritative document. The meaning of the ICCPR’s provisions should be discerned through application of standard principles of treaty interpretation reflected in VCLT Articles 31 and 32, not by reference to the views of outside bodies.

8. Regional jurisprudence and guidance, as well as other nonbinding documents, may be useful in identifying good practices that might help advance some objective of the Covenant. But in referring to such documents the Committee should clarify that they are not sources relevant to interpreting the Covenant’s meaning, but rather have informed the Committee’s recommendations regarding steps States may wish to consider taking in connection with their implementation of the Covenant.

B. Scope of Peaceful Assembly Protection

9. The first sentence of Article 21 states that “[t]he right [of] peaceful assembly shall be recognized.” For clarity, we encourage the Committee to use the language from Article 21 consistently throughout the Comment and avoid variations such as “right of assembly” (para. 80) or “freedom of assembly” (para. 112), or even “freedom of peaceful assembly,” which draws from the Universal Declaration rather than the Covenant. Further, while the United States agrees that “the right of peaceful assembly is not absolute” as stated in paragraph 8, we consider only the limitations delineated by Article 21—that is, those that are “imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public safety (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others”—to be permissible. Any references to such limitations should track Article 21’s language precisely.

10. In paragraph 6, the Committee lists examples of various forms of assemblies. Footnote 10 of the Comment explains that “During the drafting of article 21 of the Covenant, specific examples of peaceful assemblies were not included, in order to keep the formulation of

the right open.” For the same reason, the United States cautions against including a list in the Committee’s comment. If a list is included, the United States urges that it be as expansive as possible, use broader terms such as “protest,” and be explicitly non-exhaustive. At the same time, it should be clear that inclusion on the list in paragraph 6 does not imply that these activities may not be regulated in accordance with Article 21. The United States supports inclusion of illustrations that indicate Article 21 applies to all peaceful assembly, as in the second and third sentences of paragraph 6 (mobile or stationary, indoors or outdoors).

11. “Publicly accessible space”: The text of Article 21 does not limit the right to gatherings in public or publicly accessible spaces. Rather, concerns for property rights are addressed by the language in Article 21 that allows restrictions to be placed on the right of peaceful assembly that are necessary for the protection of the rights and freedoms of others. The United States recommends that the comment be revised to reflect that the right itself protects peaceful assembly whether the assembly is on publicly accessible or private property, *provided that* the owner of the private, non-publicly accessible property consents. Laws protecting private property (e.g., prohibitions on trespass) are legitimate restrictions on the right of peaceful assembly and generally are permissible under the limitations clause of Article 21 itself, but the individuals peacefully assembling have no less protection from government interference in the assembly because they happen to be doing so on private property. Such a reading would be contrary to the text of Article 21, as a restriction on peaceful assembly on private land that was permitted or even supported by the owner of that land would hardly be “necessary” for the landowners’ rights or freedoms. A contrary reading could provide justification for governments to restrict peaceful gatherings on private land without meeting the strict test in Article 21. Limitations on government action towards a peaceful assembly should apply with equal force whether the assembly is on publicly accessible or fully private land, so long as the individuals gathering are rightfully present on the private land. Given the brackets in paragraph 4 and 13, it appears that the Committee is not in agreement on this issue. Likewise, paragraph 67 states that “assembly rights may require some recognition on private property that is open to the public.” The United States believes the Comment would be strengthened by a clear statement that Article 21 applies to peaceful assembling wherever it takes place.

12. “Peaceful or Violent Assemblies”: The United States is concerned by the Comment’s articulation of a “two-stage process” for determining whether an individual is engaging in a peaceful assembly as protected by Article 21. The right of peaceful assembly, like human rights generally, belongs to individuals, not to groups. When some members of an assembly resort to violence, the other individuals do not lose protection under Article 21, as paragraph 10 *et seq.* of the current draft suggests. This does not mean that law enforcement cannot lawfully disperse an assembly that has become violent, but this action should be analyzed through the applicable exceptions articulated in Article 21 rather than an assessment that Article 21 no longer applies at all. By separating the questions of whether an assembly is peaceful and whether any peaceful assembly is otherwise subject to restrictions permitted by Article 21, the Committee is suggesting that once the government deems an assembly “violent,” it may impose restrictions that are not in conformity with law or not necessary for one of the governmental interests listed exhaustively in Article 21, or both. In many cases, law enforcement may be able to lawfully arrest and/or detain individuals engaging in violence while allowing the majority of those engaging in peaceful protest to continue; widespread arrests or dispersing an assembly should only be done when necessary. Indeed, this appears to be the Committee’s approach in paragraph

19, and the United States believes this should be the Committee's consistent approach throughout the Comment. This approach also obviates the need for a more searching assessment of whether an assembly itself is peaceful or violent, since the appropriate question is whether an individual is peaceful.

13. The United States does not dispute that an *individual's* activity does not fall within the scope of Article 21's protection if the *individual* becomes violent, e.g., if the individual engages in criminal use of force against another person or property. The United States also recognizes that in some very narrow circumstances, an individual may be deemed as violent who has not yet engaged in criminal use of force, such as where an individual is involved in a conspiracy to commit violence or where the individual's violence is imminent. It is the United States' position that any restriction on an individual's rights under Article 21 based on their speech alone must also comply with Article 19. As the United States explained in its observations on Draft General Comment No. 34,

there are some types of advocacy of national, religious, or racial hatred, namely incitement to *imminent* violence, or to imminent hostile acts such as when genuine, intentional threats of violence or intimidation are made to an individual, whereby prohibition is a legitimate government response to protect public order given the potential immediacy of the harm that may be caused by the speech. Given the difficulties in countering or preventing violence resulting from incitement to imminent violence or to hostile acts due to its immediacy, it is an appropriate governmental response to prohibit such expression to maintain public order without risking the underlying human right.”¹⁰

The United States therefore recommends that the Committee remove the brackets from “imminent” in paragraph 21.

14. Peaceful Assemblies and Civil Disobedience: The United States agrees that an individual engaging in peaceful but unlawful activity, including civil disobedience, is still protected by Article 21. However, Article 21 does not protect an individual from arrest or detention for breaking the law, including laws relating to trespass, so long as the law itself is “necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others,” and the arrest and/or detention are consistent with the State's other obligations under the Covenant, and in particular Article 9.

15. Similarly, the United States agrees that assemblies that fail to meet domestic legal requirements do not fall outside the scope of Article 21 protection, as stated in paragraph 18 of the draft Comment. Once again, however, this does not mean that the assembly cannot be subjected to the restrictions permissible under Article 21. Depending on the facts and circumstances, this may mean that an assembly that fails to meet domestic legal requirements can lawfully be disbanded or the organizers fined, so long as such actions are in conformity with law and necessary for one of the legitimate governmental interests articulated in Article 21.

¹⁰ Observations of the United States of America On the Human Rights Committee's Draft General Comment No. 34 On Article 19 – Freedom of Expression July 5, 2011, (hereinafter “U.S. Observations on Draft General Comment No. 34”), *excerpted in* Digest of U.S. Practice in International Law 2011, pp. 225-230, at 229 paragraph 13, available at <https://2009-2017.state.gov/s/l/2011/index.htm>.

C. Permissible Limitations

16. Time, Place, and Manner: The United States strongly agrees that reasonable “time, place, and manner” restrictions on assemblies in traditional public fora, such as streets, parks and other places traditionally used for public assembly and debate, are lawful under Article 21 of the Covenant. In the United States, such restrictions must be content-neutral and be narrowly tailored to serve a legitimate state interest. Indeed, time, place, and manner restrictions are often the simplest way to maintain public order and protect the rights and freedoms of others without discriminating on the content or viewpoint of the individuals peacefully assembling. However, in limited public fora where the government has opened property for certain types of communicative activity, we believe it is consistent with Article 21 for the government to limit the forum to use by certain types of groups or discussion of certain subjects. In such fora, any restrictions based on content must still be justified by a compelling state interest. In areas that the government has reserved for a specific intended purpose, the United States believes that restrictions on peaceful assembly are permissible under Article 21 so long as the limitation is reasonable. The United States believes that the Comment could be strengthened by clarification that the appropriateness of restrictions under Article 21 may depend on the location of the peaceful assembly.

17. Disruptions: In paragraph 7, the Committee correctly observes that the disruption of vehicular or pedestrian traffic or economic activity does not necessarily call into question the protection such (peaceful) assemblies should enjoy. The United States believes that this paragraph could be clarified by stating that any risks such assemblies may cause should be managed in a manner consistent with the permissible limitations in Article 21 itself and other provisions in the Covenant, rather than using the phrase “human rights framework.” The phrase “human rights framework” is not well-defined.

18. Permitting vs. Prior Notification: The United States believes that permitting regimes are consistent with Article 21 so long as they do not delegate overly broad licensing discretion to government officials, are narrowly tailored to serve a significant government interest, and leave open ample alternatives for communication. They should not discriminate on the basis of the viewpoint of the speakers or organizers or the content of their speech or message unless such restrictions comply with the strict tests set out in Articles 19(3) and 21 of the Covenant. In general, permitting regimes should provide for flexibility where a peaceful assembly is responding to emerging current events.

19. Proportionality: The Comment articulates a number of standards for when limitations on peaceful assembly are permissible. For example, in paragraph 40, the draft General Comment states, “Restrictions are not permissible unless they can be shown to have been provided for by law, and are necessary and proportionate to the permissible grounds for restrictions enumerated in article 21” and in paragraph 43, the draft General Comment states, “Article 21 spells out a *general framework* which any restrictions on the right of peaceful assembly must meet, namely the cumulative requirements of legality, necessity and proportionality”

20. The United States respectfully submits that these standards are not sound because they are not grounded in the treaty text. Under Article 21, the only circumstances in which peaceful assembly may be restricted is when the restriction is 1) imposed in conformity with law and 2) necessary in a democratic society in the interests of a) national security or public safety; b) public order; c) the protection of public health or morals; or d) the protection of the rights and freedoms of others.

21. As noted above, the United States believes that Article 21 provides a strict and exhaustive list of the requirements for limiting peaceful assembly. As a general matter, restrictions that are truly necessary for one of the governmental interests articulated in Article 21 will not be disproportionate. As the United States explained in its observations on Draft General Comment No. 34 regarding freedom of expression:

the Committee should also clarify that for a restriction to be “necessary,” it must be the least restrictive means for protecting one of the legitimate purposes described in [Article] 19(3), it cannot be overly broad, and must be narrowly tailored to prohibit the least amount of expression possible.

. . . The principle of proportionality [] appears to depart from the strict test of justification [discussed earlier in draft General Comment No. 34] and as is required for any permissible limitation of the freedom of expression under Article 19(3). The United States respectfully recommends that the Committee revise this section for greater clarity, precision reflective of the language in Article 19(3) and the principles discussed in paragraph 4 of these Observations.

22. Derivations from the text of the Covenant, even for the purpose of narrowing the permissible limitations on peaceful assembly, creates precedent for derivations from the text of the Covenant that may not be harmless in the future. The United States urges the Committee to consistently apply the strict test from Article 21 itself, rather than introducing new, nontextual standards.

23. Similarly, in paragraph 8, the Draft states that “any restrictions [on peaceful assembly] must be narrowly drawn.” While the United States agrees that Article 21 places significant limitations on any restriction the government might place on peaceful assembly, the fact that a limitation is narrowly drawn does not make it lawful under Article 21. To be permissible under Article 21, a restriction must [be] imposed in conformity with the law and necessary *for* one of the legitimate government interests articulated in the Article.

24. Indeed, the United States believes that the Draft Comment could be strengthened by greater elaboration of the necessity prong of Article 21 rather than discussing alternative standards. For example, in paragraph 90, the Draft Comment discusses the possibility that an assembly may need to be dispersed by law enforcement. However, the paragraph focuses solely on the use of force, rather than alternatives to force that could achieve the same objective, such as providing a verbal warning to non-violent assembly participants.

D. The Relationship Between Article 20 and Article 21

25. The United States has a reservation to Article 20 given its potential to be interpreted and applied in an overbroad manner. The United States respectfully submits that the Committee’s discussion of the relationship of Articles 21 and 20 should be consistent with the Committee’s discussion of Articles 19 and 20 in General Comment No. 34, in which the Committee wrote:

50. Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3.

51. What distinguishes the acts addressed in article 20 from other acts that may be subject to restriction under article 19, paragraph 3, is that for the acts addressed in article 20, the Covenant indicates the specific response required from the State: their prohibition by law. It is only to this extent that article 20 may be considered as *lex specialis* with regard to article 19.

52. It is only with regard to the specific forms of expression indicated in article 20 that States Parties are obliged to have legal prohibitions. In every case in which the State restricts freedom of expression it is necessary to justify the prohibitions and their provisions in strict conformity with article 19.

26. In particular, the Committee's discussion of Article 20 in paragraphs 22 and 57 of the draft Comment should be revised. In the bracketed paragraph 22, the draft Comment states that "[t]he scope of article 21 is *further determined* by article 20" (emphasis in original). Because, as the Committee has previously articulated, Article 20 does not expand the bases for restricting other rights in the Covenant, this paragraph should be deleted.

27. In paragraph 57, the Committee does not make any reference to the permissible limitations under Article 21 but looks only to Article 20 for its discussion of the circumstances in which an assembly must be prohibited. Paragraph 57 should be revised to reflect the Committee's earlier analysis of Article 20 and state explicitly that any restriction of peaceful assembly pursuant to Article 20 must also meet the requirements of Article 21, which articulates when restrictions on peaceful assembly are permitted: when they are imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. As the United States made clear in its observations on Draft General Comment 34:

Indeed, to protect public order or national security, it is not *necessary* to prohibit all advocacy of racial, religious or national hatred. There are other less restrictive (and more effective) means of protecting public order in the face of this type of expression. For example, a combination of efforts can protect public order in the face of hateful expression: ensuring robust protections for freedom of expression of all individuals allows everyone to have a voice and to counter any offensive speech, encouraging government leaders to speak out against such speech, promoting initiatives to create environments of mutual respect and understanding, reaching out to affected communities, providing conflict-resolution services, and rigorously enforcing anti-discrimination and violent hate crimes laws to contribute to a climate of respect. The efficacy of these types of actions in maintaining public order in the face of hostile expression negates any premise that a prohibition on advocacy of hatred, even when some may consider it amounting to incitement to hostility, discrimination or violence, is necessary for public order or national security. In fact, there are instances in which such prohibitions can actually contribute to discrimination, hostility or violence.

We strongly urge the Committee to revise the draft Comment, and in particular paragraphs 22 and 57, to reflect its past discussion of Article 20's relationship to other rights in the Covenant.

D. Relationship to Other Rights & Provisions

28. The United States strongly agrees that in addition to Article 21, many other provisions may provide protection for individuals engaging in peaceful assembly, including but not limited to Articles 6, 9, 17, 18, 19, and 22. The United States also agrees that even when an individual engages in violence and whose activity therefore falls outside the scope of Article 21, or when a peaceful assembly is restricted lawfully pursuant to Article 21, other rights of the Covenant generally remain applicable.

29. Throughout the Comment, the Committee makes use of shorthand reference to a number of rights in this Covenant and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”). The United States recommends using the language directly from the Covenants to avoid confusion about the source of these rights.

30. Freedom of Expression: The United States agrees with the Committee that freedom of expression is often directly relevant to the exercise of the right of peaceful assembly. We strongly agree that “[t]he rules applicable to freedom of expression should be followed when dealing with the expressive element of peaceful assemblies” and that “restrictions on peaceful assembly may only under strictly limited circumstances be based on the message conveyed by the participants.” Any restriction based on the message of the individuals exercising their right of freedom of expression must comply with the narrow test for restrictions on freedom of expression articulated in Article 19(3) of the Covenant. As noted above, this is true for restrictions under Article 20 as well.

31. Privacy: The Committee correctly highlights the important relationship between privacy and the exercise of the right of peaceful assembly. As noted above in paragraph 29 discussing the importance of using proper terminology rather than shorthand, wherever privacy is discussed as a human right or “international standard,” we urge the Committee to use the language from the ICCPR, specifically the right to be free from arbitrary or unlawful interference with privacy, as set out in Article 17, to be clear that privacy is not an absolute right. Paragraph 94 should also be revised, as it currently suggests that law enforcement may only engage in stop and search or frisk activity on suspicion of a “threat,” rather than any unlawful activity. The United States suggests the following alternative: “Powers of ‘stop and search’ or ‘stop and frisk,’ applied to those who participate in assemblies, or are about to do so, may not be used in a discriminatory manner. The mere fact that an individual is connected to a peaceful assembly does not constitute reasonable grounds for stopping and searching them.”

32. Similarly, paragraph 72 should be clarified and revised to indicate that lawful surveillance for *legitimate* law enforcement or national security purposes is not an infringement of Article 17. The fact that an individual is appearing in a public space diminishes their reasonable expectation of privacy; further, a warrant, court order, or similar legal process (which the Committee’s language in the final clause of this paragraph appears to contemplate) may not be legally necessary or required by respective domestic legal regimes of the Parties to the ICCPR. We recommend deletion of this final clause, or a change from “must be” to “may need to be.” This is also consistent with how the Committee has crafted paragraph 112, with the permissive “may” in the first clause of that paragraph.

33. Liability of States: In Paragraphs 100 and 101, the Committee represents that the State is “responsible under international law for the acts and omissions of its law enforcement agencies and individual officials.” Under the United States’ domestic accountability structure, the State does not always assume liability for the bad acts of law enforcement officials; rather,

there are a number of factors to consider regarding whether liability will shift to the individual suspected of acting negligently, recklessly, or potentially criminally. We recommend revising the Paragraph 100 to read “The State is responsible under international law for the acts and omissions of its law enforcement agencies and individual officials acting in their official capacity and should promote a culture of accountability for law enforcement officials during assemblies. This may be achieved under domestic law by holding either the government liable or by holding the individual liable, depending on the specific facts and circumstances.” Similarly, in Paragraph 101, we recommend changing “[l]aw enforcement agencies and individual officials must be held accountable for their actions . . .” to read “those responsible for a violation of international human rights law should be held accountable for their actions”

34. Non-discrimination: In paragraph 112, the Committee suggests that Article 26 provides a right to non-discrimination that protects individuals from discrimination in their exercise of the right of peaceful assembly. The United States respectfully submits that reference to Article 2(1), which requires States Parties to respect and ensure the rights recognized in the Covenant “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,” would be more appropriate than reference to Article 26, which addresses only equality before the law and equal protection of the law. The United States notes that Article 26 does not create a freestanding right to non-discrimination.

35. Economic, Social and Cultural Rights: The United States reiterates that only States are parties to this Covenant and to the ICESCR, and thus only States, not private individuals, have the capacity to violate the rights under the Covenants. Further, the United States reminds the Committee that not all States Party to the ICCPR are party to the ICESCR, and that States only have the obligations they have undertaken.

E. Obligations

36. The United States believes that it is a good practice of States Parties to facilitate the right of peaceful assembly, including where necessary and appropriate, through the use of law enforcement to maintain order and protect individuals exercising their right of peaceful assembly. However, from the start of negotiations in 1948, the United States has maintained that the Covenant was intended to protect individuals from State action and that existing codes of criminal law already covered actions committed by individuals or groups. The United States has repeatedly made known its longstanding view that the Covenant in general does not impose an affirmative duty on the State to protect individuals’ life, liberty, or security of person from interference by private actors and consequently such interference does not constitute a violation of the Covenant; our position on Articles 6 and 9 does not change simply because an individual is exercising their right of peaceful assembly. The United States objects to the Committee’s imputing affirmative obligations to States Parties to prevent, regulate, or punish the non-governmental conduct of private actors. The ordinary meaning of the text of the Covenant does not support such a reading, and the negotiating history makes clear that there was not universal agreement among the negotiating parties to impose obligations on States to prevent interference from private actors. The provisions concerning the affirmative duties of the state should be revised to reflect that these are good practices of states to promote enjoyment of the right of peaceful assembly.

37. This is not to suggest that the government has no duties with regard to the right of peaceful assembly. In addition to continuing to comply with the State’s other obligations under

the Covenant, in particular Articles 6 and 9, law enforcement, once engaged in maintaining order during an assembly, must not discriminate against individuals on the basis of the viewpoint they are presenting, as discussed above in section C. And where a permitting or notification system is in place, government officials must administer the system in an impartial and timely way, consistent with Article 21.

38. Nor does the United States disagree that as a general matter it is the government's role to protect individuals from violent and other crime. However, the government must ensure that its actions in this regard do not conflict with the right of peaceful assembly or other obligations under the Covenant. In paragraph 31, the Draft states that the "State is obliged to take all [possible / appropriate] measures to protect the participants" The United States strongly suggests the Committee use "appropriate" rather than "possible", because "possible" could include measures inconsistent with the right of peaceful assembly, such as refusing to issue a permit for a protest that could spark violence rather than a more targeted, and thus appropriate response.

* * * *

K. FREEDOM OF EXPRESSION

1. Freedom Online Coalition

On May 27, 2020, the State Department issued a media note regarding the Freedom Online Coalition ("FOC") statement on COVID-19 and internet freedom. The FOC is a group of 31 countries committed to promoting the Universal Declaration of Human Rights ("UDHR"). The media note regarding the FOC statement on internet freedom during the COVID-19 pandemic is excerpted below and available at <https://2017-2021.state.gov/freedom-online-coalition-statement-on-covid-19-and-internet-freedom/>.

* * * *

The FOC shares the concerns of people everywhere in the face of the COVID-19 global pandemic, including the negative economic impact associated with it, and recognizes government efforts to mitigate the spread of the virus by enacting emergency measures. At the same time, more activities are taking place online than ever before, and we are concerned with the human rights implications of certain measures, practices, and digital applications introduced by governments in response to the crisis. This includes the use of arbitrary or unlawful surveillance practices; partial or complete Internet shutdowns; online content regulation and censorship that are inconsistent with human rights law. We are further concerned with the potential short-and-long-term impact of these actions on the rights of freedom of expression, association, and peaceful assembly, and privacy rights, even after the pandemic is over.

Lack of accountability and lack of effective remedy for violations and abuses of human rights online pose a risk of reduced trust in public authorities, which, in turn, might undermine

the effectiveness of any future public response. Violations and abuses of human rights also increase risk of discrimination and may disproportionately harm members of already marginalized and vulnerable communities, including women and girls and other individuals who may face multiple and intersecting forms of discrimination. Human rights violations and abuses online are a direct challenge to the FOC's goal of protecting and promoting both the exercise of human rights online and an open, free^[1], secure, reliable, and interoperable Internet.

Furthermore, the FOC is concerned by the spread of disinformation online and activity that seeks to leverage the COVID-19 pandemic with malign intent. This includes the manipulation of information and spread of disinformation to undermine the international rules-based order and erode support for the democracy and human rights that underpin it. Access to factual and accurate information, including through a free and independent media online and offline, helps people take the necessary precautions to prevent spreading the COVID-19 virus, save lives, and protect vulnerable population groups.

We reiterate that commitments and principles outlined in FOC founding documents remain of the utmost importance. We further emphasize that countries must ensure that measures implemented to address the pandemic are in compliance with international human rights law. Measures should also be limited to what is necessary for the legitimate protection of public health, including by limiting these measures in time only as necessary to address the COVID-19 crisis. Any interference with privacy and other relevant rights and freedoms need also be consistent with the International Covenant on Civil and Political Rights and the UDHR. This is true whether the restrictions apply to activity online or offline. We welcome the focus on this issue by the UN Secretary General, the UN High Commissioner for Human Rights, and UN Special Rapporteurs and experts.

In response to the COVID-19 pandemic, we call upon governments worldwide:

- To refrain from adopting or implementing laws and policies that may negatively affect the enjoyment of human rights, or that unreasonably restrict civic space online and offline, in violation of states' obligations under international human rights law;
- To promote an enabling environment for free expression and access to information online to protect privacy and to refrain from content restrictions that violate international human rights law;
- To take appropriate measures to counter violence, intimidation, threats and attacks against individuals and groups, including human rights defenders, on the Internet and through digital technologies.
- To immediately end Internet shutdowns, and ensure the broadest possible access to online services by taking steps to bridge digital divides; and
- To commit that any actions taken pursuant to emergency measures or laws be subject to effective transparency and accountability measures and lifted when the pandemic has passed.

...while committing ourselves to do the same.

[1] 'Free' in this context does not mean 'free of cost'.

2. Russian decree targeting RFE/RL and Voice of America

On August 10, 2020, Secretary Pompeo issued a press statement regarding a Russian decree targeting RFE/RL and Voice of America in Russia. The statement is excerpted below and available at <https://2017-2021.state.gov/russian-decree-targeting-rfe-rl-and-voice-of-america-in-russia/index.html>.

The United States is deeply concerned by the recent draft decree published by Russian authorities targeting U.S. Agency for Global Media (USAGM)-funded entities in Russia. For more than 70 years, Voice of America (VOA) and Radio Free Europe / Radio Liberty (RFE/RL) have been vital sources of independent news and information for the people of Russia. This decree will impose new burdensome requirements that will further inhibit RFE/RL's and VOA's ability to operate within Russia, compounding the significant and undue restrictions these outlets already face. We remain troubled by the ongoing crackdown on independent press in Russia and call on Russia to uphold its international obligations and OSCE commitments to freedom of expression. We urge the Russian government to reconsider these actions, which will further damage the bilateral relationship.

3. Joint Statement on Internet Shutdowns in Belarus

On September 17, 2020, the following joint statement on internet shutdowns in Belarus was released by the Governments of the United States of America, Australia, Austria, Belgium, Bulgaria, Canada, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Slovenia, Sweden, Switzerland, the United Kingdom, and Ukraine. The State Department issued the joint statement as a media note, available at <https://2017-2021.state.gov/joint-statement-on-internet-shutdowns-in-belarus/>.

* * * *

We, the signatories, are deeply troubled by and condemn the recently reported and ongoing use of partial and complete Internet shutdowns, as well as targeted content blocking, by the Government of Belarus in the aftermath of the fraudulent 2020 Belarusian presidential elections. Shutdowns and blocking or filtering of services unjustifiably limit the rights of peaceful assembly and freedoms of association and expression, especially when they lack procedural fairness and transparency. In conjunction with restrictive measures and intimidation employed against opposition candidates and the mass arrests and detentions of Belarusian civil society members and journalists, actions to limit access to the Internet, including social media and other digital communication platforms, further erode civic space. We will continue to stand with the

people of Belarus, who are making their voices heard in spite of these oppressive measures, and we are especially heartened by the critical and central role women are playing in calling for fairness and accountability.

Civic space online is integral to a vibrant civic space off-line. Governments should not block or hinder Internet connectivity, as shutdowns often undermine human rights and fundamental freedoms, including the rights of peaceful assembly and freedoms of association and expression that form the basis of a democratic society. Internet shutdowns impact all users, especially marginalized groups and those in vulnerable situations. Shutdowns limit media freedom and the ability of journalists and human rights defenders to report on human rights violations or abuses and hold governments accountable. Shutdowns and restrictions also limit the dissemination and free flow of information, harm economic activity, contribute to social and political disorder, and negatively affect public safety.

Human rights must be protected online just as they are protected off-line. We call on Belarusian authorities to refrain from Internet shutdowns and blocking or filtering of services and to respect Belarus's international human rights obligations, including under articles 19 and 21 of the International Covenant on Civil and Political Rights. We call on the Government of Belarus to respect civic space, including respect for human rights and fundamental freedoms, democracy and the rule of law.

Independent, transparent and impartial investigations into all allegations of human rights violations in the context of the election must be conducted and the perpetrators brought to justice.

* * * *

L. FREEDOM OF RELIGION OR BELIEF

1. Religious Freedom or Belief Alliance

On February 5, 2020, Albania, Austria, Bosnia and Herzegovina, Brazil, Bulgaria, Colombia, Croatia, Czech Republic, Estonia, The Gambia, Georgia, Greece, Hungary, Israel, Kosovo, Latvia, Lithuania, Malta, the Netherlands, Poland, Senegal, Slovakia, Slovenia, Togo, Ukraine, and the United Kingdom, joined the United States to create the International Religious Freedom Alliance ("Alliance," subsequently renamed "International Religious Freedom or Belief Alliance"). See February 5, 2020 press statement, available at <https://2017-2021.state.gov/answering-the-call-to-advance-religious-freedom/>. Secretary Pompeo's remarks at the Alliance dinner on February 5, are available at <https://2017-2021.state.gov/secretary-michael-r-pompeo-at-the-international-religious-freedom-alliance-dinner/>. A senior State Department official provided a briefing on the Alliance, available at <https://2017-2021.state.gov/senior-state-department-official-on-the-launch-of-the-international-religious-freedom-irf-alliance/>.

Also on February 5, 2020, the United States announced that Poland would host the next "Ministerial to Advance Religious Freedom." See media note, available at <https://2017-2021.state.gov/u-s-poland-joint-statement-on-ministerial-to-advance-religious-freedom/>.

2. Executive Order on International Religious Freedom

On June 2, 2020, President Trump issued Executive Order 13926, “Advancing International Religious Freedom.” 85 Fed. Reg. 34,951 (June 5, 2020). Excerpts follow from the order.

* * * *

Section 1. Policy. (a) Religious freedom, America’s first freedom, is a moral and national security imperative. Religious freedom for all people worldwide is a foreign policy priority of the United States, and the United States will respect and vigorously promote this freedom. ...

(b) Religious communities and organizations, and other institutions of civil society, are vital partners in United States Government efforts to advance religious freedom around the world. It is the policy of the United States to engage robustly and continually with civil society organizations—including those in foreign countries—to inform United States Government policies, programs, and activities related to international religious freedom.

Sec. 2. Prioritization of International Religious Freedom. Within 180 days of the date of this order, the Secretary of State (Secretary) shall, in consultation with the Administrator of the United States Agency for International Development (USAID), develop a plan to prioritize international religious freedom in the planning and implementation of United States foreign policy and in the foreign assistance programs of the Department of State and USAID.

Sec. 3. Foreign Assistance Funding for International Religious Freedom. (a) The Secretary shall, in consultation with the Administrator of USAID, budget at least \$50 million per fiscal year for programs that advance international religious freedom, to the extent feasible and permitted by law and subject to the availability of appropriations. Such programs shall include those intended to anticipate, prevent, and respond to attacks against individuals and groups on the basis of their religion, including programs designed to help ensure that such groups can persevere as distinct communities; to promote accountability for the perpetrators of such attacks; to ensure equal rights and legal protections for individuals and groups regardless of belief; to improve the safety and security of houses of worship and public spaces for all faiths; and to protect and preserve the cultural heritages of religious communities.

(b) Executive departments and agencies (agencies) that fund foreign assistance programs shall ensure that faith-based and religious entities, including eligible entities in foreign countries, are not discriminated against on the basis of religious identity or religious belief when competing for Federal funding, to the extent permitted by law.

Sec. 4. Integrating International Religious Freedom into United States Diplomacy. (a) The Secretary shall direct Chiefs of Mission in countries of particular concern, countries on the Special Watch List, countries in which there are entities of particular concern, and any other countries that have engaged in or tolerated violations of religious freedom as noted in the Annual Report on International Religious Freedom required by section 102(b) of the International Religious Freedom Act of 1998 (Public Law 105–292), as amended (the “Act”), to develop comprehensive action plans to inform and support the efforts of the United States to advance international religious^[1]freedom and to encourage the host governments to make progress in eliminating violations of religious freedom.

(b) In meetings with their counterparts in foreign governments, the heads of agencies shall, when appropriate and in coordination with the Secretary, raise concerns about international religious freedom and cases that involve individuals imprisoned because of their religion.

(c) The Secretary shall advocate for United States international religious freedom policy in both bilateral and multilateral fora, when appropriate, and shall direct the Administrator of USAID to do the same.

Sec. 5. *Training for Federal Officials.* (a) The Secretary shall require all Department of State civil service employees in the Foreign Affairs Series to undertake training modeled on the international religious freedom training described in section 708(a) of the Foreign Service Act of 1980 (Public Law 96–465), as amended by section 103(a)(1) of the Frank R. Wolf International Religious Freedom Act (Public Law 114–281).

(b) Within 90 days of the date of this order, the heads of all agencies that assign personnel to positions overseas shall submit plans to the President, through the Assistant to the President for National Security Affairs, detailing how their agencies will incorporate the type of training described in sub- section (a) of this section into the training required before the start of overseas assignments for all personnel who are to be stationed abroad, or who will deploy and remain abroad, in one location for 30 days or more.

(c) All Federal employees subject to these requirements shall be required to complete international religious freedom training not less frequently than once every 3 years.

Sec. 6. *Economic Tools.* (a) The Secretary and the Secretary of the Treasury shall, in consultation with the Assistant to the President for National Security Affairs, and through the process described in National Security Presidential Memorandum–4 of April 4, 2017 (Organization of the National Security Council, the Homeland Security Council, and Subcommittees), develop recommendations to prioritize the appropriate use of economic tools to advance international religious freedom in countries of particular concern, countries on the Special Watch List, countries in which there are entities of particular concern, and any other countries that have engaged in or tolerated violations of religious freedom as noted in the report required by section 102(b) of the Act. These economic tools may include, as appropriate and to the extent permitted by law, increasing religious freedom programming, realigning foreign assistance to better reflect country circumstances, or restricting the issuance of visas under section 604(a) of the Act.

(b) The Secretary of the Treasury, in consultation with the Secretary of State, may consider imposing sanctions under Executive Order 13818 of December 20, 2017 (Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption), which, among other things, implements the Global Magnitsky Human Rights Accountability Act (Public Law 114– 328).

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3. U.S. Annual Report

On June 10, 2020, the U.S. Department of State announced the release of the 2019 International Religious Freedom Report. The report is available at <https://www.state.gov/reports/2019-report-on-international-religious-freedom/>. Secretary Pompeo and Ambassador Brownback delivered remarks and answered questions from the media on the release of the 2019 Report, which are available at

<https://2017-2021.state.gov/secretary-michael-r-pompeo-at-a-press-availability-on-the-release-of-the-2019-international-religious-freedom-report/>.

4. Designations under the International Religious Freedom Act

On December 2, 2020, the Department of State re-designated Burma, China, Eritrea, Iran, the Democratic People's Republic of Korea, Pakistan, Saudi Arabia, Tajikistan, and Turkmenistan as Countries of Particular Concern and, also, designated Nigeria as a Country of Particular Concern under the International Religious Freedom Act of 1998, as amended. 86 Fed. Reg. 2718 (Jan. 13, 2021). The "Countries of Particular Concern" were so designated for having engaged in or tolerated "particularly severe violations of religious freedom," *id.*, which the Act defines as "systematic, ongoing, egregious violations of religious freedom." 22 U.S.C. § 6402(13). The Department again placed Comoros, Cuba, Nicaragua, and Russia on a Special Watch List ("SWL") for governments that have engaged in or tolerated "severe violations of religious freedom." 86 Fed. Reg. 2718-19. The "Presidential Actions" or waivers designated for each of the countries designated by the Secretary as Countries of Particular Concern are listed in the Federal Register notice. *Id.* The Department also designated Al-Shabaab, al-Qa'ida, Boko Haram, Hayat Tahrir al-Sham, the Houthis, ISIS, ISIS-Greater Sahara, ISIS-West Africa, Jamaat Nasr al-Islam wal Muslimin, and the Taliban as "Entities of Particular Concern," under section 301 of the Frank R. Wolf International Religious Freedom Act of 2016 (Pub. L. 114-281). *Id.*

The State Department issued a press statement from Secretary Pompeo on December 7, 2020, available at <https://2017-2021.state.gov/united-states-takes-action-against-violators-of-religious-freedom-2/>, announcing the designations. The press statement explains:

The United States is designating Burma, China, Eritrea, Iran, Nigeria, the DPRK, Pakistan, Saudi Arabia, Tajikistan, and Turkmenistan as Countries of Particular Concern under the International Religious Freedom Act of 1998, as amended, for engaging in or tolerating "systematic, ongoing, egregious violations of religious freedom."

We are also placing the Comoros, Cuba, Nicaragua, and Russia on a Special Watch List for governments that have engaged in or tolerated "severe violations of religious freedom." Additionally, we are designating al-Shabaab, al-Qa'ida, Boko Haram, Hayat Tahrir al-Sham, the Houthis, ISIS, ISIS-Greater Sahara, ISIS-West Africa, Jamaat Nasr al-Islam wal Muslimin, and the Taliban as Entities of Particular Concern under the Frank R. Wolf International Religious Freedom Act of 2016.

We have not renewed the prior Entity of Particular Concern designations for al-Qa'ida in the Arabian Peninsula and ISIS-Khorasan, due to the total loss of territory formerly controlled by these terrorist organizations. While these two

groups no longer meet the statutory criteria for designation, we will not rest until we have fully eliminated the threat of religious freedom abuses by any violent extremist and terrorist groups.

There are also positive developments to share. I am pleased to announce that Sudan and Uzbekistan have been removed from the Special Watch List based on significant, concrete progress undertaken by their respective governments over the past year. Their courageous reforms of their laws and practices stand as models for other nations to follow.

Ambassador Brownback also held a briefing on the designations under the International Religious Freedom Act, a record of which is available at <https://2017-2021.state.gov/ambassador-at-large-for-international-religious-freedom-samuel-d-brownback-briefing-on-rollout-of-u-s-actions-against-religious-freedom-violators/>.

M. OTHER ISSUES

1. Privacy

On November 17, 2020, Mordica Simpson, advisor for economic and social affairs for the U.S. Mission to the UN, delivered the explanation of position on a resolution on the right to privacy in the digital age. Her statement follows.

* * * *

The United States appreciates the efforts of Germany and Brazil on this resolution, and, despite concerns with some aspects of the text, 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 (ICCPR), 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. 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. Robust data protection and privacy safeguards should also not prohibit legitimate access to data by law enforcement entities through proper legal process requests.

We believe that the portion of the resolution addressing business enterprises is too prescriptive. 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 meaningful consent may be appropriate, such as opt-out agreements or 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 resolution as emphasizing those contexts where such explicit consent is important.

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 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.

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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2. Purported Right to Development

On November 17, 2020, the United States provided an explanation of its "no" vote on the resolution in the Third Committee on the "right to development." The statement is excerpted below and available at https://usun.usmission.gov/explanation-of-vote-on-a-resolution-on-the-right-to-development/?_ga=2.113043015.2100943753.1613669895-1488883581.1611183416.

* * * *

The United States is firmly committed to the promotion and advancement of global development efforts. The U.S. government collaborates with developing countries, other donor countries, non-governmental organizations, and the private sector in order to alleviate poverty and aid development efforts across all dimensions. However, the United States maintains its long-

standing concerns over the existence of a purported “right to development” within existing human rights law.

We note that the “right to development” discussed in this resolution is not recognized in any of the core UN human rights conventions, does not have an agreed international meaning, and, unlike with human rights, is not recognized as a universal right held and enjoyed by individuals and which every individual may demand from his or her own government. Indeed, we continue to be concerned that the “right to development” identified within the text protects states instead of individuals.

States must implement their human rights obligations, regardless of external factors, including the availability of development and other assistance. Lack of development may not be invoked to justify the abridgement of internationally recognized human rights. To this end, we continually encourage all states to respect their human rights obligations and commitments, regardless of their levels of development.

Additionally, the United States cannot support the inclusion of the phrase “to expand and deepen mutually beneficial cooperation.” This phrase has been promoted interchangeably with “win-win cooperation” by a single Member State to insert the domestic policy agenda of its Head of State in UN documents. None of us should support incorporating political language targeting a domestic political audience into multilateral documents – nor should we support language that undermines the fundamental principles of sustainable development. It should also be noted that while the United States supports access to safe, effective, affordable and quality essential medicines and vaccines for addressing COVID-19, that access should not undermine incentives for innovation. Additionally, the United States does not recognize the term “global public good” as applied to medicines and vaccines more generally.

For these reasons, we request a vote and we will vote against this resolution.

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Cross References

Asylum, Refugee, and Migrant Issues, **Ch. 1.C**

Trafficking in Persons, **Ch. 3.B.3.b**

Nestle/Cargill litigation (Alien Tort Statute), **Ch. 5.B.2**

Inter-American Commission on Human Rights (“IACHR”), **Ch. 7.D.3**

Belarus, **Ch. 9.A.5**

Iran sanctions related to human rights, **Ch. 16.A.1.c(8)**

China sanctions related to human rights (including in Xinjiang), **Ch. 16.A.4.a**

Magnitsky sanctions and other measures related to corruption and human rights, **Ch. 16.A.12**

Export controls relating to human rights abuses in China, **Ch. 16.B.1.c**

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

International humanitarian law, **Ch. 18.A.4**

CHAPTER 7

International Organizations

A. UNITED NATIONS

1. World Health Organization

a. *Taiwan's exclusion from the World Health Assembly*

On May 18, 2020, the State Department issued a press statement by Secretary Pompeo condemning the exclusion of Taiwan from the World Health Assembly of the World Health Organization ("WHO"). The statement, available at <https://2017-2021.state.gov/taiwans-exclusion-from-the-world-health-assembly/>, includes the following:

No one disputes that Taiwan has mounted one of the world's most successful efforts to contain the pandemic to date, despite its close proximity to the original outbreak in Wuhan, China. This should not be a surprise. Transparent, vibrant, and innovative democracies like Taiwan always respond faster and more effectively to pandemics than do authoritarian regimes.

WHO's Director-General Tedros had every legal power and precedent to include Taiwan in WHA's proceedings. Yet, he instead chose not to invite Taiwan under pressure from the People's Republic of China (PRC). The Director-General's lack of independence deprives the Assembly of Taiwan's renowned scientific expertise on pandemic disease, and further damages the WHO's credibility and effectiveness at a time when the world needs it the most.

b. *U.S. withdrawal*

On July 6, 2020, the United States notified the Secretary General of the United Nations of the United States withdrawal from the WHO. UN Secretary-General, Depositary Notification (July 14, 2020), <https://treaties.un.org/doc/Publication/CN/2020/CN.302.2020-Eng.pdf>. This action followed President Trump's May 29, 2020, announcement that the United States would terminate its relationship with the WHO over its handling of the coronavirus pandemic.

The U.S. letter is excerpted in Chapter 4.*

On September 2, 2020, the State Department hosted a briefing (via teleconference) regarding next steps with regard to the U.S. withdrawal from the WHO. Participants in the briefing include: Deputy Assistant Secretary of State Nerissa Cook from the Bureau of International Organization Affairs; Director of the Office of Global Affairs at the Department of Health and Human Services Garrett Grigsby; and Dr. Alma Golden, assistant administrator for global health, USAID. The briefing is excerpted below and available at <https://2017-2021.state.gov/briefing-with-nerissa-cook-deputy-assistant-secretary-of-state-bureau-of-international-organization-affairs-garrett-grigsby-director-of-the-office-of-global-affairs-department-of-health-and-human/>.

* * * *

MS COOK: ... Today we are announcing significant steps to complete th[e withdrawal] process ..., and including on matters related to funding.

I am pleased to be joined today by colleagues from USAID and HHS. ...

Before we proceed, let me note in advance that the information we are providing today was also presented to WHO Director General Tedros during a meeting earlier today with our U.S. ambassador in Geneva, Andrew Bremberg.

To begin, I would like to discuss the status of U.S. assessed contributions to the WHO. These are the annual dues that member-states are required to pay as the price of membership. As with many UN organizations, the U.S. is assessed at 22 percent of the WHO's regular budget, which typically totals more than \$100 million a year. For Fiscal Year 2020, the U.S. assessment was just over \$120 million, of which 58 million had already been contributed at the time of the President's April decision to suspend additional funding. Today we are announcing the remaining portion of the 2020 assessment, slightly more than \$62 million, will be reprogrammed to the UN to pay other assessments.

I would like to turn now to my colleagues to discuss some of the specific steps their agencies are taking to implement the President's decision, but let me make one additional comment about the U.S. institutional relationship with the WHO going forward: There may be instances in the future when the United States wishes to participate in particular meetings of the WHO's governing bodies and technical and advisory committees where we believe American interests need to be represented. We will consider those instances on a case-by-case basis.

Now for additional detail on questions related to funding of global health priorities, let me turn first to HHS

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* Editor's note: On January 20, 2021, the United States retracted its notice of withdrawal and stated that it "intends to remain a member of the World Health Organization." The depositary notification is available at <https://treaties.un.org/doc/Publication/CN/2021/CN.11.2021-Eng.pdf>.

MR GRIGSBY: ... A number of operating divisions of the Department of Health and Human Services traditionally have engaged with the World Health Organization and some of these interactions have included voluntary contributions. In the case of voluntary program funding, operating divisions of HHS have in some cases ... found other recipients to carry out activities moving forward. ...

The WHO activities that HHS will support this year are one-time exceptions for funding, up to \$40 million, in the program areas of immunization and influenza. These contributions would be to ensure continuity of activities important to the health security of Americans for which there was not immediate alternative programmatic partners. They'll ensure that activities ... of critical concerns to the health of Americans will continue until appropriate alternative partners are secured. The one-year timeline for U.S. withdrawal from WHO allows time to find and secure partnerships to fund critical programs. HHS is well underway with this process to make this happen in advance of the one-year anniversary of Secretary Pompeo's letter to the UN Secretary-General making known U.S. intentions with regard to WHO.

Finally, HHS has a number of individuals detailed to WHO working on technical health issues. We're working with these individuals to bring them home or to send them to their next assignment in advance of 2021 when the U.S. will no longer be a member of WHO.

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MS GOLDEN: ...

... USAID has funded our work with the World Health Organization through voluntary contributions. My colleagues and I at the agency have worked diligently to identify appropriate partners to carry out this urgent and complex work on which we previously collaborated with WHO. Despite progress on the humanitarian reform, it is critical that the WHO better prepare for, prevent, detect, and respond to outbreaks of dangerous pathogens with transparency and with accountability. While in the vast majority of cases, USAID has identified strong and appropriate partners to carry forward this work, we will make a one-time disbursement of up to \$68 million to the WHO to support humanitarian health assistance in Libya and Syria as well as efforts to eradicate polio in priority countries. These exceptions reflect the few cases in which WHO has the unique capabilities that an alternate partner could not replicate at this time.

Since 2001, the U.S. Government has contributed more than \$142 billion to help prevent, detect, and treat HIV/AIDS, malaria, tuberculosis, Ebola, and other dangerous diseases and conditions. We give an average of \$10 billion per year for global health, and this year, it will be double that as we surge to fight COVID-19 worldwide.

USAID is determined to ensure that our withdrawal from WHO does not affect the level of our overall health assistance to the most vulnerable. The United States leads the world in health and humanitarian aid through an all-of-America effort, and we are committed to ensuring that our generosity directly reaches people around the world. We and the rest of the U.S. Government will continue to engage the WHO on a limited basis during this coming year of our withdrawal.

On a case-by-case basis, the United States will participate in specific meetings of the WHO's governing bodies and technical and advisory committees. Our priorities will be events and processes of a normative, regulatory and standard-setting nature that have a direct impact on Americans, on U.S. national security, on U.S. economic interests, U.S. companies, and on the U.S. Government's global health investments.

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On September 3, 2020, the State Department issued a press statement providing an update on steps with respect to U.S. withdrawal from the WHO and the redirection of resources previously provided to the WHO. The press statement is excerpted below and available at <https://2017-2021.state.gov/update-on-u-s-withdrawal-from-the-world-health-organization//index.html>.

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The United States has long been the world's most generous provider of health and humanitarian assistance to people around the world. This assistance is provided with the support of the American taxpayer with the reasonable expectation that it serve an effective purpose and reach those in need.

Unfortunately, the World Health Organization has failed badly by those measures, not only in its response to COVID-19, but to other health crises in recent decades. In addition, WHO has declined to adopt urgently needed reforms, starting with demonstrating its independence from the Chinese Communist Party.

When President Trump announced the U.S. withdrawal from that organization, he made clear that we would seek more credible and transparent partners.

That withdrawal becomes effective on July 6, 2021, and since the President's announcement, the U.S. government has been working to identify partners to assume the activities previously undertaken by WHO.

Today, the United States is announcing the next steps with respect to our withdrawal from the WHO and the redirection of American resources. This redirection includes reprogramming the remaining balance of its planned Fiscal Year 2020 assessed WHO contributions to partially pay other UN assessments.

In addition, through July 2021, the United States will scale down its engagement with the WHO, to include recalling the Department of Health and Human Services (HHS) detailees from WHO headquarters, regional offices, and country offices, and reassigning these experts. U.S. participation in WHO technical meetings and events will be determined on a case-by-case basis.

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2. PAHO

On July 15, 2020, Secretary Pompeo issued a press statement regarding the Pan American Health Organization ("PAHO"). His statement follows and is available at <https://2017-2021.state.gov/pan-american-health-organization-transparency/>.

The United States government welcomes the Pan American Health Organization's decision to initiate an independent review of its role in the Mais Medicos program, pursuant to which PAHO provided well over a billion dollars to Cuba. The United States and other key PAHO member states have actively

worked with PAHO leadership to design this review into how Mais Medicos was initiated and operated.

The review is designed to answer the questions that the U.S. government has raised.

3. Charter Committee

On February 18, 2020, Elizabeth Grosso, attorney-adviser for the U.S. mission to the UN, delivered the U.S. statement at the Special Committee on the Charter of the UN and on the Strengthening of the Role of the Organization. Ms. Grosso's statement is excerpted below and available at <https://usun.usmission.gov/statement-of-the-u-s-special-committee-on-the-charter-of-the-united-nations-and-on-the-strengthening-of-the-role-of-the-organization/>.

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The United States welcomes this opportunity to make some general observations about the work of the Special Committee this year. As we celebrate the 75th Anniversary of the signing of the UN Charter in San Francisco, we reaffirm our commitment to the Charter, and the spirit of multilateral cooperation embodied in that landmark occasion. In this milestone year, examining and strengthening adherence to the Charter through the work of this Committee takes on renewed importance.

With respect to items on the agenda under the peaceful settlement of disputes, the United States is looking forward to the annual thematic debate during this meeting focusing on the exchange of information on State practices regarding the use of conciliation. As member states, we must dedicate ourselves to preventive diplomacy. The annual debate is an opportunity to deepen the Committee's dialogue on this topic.

With respect to items on the Committee's agenda concerning the maintenance of international peace and security, the United States continues to note the positive developments that 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. We will look forward to the annual briefing on sanctions, and the biannual briefing on Article 50, and hope that these discussions will further advance an effective and appropriate approach to the use of sanctions.

The United States continues to believe that the Committee should not pursue activities in the area of the maintenance of peace and security 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 working paper that calls, among other things, for a Charter Committee legal study of General Assembly powers, as well as a longstanding proposal regarding UN reform. On the question of the General Assembly requesting an advisory opinion on the use of force from the International Court of Justice, we have consistently stated that the United States does not support the proposal.

However, we also continue to believe that consideration of the proposal of Ghana could lead to fruitful results, if its scope can be narrowed to areas where consensus is possible on how to fill specific gaps. We look forward to continued engagement and discussion in the working group.

The United States has welcomed productive steps in recent years to streamline the agenda of this Committee and to close the discussion of proposals that failed to generate consensus. We believe that there is more progress to be made in the area of productivity and 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 in past years 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.

With respect to proposals regarding new subjects that might warrant consideration by the Special Committee, the United States continues to stand ready to engage on matters that have the potential to add value. These new items should be practical, non-political, and not duplicate efforts elsewhere in the United Nations. In addition, we would not wish this Committee to become a forum for the airing of bilateral concerns, or for meaningful discussion within its mandate to be displaced by consideration of topics more appropriately raised in other forums. In particular, concerns about the obligations of the host country should be raised in the dedicated Host Country Committee. We do not support the new proposal concerning unilateral coercive measures, and also have serious doubts about the new proposal concerning Article 51. We believe consideration of these politically charged topics has little prospect for generating consensus in this committee.

Finally, we thank the Codification Division of the Office of Legal Affairs for their continued work on the Repertory of Practice of the United Nations Organs and the Repertoire of the Practice of the Security Council. 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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4. Responsibility of International Organizations

On November 11, 2020, Deputy Legal Adviser Julian Simcock delivered the statement on behalf of the U.S. Mission to the UN regarding the responsibility of international organizations. Mr. Simcock's remarks are excerpted below and are available at <https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-88-responsibility-of-international-organizations/>.

We appreciate the work of the International Law Commission on the responsibility of international organizations, which is an important topic in light of the number of international organizations and their growing functions. We also express our gratitude to the Secretariat, in particular the Office of Legal Affairs, for compiling the two reports that form the basis of our discussion today. The Reports enable us and the rest of the international community to stay

current on the development of the law in this area. It was informative to review the application of the draft Articles by several arbitral and judicial bodies between 2017-2019. However, the limited development of the law in this area since the last time this topic was on our agenda confirms that it is not appropriate to take further action on the draft Articles.

In light of the lack of significant developments in this area over the last three years, we reiterate the view we have expressed on past occasions that many of the rules contained in the Draft Articles fall into the category of progressive development rather than codification of the law, a point expressly recognized in the General Commentary introducing the Draft Articles. We continue to agree with the Commission's assessment that the provisions of the present Draft Articles do not reflect the current law in this area to the same degree as the corresponding provisions on state responsibility. In this connection, we again highlight our view that the principles contained in some of the Draft Articles – such as those addressing countermeasures and self-defense – likely do not apply generally to international organizations in the same way that they apply to states.

Given these considerations and the significant differences of opinion that remain regarding which principles should govern and how they should operate, the United States continues to hold the view that the Draft Articles should not be transformed into a Convention.

5. Annual Program Budget

On December 31, 2020, the United States called for a vote in the UN General Assembly and voted against the 2021 UN Program Budget. In a press statement, available at <https://2017-2021.state.gov/u-s-vote-against-the-united-nations-2021-program-budget/>, the State Department provided the following explanation:

[I]t is outrageous that the UN will fund in 2021 an event to promote the objectives of the Durban Declaration—a document saturated with anti-Semitism, anti-Israel bias, and hostility toward freedom of expression. Over the last 20 years, the United States has consistently opposed the corrosive Durban process. We call on all UN member states to seek new means to address constructively and inclusively the challenge of racism and racial discrimination. The United Nations should never serve as a platform for those determined to divide and diminish, but sadly that is all too often the case. For our part, we will continue to hold the United Nations to a higher standard.

B. INTERNATIONAL COURT OF JUSTICE

1. General

On December 18, 2020, Deputy Permanent Representative Richard Mills delivered remarks at a UN Security Council open debate on cooperation between the UN Security Council and the International Court of Justice. Ambassador Mills's remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-security-council-open-debate-on-cooperation-between-the-un-security-council-and-the-international-court-of-justice-via-vtc/>.

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We are pleased that South Africa has organized this debate. The Security Council receives an annual briefing from the President of the International Court of Justice and exchanges views about issues of common interest, but those meetings by custom are held in private. In this 75th anniversary year of the Court, it is fitting that we have a second opportunity to highlight the crucial role of the ICJ and to do so at a public meeting.

I would first like to extend our congratulations to those candidates recently elected or re-elected to the Court, as well as our deep gratitude to all of the candidates for their dedication to the field of international law.

We appreciate the opportunity to address the relationship between the Court and the Security Council and the complementary role these principal organs play in the maintenance of international peace and security. The ICJ plays a vital role in promoting and preserving the rule of law, and in advancing international peace and security through the peaceful resolution of disputes.

The increasing workload of the ICJ demonstrates a recognition by Member States that accept its jurisdiction that it is preferable to resolve disputes peacefully through the ICJ rather than to allow them to fester and possibly lead to conflict. That these disputes may, as a result, never reach these chambers reinforces the effectiveness of the UN framework. As situations develop into matters requiring the Security Council's attention, we must, of course, remain mindful of where the Court might play a role while preserving the fundamental principle enshrined in the ICJ Statute of State consent to judicial settlement of disputes.

We are also mindful that the UN Charter, as we've heard, provides in Article 33 that parties to a dispute that is likely to endanger international security and peace shall first seek a solution through the peaceful means of their choice, which can run from negotiation, mediation, conciliation, arbitration, or judicial settlement.

Many disputes are successfully resolved through other means of dispute settlement, so that they never need to reach the Security Council or the ICJ. And with the multiplicity of available dispute settlement mechanisms, such as regional courts and international tribunals, parties to a dispute have a range of avenues to consider to resolve their disputes. And it is gratifying to know that for those Member States that accept its jurisdiction, the ICJ stands ready to adjudicate their disputes.

We should not forget, on this 75th anniversary, that there once was a day when territorial disputes, and even trade matters, were resolved, almost routinely, through military means. We should not take for granted how transformative the UN Charter and the ICJ Statute were when they were adopted, including in their advancement of the peaceful resolution of disputes in accordance with international law. On this 75th anniversary of the UN and of the ICJ, we celebrate their contribution to the promotion of the rule of the law and the preservation of international peace and security.

Mr. President, finally, let me add a few words as well about the trust fund to support participation in the ICJ judicial fellowship program. The program was founded in 1999, through an initiative of a very prominent law school in our host city: the New York University School of Law. The program has expanded over the years so that dozens of law school graduates have benefited from this worthy, valuable opportunity to work with and learn from the Judges of the ICJ.

We certainly agree that recent law school graduates from developing countries should also have the opportunity to participate in the ICJ's judicial fellowship program. Increasing opportunities for future practitioners of international law to learn about the Court and learn from its esteemed judges will itself serve to strengthen the rule of law and help to spread awareness of the valuable role the Court can play in the promotion of international peace and security.

Accordingly, we were very pleased to co-sponsor and to join consensus on the resolution establishing the trust fund, which the General Assembly adopted on Monday of this week.

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2. *Alleged Violations of the 1955 Treaty of Amity*

See *Digest 2018* at 220-27 for background on this case at the ICJ. On September 14, 2020 the ICJ held oral proceeding on the U.S. preliminary objections in *Alleged Violations of the 1955 Treaty of Amity*. The opening remarks of Legal Adviser Marik String are excerpted below. *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Iran v. U.S.), Verbatim Record 2020/10 (Sep. 14, 2020, 3 p.m.), <https://www.icj-cij.org/public/files/case-related/175/175-20200914-ORA-01-00-BI.pdf>. The records of all oral proceedings in the case are available at <https://www.icj-cij.org/en/case/175/oral-proceedings>. The records of written proceedings, including the August 23, 2019 preliminary objections of the United States that were the subject of the 2020 oral proceedings, are available at <https://www.icj-cij.org/en/case/175/written-proceedings>.^{**}

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I. Introduction

1. Mr. President, Madam Vice-President, Members of the Court, it is my honour to appear as Agent of the United States in these proceedings. I am joined by two colleagues from the US

^{**} Editor's note: The Court rejected the U.S. objections in a February Judgment available at <https://www.icj-cij.org/en/case/175/judgments>.

Department of State—Lisa Grosh and Kimberly Gahan—who will present portions of our argument, together with Sir Daniel Bethlehem and Professor Laurence Boisson de Chazournes.

2. I wish to express, on behalf of the United States, our sincere appreciation for the Court's efforts to adjust its mode of work in view of the COVID-19 pandemic, while taking into account principles of due process and equality. I offer my best wishes for the health and safety of the Court and its staff, as well as the delegations participating in these proceedings.

II. Overview of the broader context of Iran's case

3. I turn now to our task in this hearing, to underscore the reasons why Iran's Application requires dismissal at this preliminary stage. It is well known that the United States has long considered Iran's conduct to present a grave threat to US national security and the safety and security of US nationals and interests, as well as to the security of our regional allies. These concerns are well founded in Iran's persistent actions: its support for terrorism, including terrorist acts that have taken, or threaten to take, the lives of US nationals; its supply of weapons and training to militant groups, fuelling conflict throughout the Middle East; its arbitrary and unlawful detention of US and foreign nationals; its development and proliferation of ballistic missile technology; and, of central significance to this case, its efforts to advance a destabilizing nuclear programme.

4. There is a deep and continuing record of Iranian misconduct in these areas, as addressed in detail in the US written submission. And it is important to be clear that these concerns—long-standing though they may be—persist and remain as urgent and necessary to address as ever.

5. The United States has engaged on a number of different tracks over the years to counter the threats posed by Iran. It has worked alongside other States within international organizations, such as the International Atomic Energy Agency (IAEA), in response to Iran's repeated violations of its nuclear safeguards obligations, which included the construction of undeclared nuclear facilities and the unreported importation, processing and enrichment of fissionable materials. It has pursued efforts in the Security Council, which—beginning in 2006—adopted a series of resolutions imposing measures to restrict Iran's nuclear activities, its trade in sensitive nuclear materials and technology, its ballistic missile-related activities, and its import and export of arms. And of course, the United States—like other States, as well as the European Union—has adopted measures under its domestic law to deter and discourage Iran from advancing these activities, and to deny it the materials, resources and capabilities to carry them out. The United States has adjusted its approach over time in light of the evolution of the threats posed by Iran and the need to develop effective means of addressing them.

6. In 2015, a political arrangement known as the Joint Comprehensive Plan of Action, or JCPOA, was concluded. The basic bargain in the JCPOA was that Iran would take steps to constrain its nuclear programme and provide greater transparency into it, while the United States and others would provide for the lifting of what were identified expressly by all sides, including Iran and the United States, as “nuclear-related” sanctions measures. Other areas of threatening Iranian activities, and the measures adopted to counteract them, were not addressed by the JCPOA.

7. After more than two years of implementing the JCPOA, the United States' assessment of whether this arrangement was advancing, or instead undermining, US national security had changed. As this Court well knows, the United States announced on 8 May 2018 that it would no longer participate in the JCPOA, and would not continue the lifting of US nuclear-related

sanctions measures, in view of the persistent national security threats posed by Iran and the inadequacy of the JCPOA to address them.

8. The United States summarized its reasons in a National Security Presidential Memorandum issued on the same date. These reasons are also discussed at length in our written submission and accompanying annexes, so I will touch upon them just briefly now. The broad range of non-nuclear threats posed by Iran had continued, and in some cases grown, during US participation in the JCPOA. The United States assessed that, instead of leading to an overall reduction in the national security threats to the United States posed by Iran, the JCPOA—and in particular the lifting of nuclear-related sanctions—had the opposite effect, strengthening not only Iran’s ability but also, crucially, its willingness to engage in other threatening activities outside the nuclear realm. The United States also explained its assessment that the JCPOA was not adequate in either the scope or duration of key commitments to address long-term concerns about Iran’s nuclear activities, particularly given Iran’s past deception regarding its nuclear programme and failures to co-operate as required with international inspectors. The United States concluded, in view of the totality of the threats posed by Iran, that it was in the national security interests of the United States to cease participation in the JCPOA.

9. The measures at issue in this case, which were reimposed as a consequence of that 8 May decision, reversed the US sanctions relief provided in the JCPOA. What Iran seeks in these proceedings is to obtain the Court’s assistance to nullify the effect of the United States’ decision to leave the JCPOA by giving Iran all the benefits that it would have received had the United States remained in the arrangement.

10. To accomplish this aim, Iran has resorted to an instrument that has nothing whatsoever to do with the JCPOA: the Treaty of Amity. It does so purely for purposes of trying to establish jurisdiction. The Treaty is well known to the Court, but the manner in which Iran is using it once again necessitates careful scrutiny. That scrutiny will show that this case should not proceed to the merits.

11. The measures that Iran challenges remain critical to the United States’ efforts to address the national security threats posed by Iran, including the current threat posed by Iran’s nuclear programme. The IAEA reported recent failures by Iran with respect to its nuclear safeguards obligations. Furthermore, Iran has engaged in enrichment and stockpiling of nuclear materials, as well as nuclear-related research and development activities, in clear failure to uphold its commitments under the JCPOA. Whatever Iran says about the reasons for its actions, they leave little room for doubt that depriving Iran of the means to further its destabilizing nuclear escalations is of continued and vital national security interest to the United States.

III. Developments since the last hearing

12. Against this backdrop, I would like to address two points that have arisen since the last hearing in this case in late August 2018. As the Court noted in its Judgment on preliminary objections in *Certain Iranian Assets*, on 3 October 2018, the United States gave notice to Iran of the Treaty of Amity’s termination. The United States recognizes that the termination of the Treaty does not go to questions of jurisdiction, as Iran’s Application was submitted before the termination. But it is not correct to assert, as Iran does, that the Treaty “remains in force” for the purposes of this case. There can be no mistake about this: the Treaty of Amity is no longer in force.

13. Second, inasmuch as Iran has raised the point in its written submissions, I would like to affirm before the Court that the United States is acting fully in accordance with the Court’s provisional measures Order. As the Court will know from the detailed US correspondence to the

Court on this subject, the United States has taken significant steps since the *issue* of the Order to ensure the effectiveness of all relevant humanitarian exceptions, exemptions and authorizations, and to ensure that the reimposition of measures at issue in this case has not posed an impediment to the exportation to Iran of the goods and services identified in the Order. That said, this hearing is not about the issuance or compliance with the provisional measures Order. The task in the coming days is, rather, to address the US preliminary objections.

IV. Overview of US objections

14. Mr. President, Members of the Court, I turn now to outline briefly the remainder of our presentations today.

15. First, Mr. Bethlehem will elaborate on the inescapable reality that the real issue in dispute concerns Iran's attempt to obtain from the Court the sanctions relief that was provided under the JCPOA, an issue that is well outside the Treaty of Amity.

16. Next, Ms Grosh will address the fundamental mismatch between the Treaty's provisions and the measures that Iran challenges. The Treaty's provisions address specific elements relating to the Parties' *bilateral* economic and consular relations. They do not address measures concerning trade and transactions between one party and a third country, or between their nationals and companies—what we refer to as “third country measures”.

17. Next, Ms Gahan, building on Ms Grosh's submissions, will explain that the vast majority of the challenged measures are such third country measures. The Court should accordingly dismiss claims predicated on those measures for lack of jurisdiction.

18. Professor Boisson de Chazournes will conclude our submissions today by explaining why, in any event, in this case, and in accordance with Article 79 of the Rules of Court, the Article XX exceptions in the Treaty of Amity concerning measures relating to fissionable materials and measures that are necessary to protect the essential security interests of a party preclude Iran's claims from proceeding to the merits.

V. Conclusion

19. Mr. President, Members of the Court, the United States has deep respect for this Court's role in the peaceful settlement of disputes. We are here to argue our case. But Iran has brought to the Court a dispute whose subject-matter does not fall within the Treaty of Amity. Iran has done so in relation to issues of the utmost gravity from the perspective of US national security: namely, the need to address Iran's destabilizing nuclear programme, as well as its ballistic missile activities, support for terrorism and regional destabilization, and the arbitrary and unlawful detention of US nationals. Iran's efforts to shoehorn this dispute into a legal instrument not intended for the purpose run counter to the aim of resolving these issues and are entirely without merit. For all the reasons you will hear over the course of the day, we respectfully request dismissal of Iran's case.

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3. Request for Advisory Opinion on the British Indian Ocean Territory

As discussed in *Digest 2018* at 235-51, and *Digest 2019* at 219-21, the United States participated in ICJ proceedings in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Request for Advisory Opinion). The ICJ issued its advisory opinion in 2019. On February 3, 2020, the United States provided a submission to the UN Secretary General, included in his May 18, 2020 report on the advisory

opinion of the ICJ. U.N. Secretary-General, Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965: Rep. of the Secretary-General, U.N. Doc. A/74/834 (May 18, 2020). https://digitallibrary.un.org/record/3865093/files/A_74_834-EN.pdf. The U.S. submission follows.

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The United States recognizes the important work of the General Assembly and the International Court of Justice, and recalls that their respective mandates must be exercised consistent with the right of States to determine for themselves how to peacefully settle their disputes. This fundamental principle of international law is reflected in both the Charter of the United Nations and the deliberate limitations that States elected to place on the Court's jurisdiction.

Consistent with this principle, the United States voted against General Assembly resolutions 71/292 and 73/295. These resolutions respectively sought and welcomed an advisory opinion inappropriately designed to address a bilateral dispute between Mauritius and the United Kingdom regarding sovereignty over the British Indian Ocean Territory, also referred to as the Chagos Archipelago. The United States did not support referral of this matter to the International Court of Justice out of concern that it could set a dangerous precedent, including by disregarding the fundamental principle of international law that States must consent to adjudication of their bilateral disputes. During the debate in the General Assembly on resolution 71/292, other States Members of the United Nations expressed similar concerns and ultimately less than half voted in favour of referring the request to the Court.

However, out of respect for the International Court of Justice and given the potential implications of this improper request, the United States participated fully in the proceedings before the Court. It is notable that there was no disagreement among participants in those proceedings that the questions referred bore directly and significantly on an ongoing bilateral dispute over sovereignty, or indeed that the purpose of the referral was to adjudicate that sovereignty dispute. Attempts to present the questions as ones that might guide the General Assembly in the exercise of its decolonization mandate neither altered that reality nor displaced the principle of consent to judicial settlement as an important constraint on the Court's jurisdiction.

The General Assembly, in its resolution 73/295, did nothing to allay these concerns, including in its suggestion that a non-binding advisory opinion of the Court could not only resolve a bilateral dispute but also lead to obligations for third States and international organizations to take steps in support of one side in that dispute. This is a troubling mischaracterization of the effect of the Court's opinion, a mischaracterization that reflects conclusions that are unsupported by either the historical record or the Court's own test for determining the existence of rules of customary international law, as is made clear in the submissions of the United States during the course of the proceedings before the Court.

Indeed, the approach taken by the General Assembly in its resolution 73/295 suggests that a State that is party to any bilateral dispute could be compelled to have its sovereignty dispute adjudicated through the Court's advisory opinion procedure simply through a recasting of its claim as a matter that could be addressed by the General Assembly. This position would

effectively dispose of the non-circumvention principle, as well as rewrite the careful and conscious jurisdictional limitations that were placed upon the Court.

In conclusion, the United States reiterates its unequivocal support for the position that the United Kingdom is and remains sovereign over the British Indian Ocean Territory, as has been the case continuously since 1814. Furthermore, the United States notes that the arrangement involving the joint United States-United Kingdom military base in the British Indian Ocean Territory is grounded in the uniquely close and active partnership between the United States and the United Kingdom. The Territory's status as a United Kingdom territory is essential to the value of the joint United States-United Kingdom base in the Territory, which is critical to not only shared security interests but also our broader efforts toward global security. The importance of the base to the Indian Ocean region and beyond has been recognized by many States. The location of the shared base enables the United States and the United Kingdom to provide a rapid response in times of humanitarian crisis and allows us, with our allies and partners, to combat some of the most challenging threats to global peace and security, including terrorism and piracy, natural disasters and various types of maritime crime, including trafficking in persons and illicit drugs, as well as illegal, unreported and unregulated fishing.

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C. INTERNATIONAL LAW COMMISSION

Deputy Legal Adviser Julian Simcock delivered remarks on November 5, 2020 at a meeting of the Sixth Committee on the report of the International Law Commission. Excerpts follow from Mr. Simcock's remarks, which are available at <https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-80-report-of-the-international-law-commission/>.

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We would like to express our gratitude to the chair designate and secretary of the International Law Commission for their reports today, and we ask them to accept our thanks on behalf of the entire Commission for its work. We also thank the Office of Legal Affairs, and particularly its Codification Division, for its continued effort to support the work of the ILC.

The United States remains committed to the important work of the ILC. We reaffirm the written and oral comments that we offered last year on several ILC projects, and we look forward to submitting our written comments by June 2021 on the drafts regarding peremptory norms in general international law or *jus cogens*, and protection of the environment in armed conflict. We urge the members of the Commission to take these comments fully into account as they revise their work products.

We also read with interest the reports drafted last spring by the various special rapporteurs, as well as the chairs of the sea-level rise working group. We will not be providing comments on those reports today, as the full Commission did not have an opportunity to work through those reports over the summer. To comment on those projects now would therefore be

premature. Our silence on those matters today should not, however, be regarded as indicative one way or the other of the U.S. position on any specific aspect of those reports.

The United States appreciates the difficulty faced by the ILC in conducting its business during the pandemic, and the complications presented by virtual meetings. We trust the ILC's assessment of what is, and what is not, possible to accomplish on its substantive projects before it reconvenes in Geneva.

In this regard, the United States has a modest proposal for procedural work that might be accomplished virtually. As the U.S. delegation and others have pointed out in previous years, there is some confusion about the range of ILC work products, which in the past two decades has included draft articles, principles, conclusions, guides, and guidelines. The precise difference between some of these various frameworks is not readily apparent. Even when adopting the same framework over multiple projects the format and content of the final work products vary significantly. In addition, some recent products styled as draft "principles" or "conclusions" have included material more appropriate for draft articles — including, for example, binding language and dispute resolution clauses.

The United States therefore proposes that the ILC consider drafting a practice guide for the selection of the framework of its work products. This practice guide could detail the criteria for the selection of a particular work product framework, the types of provisions that may be included within that framework, and what the legal implications of the framework choice might be, if any.

We hope the ILC finds this proposal useful. On behalf of the United States, we send our best wishes for the health and safety of the ILC Members and their families during these difficult times.

* * * *

D. ORGANIZATION OF AMERICAN STATES

1. Actions on Venezuela

On January 17, 2020, Secretary Pompeo addressed the Organization of American States ("OAS") regarding Venezuela. His remarks are excerpted below and available at <https://2017-2021.state.gov/the-oas-revival/>.

* * * *

Throughout this past year, the OAS has been a vanguard for helping the Venezuelan people, they who are so downtrodden and starving because of Maduro's cruelty.

In only three months—very fast by diplomatic standards—we sat a new representative from Venezuela to the OAS, Ambassador Tarre.

We have helped bolster Juan Guaido's legitimacy in the international community, despite Maduro's best efforts to undermine him.

We revived the Rio Treaty, which led to increased travel restriction on Maduro and dozens of other officials. And you all should know that more actions will be coming.

Maduro certainly knows that we mean business. It's why he sought to withdraw Venezuela from this institution, the OAS. We welcomed Venezuela's new representative before he got the chance to do so.

We mean what we say in that charter that ...the previous speakers referred to. The OAS Charter says as follows, quote: "Representative democracy is an indispensable condition for the stability, peace, and development of the region."

This is multilateralism, nations coming together in a way that truly does work.

These have been landmark actions, and in taking these actions we're returning to the spirit the OAS showed in the 1950s and 1960s. We sent election monitors to Costa Rica in 1962. Two years later, we imposed sanctions on Cuba for attempting to overthrow the democratically elected Government of Venezuela by force.

But sadly, the OAS drifted in the 1970s and 1980s. Military dictatorships in our hemisphere colluded to prevent concerted action to support freedom. Some Latin American countries were still in the thrall to leftist ideas that produced repression for their own kind at home and stagnation in this building. And even in the early part of this century, with the OAS, many nations were more concerned with building consensus with authoritarians than actually solving problems.

But the good news is—and I'm so proud of what you all have accomplished—that's all changed. ...

As I said in Santiago last year, in 2019, people of the Americas have brought a new wave of freedom, freedom-minded governments all throughout our hemisphere. Only ...in Cuba and Nicaragua and Venezuela do we face stains of tyranny on a great canvas of freedom in our hemisphere.

Look at the work that we have all done together. We have rejected despotism this year, besides what we've done in Venezuela.

In Nicaragua, the Permanent Council named a Commission of Member States that has investigated the Ortega regime's killing of hundreds and made clear recommendations for the future of that country.

More recently, the OAS honored the former Bolivian government's request to conduct an audit of the disputed election results. The probe conducted uncovered proof of massive and systemic fraud. It helped end the violence that had broken out over the election dispute. It helped the Bolivian Congress unanimously establish a date and conditions for a new election. And it honored ... the Bolivian people's courageous demand for a free and fair election, and for democracy.

These actions didn't happen within the OAS by accident. It took hard work. They happened because the member states ... decided to use the organization to get results. All of us, together.

They happened because we have a leader for our times as well. Secretary Almagro is fearless in guarding against authoritarian regimes. He believes in multilateralism that holds people accountable, that puts new ideas on the table, and forces countries to take a position.

He restored the OAS financial health too—building the reserve fund and strengthening internal financial controls. This is crucial to making the OAS effective in promoting prosperity throughout the region.

Just a handful of years ago, ...the U.S. Congress openly entertained slashing funding for the OAS. Now Congress, America's Congress, is more eager than ever to support what we're doing together, because his leadership values capture the bipartisan values of freedom and of

democracy. And the good financial management here too gives confidence that OAS progress will be effective, cost-effective, and transparent.

Secretary Almagro is worthy of our respect and our admiration. The heroes in the Hall of the Americas would be proud of what he's done. He is a true champion for freedom throughout our entire hemisphere.

And his example isn't just for those of us in the room. I think other leaders and other organizations—from the UN, to ASEAN, to NATO—should take note of how this institution has been run by the Secretary General ...

* * * *

2. Summit of the Americas

On July 10, 2020, Acting Assistant Secretary of State for Western Hemisphere Affairs Ambassador Michael Kozak accepted the chair of the Ninth Summit of the Americas on behalf of the United States. See media note, available at <https://2017-2021.state.gov/the-united-states-assumption-of-the-summit-of-the-americas-chair/>.

The media note explains:

The United States will host the Summit in 2021.

Acting Assistant Secretary Kozak participated in a virtual handover ceremony with the Organization of American States (OAS) Secretary General Luis Almagro, Peruvian National Summit Coordinator Luis Enrique Chávez, and OAS Secretary for Hemispheric Affairs Ambassador James Lambert. Acting Assistant Secretary Kozak recognized Peru for its leadership and vision for the Summit of the Americas process over the last four years which focused on the role of democratic governance in the fight against corruption.

3. 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 adopted by the countries of the Americas in a 1948 resolution. The American Convention is an international agreement 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).

By the end of 2020, the IACHR appears to have successfully cleared the backlog of individual petitions pending its initial action on admissibility. This marked the conclusion of a years-long effort by the IACHR, with sustained encouragement from the United States, to resolve this substantial backlog in petitions. In the process of working through its backlog of petitions, the Commission's activity with respect to the United States increased in various respects. Since mid-2018, the Commission adopted sixteen merits reports making recommendations to the United States, fourteen of which concerned death penalty matters. The two non-death penalty matters concerned a Guantanamo Bay detainee and brothers of Japanese ancestry interned during World War II. During this same period, the Commission archived twenty-five petitions filed against the United States. In addition, the Commission determined seven petitions against the United States to be inadmissible in their entirety. The Commission also closed several requests for precautionary measures. These outcomes are best viewed in light of the practice of the Commission, which is not to adopt merits reports in favor of the United States.

In 2020, the United States continued its active participation before the IACHR through written submissions and participation in a number of hearings. The United States submitted responses to 26 petitions in 2020. Specifically, the United States submitted responses on the admissibility of 20 petitions and the merits of another six petitions; the United States responded to an additional four requests for precautionary measures and one request for information.

In addition to its written engagement, the United States participated virtually in three "periods of sessions" convened by the Commission. This consisted of two "thematic" hearings, requested by civil society on matters of interest to the Commission, and three closed working meetings on completed cases. No petition-based hearings were convened for the United States.

The United States also submitted a response to the Inter-American Court of Human Rights (IACtHR) on a request for an advisory opinion on the compatibility of executive term limits with human rights obligations and commitments under various Inter-American instruments, only the fifth such response submitted by the United States. In addition, the U.S. delegation participated virtually in two hearings convened by the Inter-American Court: one on the request regarding executive term limits, and the other on a request concerning obligations of a state denouncing the American Convention on Human Rights and purporting to withdraw from the OAS (on which the United States submitted a written response in 2019). Apart from a 1989 advisory proceeding on the normative status of the American Declaration on the Rights and Duties of Man, these appear to be the only appearances by the United States before the Inter-American Court.

Significant U.S. activity in matters, cases, and other proceedings before the IACHR and IACtHR in 2020 is discussed below. The United States also corresponded in other matters and cases not discussed herein. The 2020 U.S. briefs and letters discussed below, along with several of the other briefs and letters filed in 2020 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. Petition No. P-2528-17: Allen

On September 3, 2020, the United States submitted its response to a petition by Bridget Allen, relating to foreclosure on Petitioner's property in 2013, in which she alleges the United States is engaged in "genocide of black residents of the United States." The U.S. response, from which the discussion section is excerpted below, raises numerous procedural objections.

* * * *

The matters addressed by the Petition are not admissible and must be dismissed because the Petition fails to meet the Commission's established criteria in Articles 31, 32, 33, and 34 of the Rules. Claims presented in the Petition are beyond the *ratione personae* and *ratione materiae* competence of the Commission. Moreover, Petitioner has not exhausted the domestic remedies available in the United States, as required by Article 20(c) of the Commission's Statute and Article 31 of the Rules. The Petition is not in compliance with the deadline for the presentation of petitions under Article 32 of the Rules. Because the Petition has apparently been submitted to another international governmental organization, it is precluded by the rule against duplication of procedures under Article 33 of the Rules. Finally, the Petition is 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, and it is manifestly groundless under Article 34(b).

A. Claims based on Instruments beyond the American Declaration are Inadmissible because they are outside the Commission's Competence *Ratione Materiae*.

Petitioner does not allege that the United States has "violated" the American Declaration. Instead, Petitioner purports to submit the Petition pursuant to 1948 Genocide Convention, "ICCPR Optional Protocol," CAT, ICESCR, and a U.N. Resolution. Each of these instruments is outside the Commission's competence *ratione materiae*. Under Article 34(a), the Commission may only consider petitions that state facts tending to establish a violation of the rights referred to in Article 27 of the Rules. Article 27, in turn, directs the Commission to "consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights [(‘American Convention’)] and other applicable instruments" Article 20 of the Commission's Statute and Article 23 of the Rules identify the American Declaration as an "applicable instrument" with respect to nonparties to the American Convention such as the United States. The United States is not a party to any of the other instruments listed in Article 23, and in any event, Article 23 does not list the 1948 Genocide Convention, the "ICCPR Optional Protocol," CAT, ICESCR or the cited U.N. resolution. Consequently, the Commission lacks competence to apply any instrument beyond the American Declaration with respect to the United States. As such, Petitioner's claims, which are based on such instruments, are inadmissible under Article 34(a) as outside the Commission's competence.

B. Claims based on *Actio Popularis* are Inadmissible because they are outside the Commission's Competence *Ratione Personae*.

To the extent that Petitioner articulates generalized allegations beyond those cognizable in relation to Petitioner, the Petition must be dismissed because the Commission lacks competence *ratione personae* to entertain claims based on a theory of *actio popularis*. The Petition is filed on behalf of Petitioner Bridget Allen. Therefore, the Commission only has competence to review particularized claims, to the extent such claims have been articulated, with respect to this named Petitioner. As it has explained on numerous occasions, the Commission has competence to review individual petitions that allege “concrete violations of the rights of specific individuals, whether separately or as part of a group, in order that the Commission can determine the nature and extent of the State’s responsibility for those violations[.]” The Commission’s governing instruments “do not allow for an *actio popularis*.” Consequently, an individual petition is not the proper means by which to request a decision about alleged violations suffered generally by “black residents of the United States,” “all black persons,” or “black victims known and yet to be identified.” Such claims are beyond the *ratione personae* competence of the Commission and out of order in the context of an individual petition. This same conclusion applies to Petitioner’s claims pertaining to what she refers to as “Debtors’ Prisons” in Ferguson, Missouri, which claims are also inadmissible because the Commission’s governing instruments do not allow for an *actio popularis*.

C. The Petitioner has not Pursued or Exhausted Domestic Remedies.

To the extent that Petitioner might allege violations of the American Declaration that fall within the competence of the Commission, the Commission should declare the Petition inadmissible because Petitioner has not satisfied her duty to demonstrate that she 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. It ensures that the State on whose territory a human rights violation allegedly has occurred has the opportunity to redress the allegation by its own means within the framework of its own domestic legal system. A State conducting such judicial proceedings for its national system has the sovereign right to be given the opportunity to determine the merits of a claim and decide the appropriate remedy before resorting to an international body. The Inter-American Court of Human Rights has remarked that the exhaustion requirement is of particular importance “in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction.” The Commission has repeatedly made clear that petitioners have the duty to pursue available domestic remedies.

The Petition does not evidence that Petitioner has pursued any domestic remedies to attempt to redress her claims of alleged human rights violations and, on that basis alone, the Petition should be deemed inadmissible. For example, Section 42 U.S.C. § 1983 provides for suit against state government officials for violations of constitutional rights in U.S. district court. However Petitioner did not pursue her constitutional or civil rights claims against state officials. And, although Petitioner curiously indicated that the Petition was intended to provide the state of Virginia with notice of her intent to pursue certain tort claims in state court, there is no indication that such claims were pursued.

Instead, Petitioner unsuccessfully pursued a series of claims before the U.S. Court of Federal Claims, a court of special jurisdiction. The U.S. Court of Federal Claims explained that it lacked jurisdiction over Petitioner's civil rights and constitutional due process claims. As the Commission has noted, pursuit of claims that cannot provide a petitioner the relief he or she seeks do not satisfy the exhaustion requirement. For example, in *Josué Luís Zaar v. Brazil*, the Commission found that pursuit of administrative remedies incapable of providing relief was insufficient to satisfy the Commission's exhaustion requirement:

Based on the information provided by the parties, the Commission verifies that, as provided by domestic legislation, the alleged victim could have engaged competent judicial mechanisms However, he limited himself to the complaint filed with . . . a body with administrative jurisdiction that would not have been able to give the alleged victim what he was seeking. Thus, the Commission considers that this petition does not meet the requirement for exhaustion of domestic remedies.

Similarly, in its report in *Leonardo López Amancio v. Peru*, the Commission "reiterate[d] that the domestic remedies that must be taken into account for the purpose of exhaustion of domestic remedies are those capable of resolving the legal situation infringed." Because the remedies pursued in that case, even if resolved in petitioner's favor, "would not have remedied the situation brought before the IACHR," they were insufficient to satisfy the Commission's exhaustion requirement. The same reasoning is applicable to the instant Petition. Because Petitioner's claims before the U.S. Court of Federal Claims were not capable of providing remedies for Petitioner's human rights claims, those claims—even if they had been exhausted, though there is no indication that they were—would not be sufficient to satisfy the Commission's exhaustion requirement. Therefore, Petitioner has failed to satisfy the exhaustion requirement at Article 20(c) of the Commission's Statute and Article 31 of the Rules and the Petition must be dismissed.

D. The Petition is Inadmissible because it is Untimely under the Statute of Limitations.

Even if the Commission determines that Petitioner has exhausted her domestic remedies, which it should not, the Petition should be dismissed as untimely. Under Article 32(1) of the Rules, the Commission will only consider "petitions that are lodged within a period of six months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies." Here, the Commission received the Petition on December 22, 2017, which is more than six months after decisions were rendered by the U.S. Court of Federal Claims in 2013 and 2014 dismissing Petitioner's claims. The Commission applies the six-month requirement under article 32(1) strictly. Petitioner does not assert, and could not substantiate, entitlement to exemption from the exhaustion requirement under Article 31 of the Rules and, even if she had, could not demonstrate that the Petition was "presented within a reasonable period of time" within the meaning of Article 32(2). Petitioner failed to submit the instant Petition in conformity with the statute of limitations for petitions under Article 32 of the Rules, further rendering the Petition inadmissible.

E. The Petition appears to be Duplicative of other Procedures.

Article 33 of the Rules provides that the Commission "shall not consider a petition if its subject matter . . . essentially duplicates a petition pending . . . by another international

governmental organization of which the State concerned is a member.” The Petition is styled as a “UN OHCHR Petition and Complaint” and appears to be duplicative of a petition submitted to the Office of the High Commissioner of Human Rights. The OHCHR is a human rights organ of the United Nations, an international governmental organization of which the United States is a member. Therefore, it appears that the Petition is inadmissible under Article 33 of the Rules as duplicative of other procedures.

F. The Petitioners Fails to Establish Facts that Could Support a Claim of Violation of the American Declaration.

The Petition is also inadmissible under Article 34 of the Rules because it does not state facts that establish a violation of the American Declaration and it is manifestly groundless.

First, Petitioner alleges without basis that the United States has engaged in “Genocide of black residents of the United States” through generalized allegations of violations of several instruments beyond the competence of the Commission. However, Petitioner has not articulated facts that tend to establish any violation of any right in the American Declaration by the United States in this regard. Instead, Petitioner presents baseless assertions that, *inter alia*, the United States “has undertaken a massive cover-up to conceal that it has completely eliminated” Title VI of the Civil Rights Act of 1964, and engaged in a conspiracy “of takings of black citizens’ property, without their knowledge.” These frivolous claims do not state facts that tend to establish a violation of the American Declaration, including any violation of the right to life under Article I, pursuant to Article 34(a) of the Rules. Moreover, such claims are baseless and must be rejected under Article 34(b) of the Rules.

Second, to the extent that Petitioner has articulated particularized claims alleging human rights violations, it appears that those claims are based on alleged discrimination by various organs and entities of the state of Virginia and the Federal government. However, Petitioner has failed to state facts that tend to establish that she has suffered from unequal treatment before the law on the basis of race, sex, language, creed or any other factor within the meaning of Article II of the Declaration. The Petition asserts throughout that actions Petitioner complains of were motivated by discrimination. Yet Petitioner states no facts that tend to establish that actions she complains of were animated by a protected factor. The mere fact of Petitioner’s race or sex, without more, is insufficient to substantiate a claim that actions were taken with respect to her on an impermissible basis. Therefore, Petitioner’s claims based on alleged discrimination are inadmissible under Article 34(a) and 34(b) of the Rules.

Finally, the Petition includes a series of allegations of discrimination by private entities. It is well established that State responsibility for the conduct of private actors is limited to certain specific circumstances, none of which is present here. The International Law Commission has articulated such exceptional circumstances as arising where “the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.” Thus, for alleged private abuses to be attributable to the United States, Petitioner would have to show that each abuse occurred either as a result of control exercised or instructions given by the United States. Petitioner has shown nothing of the kind. The private conduct Petitioner complains of, even if true, could not be attributed to the United States under international law. Therefore Petitioner’s claims in this regard are inadmissible and cannot form the basis of any purported violation of the American Declaration.

* * *

For the foregoing reasons, the Petition is inadmissible under Article 34 of the Rules because it does not state facts that establish a violation of the American Declaration and because it is manifestly groundless.

G. The Petition Fails to Satisfy the Requirements for a Precautionary Measures Request.

While the Petition includes a request for precautionary measures, Petitioner fails to state how the Petition satisfies the requirements for such a request under Article 25 of the Rules. Article 25 reserves precautionary measures for “serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition or case before the organs of the Inter-American system.” The Petition fails to satisfy these elements, as defined in Article 25(2) of the Rules, and Petitioners present no argument to the contrary. There is no basis for a request by the Commission for precautionary measures in this matter.

The United States respectfully reaffirms its 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, the United States would construe any request by the Commission with respect to precautionary measures as recommendatory in nature.

* * * *

b. Petition No. P-2309-12: Carty

Excerpts follow from the May 4, 2020 U.S. response in *Carty*, a Texas death penalty petition raising consular notification and other issues.

* * * *

As discussed in more detail below, consular notification claims do not raise a violation of a human right enshrined in any international instrument to which the United States—or any OAS member to our knowledge—is a party or has endorsed. However, the United States takes its consular notification and access obligations very seriously.

Carty was twice given written notice that, if she were a foreign citizen, the appropriate consulate would be notified of her arrest. The first such notice was provided on May 17, 2001 (the day following her arrest), the second on May 21, 2001. On May 17, a Magistrate Judge asked Carty if she was a United States citizen, and she confirmed that she was a United States citizen. The accompanying written warning has been attached as Attachment 1. Had she informed the court that she was a foreign national, she would have received the following notice: “As a non-U.S. citizen who is being arrested or detained, you are entitled to have us notify your

country's consular representatives here in the United States. Do you want us to notify your country's consular officials?" Had she informed the court that she was a U.K. citizen, she would have additionally received the following notice: "Because of your nationality, we are required to notify your country's consular representative here in the United States that you have been arrested or detained. We shall notify your country's consular officials as soon as possible."

On May 21, 2001, she was given the following warning when she appeared before a Magistrate Judge, attached as Attachment 2:

"On this day, Carty, Linda, black, female, 42 years of age, personally appeared before me in the custody of Brenda Pope of HCSO, and I gave said accused the following warning: Carty, Linda, you have been accused of the offense of capital murder.

You have the right to retain counsel. You have the right to remain silent. You have a right to have an attorney present during any interview with peace officers or attorneys representing the state. You have a right to terminate an interview with peace officers or attorneys representing the state at any time. You have a right to request the appointment of counsel if you are indigent and cannot afford counsel, and you have a right to have an examining trial.

You are not required to make any statement and any statement you make may and probably will be used against you in your trial.

If you are not a citizen of the United States, you may have the right to contact your consulate. If you are a foreign national of certain countries, you have the right to have your consulate contacted for you. (emphasis added)

Carty signed underneath the sentence "I understand the above warning," and in the "remarks" section, the Magistrate Judge noted, "per Δ: she is a U.S. citizen," indicating that this warning was provided orally, as well as in writing.

During a competency evaluation performed by Dr. Edward Friedman, a court-appointed psychiatrist, on June 27, 2001, Carty stated that she was born in the U.S. Virgin Islands, which, at least in part, explains why Texas officials may not have suspected that she was a foreign national despite her accent.

* * * *

The matter addressed by the Petition is not admissible and must be dismissed because it fails to meet the Commission's established criteria in Article 20(c) of the Commission's Statute and Articles 31 and 34 of the Rules. The 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, includes claims beyond the *ratione materiae* competence of the Commission, and is manifestly groundless under Article 34(b). Finally, consideration of the Petition would be inappropriate in light of the Commission's Fourth Instance doctrine.

* * * *

b. Petitioner's Consular Notification Claim is not Cognizable under the American Declaration

Petitioner contends that when she was arrested, Texas authorities failed to tell her that she had the option of requesting that they notify the U.K. consulate of her detention, and that this alleged failure violated the VCCR.

This claim is inadmissible under Article 34(a) of the Rules for failure to state facts that tend to establish a violation of the rights in the American Declaration, and lacks merit in any

event. While the United States acknowledges that the Commission has taken a different view on this issue with respect to the VCCR, we respectfully maintain our firm position that the Commission does not, in fact, have competence to review claims arising under the VCCR. This lack of jurisdiction is not avoided by characterizing a claim as one arising under the American Declaration. Claims concerning consular notification do not give rise to a violation of a human right enshrined in any international instrument to which the United States is a party or has endorsed. Thus, Article 20 of the Commission's Statute and Articles 23 and 27 of the Rules preclude their consideration here.

As the United States has emphasized in numerous previous submissions, consular notification is not a human right. The VCCR's consular notification protections are based on principles of reciprocity, nationality, and function, and any rights arising from those protections attach to consular officers for the purpose of facilitating a foreign state's information about—and access to—its nationals. Nor is consular notification a necessary component of the right to a fair trial or the right to due process in criminal proceedings. In the *Avena* case, the International Court of Justice noted that neither the text, nor the object and purpose, nor the *travaux* of the VCCR support the conclusion that consular notification is an essential element of due process in criminal proceedings.

Moreover, the American Declaration's due process rights are not defined by the provisions of the VCCR. The availability of consular notification and access is premised on the existence of consular relations between governments. Consular access and assistance is thus undeniably a right exercised by the detained individual's State of nationality, through its consular officers, in order to facilitate that State's access to its national, as clearly stated in the introductory clause of Article 36(1) of the VCCR. As the plain text of Article 36(1)(c) provides: "*consular officers* shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation" (emphasis added). Nothing in this provision suggests that the right to access may be privately enforced by the detained individual.

Furthermore, consideration of other VCCR clauses supports this view. The VCCR's preamble states that "the purpose of [the] privileges and immunities [created by the treaty] is not to benefit individuals, but to ensure the efficient performance of functions by consular posts." And the introductory clause to Article 36 states that it was designed "[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State." Those clauses show that "the purpose of Article 36 was to protect a *state's right* to care for its nationals."

It is therefore up to representatives of the individual's State of nationality to determine whether or not to provide assistance, and the VCCR does not provide the detained individual any right or authority to demand it. While the State of nationality may diplomatically protest any failure to observe the terms of the VCCR and attempt to negotiate a solution, the individual does not have a judicially enforceable right to compel compliance. To accept the argument that Petitioner's consular notification claim amounts to a human rights violation under the American Declaration would require the untenable conclusion that any foreign national who is not given the option of consular notification at the time of arrest because of an absence of consular relations cannot receive a fair trial or due process of law.

Thus, because consular notification is not a right in the American Declaration, nor a component of any right therein, Article 34(a) of the Rules prevents the Commission from entertaining Petitioner's consular notification claims, and any such claims are meritless for the same reason.

Although this claim is inadmissible and meritless, the United States wishes to emphasize once again that it takes its consular notification and access obligations under the Vienna Convention very seriously and has made significant efforts over the past several years, as discussed in detail in several past proceedings before the Commission, to meet the U.S. goal of across-the-board compliance by domestic authorities. The United States has a robust outreach and training program on consular notification and access that targets federal, state, and local law enforcement, prosecutors, and judges. The centerpiece of this outreach is the regularly revised *Consular Notification and Access Manual*, a one-of-a-kind public resource also utilized as a best practice by governments of other States in seeking to improve their compliance with the VCCR's obligations. Among other things, the *Manual* provides detailed guidance on the law regarding consular notification and access, its application in a myriad of specific scenarios, and best practices. The *Manual* also contains sample consular notification statements in English, Spanish, and 27 other languages, sample fax sheets for providing notification, information on the applicable treaties, and sample diplomatic and consular notification cards, and contact information for foreign embassies and consulates in the United States. Since 1997, moreover, the U.S. Department of State has conducted more than 1,000 training sessions and distributed millions of manuals and pocket cards so that police and other officials may have easy access to the basic consular notification and access requirements.

Moreover, at the urging of the U.S. Departments of State and Justice, the Federal Rules of Criminal Procedure were updated in December 2014 to help facilitate compliance with U.S. consular notification and access obligations. Pursuant to these changes, under Federal Rules of Criminal Procedure 5(d)(1)(F) and 58(b)(2)(H), a defendant who is not a U.S. citizen and who has been charged with a federal crime shall be informed by a federal magistrate judge at the initial appearance that he or she “may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant’s country of nationality that the defendant has been arrested.” In addition to ensuring prospective compliance with our consular notification and access obligations, the United States is committed to honoring its obligations under *Avena*. The Commission is likely aware of our ongoing, concerted efforts over several years, including before the U.S. Supreme Court and with U.S. state officials, to give effect to the judgment. The Executive Branch has continued to take steps to promote compliance with *Avena*, including by seeking legislation. The United States reiterates its willingness to provide the Commission, at the Commission’s request, further updates as to its robust consular notification outreach efforts.

* * * *

c. *Petition No. P-2173-17: Citizens of Flint, Michigan*

On October 14, 2020, the United States submitted its response to the petition filed by certain *Citizens of Flint, Michigan* claiming that the “right to democracy” was violated in connection with the Flint water crisis. Excerpts follow from the U.S. response.

* * * *

The matter addressed by the Petition is not admissible and must be dismissed because it fails to meet the Commission's established criteria in Article 20(c) of the Commission's Statute and Articles 31 and 34 of the Rules. Claims presented in the Petition are beyond the *ratione materiae* and *ratione personae* competence of the Commission. Moreover, Petitioners have 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 and is manifestly groundless under Article 34(b). Additionally, consideration of the Petition would be inappropriate in light of the Commission's fourth instance doctrine. Finally, the Petition fails to satisfy the requirements for a precautionary measures request.

A. Claims based on instruments beyond the American Declaration, and certain provisions of the American Declaration, are inadmissible because they are outside the Commission's competence *ratione materiae*.

Petitioners allege that the United States has violated certain specific rights recognized in the American Declaration of the Rights and Duties of Man ("American Declaration"). As noted in numerous prior submissions, the United States has undertaken a political commitment to uphold the American Declaration, a nonbinding instrument that does not itself create legal rights or impose legal obligations on member States of the Organization of American States (OAS). ...

Moreover, although Petitioners anchor their claims in specific provisions of the American Declaration, in every instance, they attempt to expand the competence of the Commission by invoking an array of other international instruments to substantiate claims that international legal obligations have been violated. Petitioners identify such "applicable instruments" to include the OAS Charter, the Inter-American Democratic Charter, and the International Covenant on Civil and Political Rights. Petitioners also invoke, among other things, "regional custom," a U.S. decision applying the Alien Tort Statute, and a host of "developments" in "related areas of law." Claims based on such international instruments and purported authorities beyond the American Declaration are beyond the competence *ratione materiae* of the Commission and must be rejected as inadmissible.

Under Article 34(a), the Commission may only consider petitions that state facts tending to establish a violation of the rights referred to in Article 27 of the Rules. Article 27, in turn, directs the Commission to "consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights [('American Convention')] and other applicable instruments" Article 20 of the Commission's Statute and Article 23 of the Rules identify the American Declaration as an "applicable instrument" with respect to nonparties to the American Convention such as the United States. The United States is not a party to any of the other instruments listed in Article 23, and in any event, Article 23 does not list various instruments and bodies Petitioners rely on to articulate their claims. Consequently, the Commission lacks competence to apply any instrument beyond the American Declaration with respect to the United States. As such, Petitioners' claims, which at base are rooted in these such instruments and purported authorities, are inadmissible under Article 34(a) as outside the Commission's competence.

Moreover, Article 20 of the Commission's Statute further identifies the particular provisions of the American Declaration over which the Commission is empowered "to pay particular attention" vis-à-vis States not party to the American Convention. Article 20(a)

enumerates these as “the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration.” Therefore, Petitioners’ principal claim based on Article XX of the Declaration falls beyond the *ratione materiae* competence of the Commission and must be dismissed pursuant to Article 20 of the Commission’s Statute. Petitioners’ subsidiary claims under on Articles V and XI of Declaration also fall beyond the *ratione materiae* competence of the Commission and must be dismissed pursuant to Article 20 of the Commission’s Statute.

* * * *

C. The Petition fails to state facts that tend to establish a violation of the American Declaration and presents manifestly groundless claims.

The Petition is also inadmissible under Article 34 of the Rules because it does not state facts that establish a violation of the American Declaration and it is manifestly groundless.

1. Violation of Article XX of the American Declaration

Petitioners’ principal claim is that the United States violated Article XX of the American Declaration because, *inter alia*, the Local Financial Stability and Choice Act, Public Act 436 (PA 436) authorizes the appointment of emergency managers, who under certain circumstances exercise the power of the local government. Petitioners argue that, because such emergency managers are unelected, their appointment constitutes a violation their “right to democracy.” This claim is inadmissible under Article 34 of the Rules.

Article XX of the Declaration provides that “[e]very 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.” As is clear from the text, Article XX does not limit the ability of democratically elected state officials, by operation of law enacted by democratically elected representatives, to appoint certain local officials to exercise municipal functions.

It does not follow from a right to participate in the government of one’s country that each local official must be elected. Again, nothing in Article XX suggests that democratically elected state representatives may not, by operation of law enacted by democratically elected representatives, appoint local officials. This conclusion is consistent with the holdings of U.S. courts considering this matter. The U.S. Court of Appeals for the Sixth Circuit held, in addressing Petitioners’ claims:

American governments, whether state or federal, have subsidiary agencies that are led by appointed officials, and which make orders and regulations that may carry the force of law. No federal constitutional provision requires the administrators or boards that run these agencies to be elected. Suggesting as much would be revolutionary to our way of government, even assuming that a government under such a constraint could even function. . . .

The right to political participation does not require that each and every public official be elected. It should be recalled that public officials appointed pursuant to PA 436 remain subsidiary to democratically elected state officials.

To the extent that Petitioners complain about their enjoyment of the right to participate in government in the United States, such complaint is insufficient to constitute a claim under

Article XX of the American Declaration because the Commission should provide the United States with a margin of appreciation to implement that right. The Commission should defer to the discretion of local democratically elected actors who are required to make difficult decisions based on their own factual assessments. Such a margin of appreciation is particularly useful when implementation of a legitimate state goal requires fact-intensive judgment calls. The complicated factual and policy circumstances in this matter counsel strongly in favor of deferring to the discretion of those democratically elected officials responsible for decision-making. In these types of difficult cases, international bodies such as the Commission and the Inter-American Court of Human Rights use this “margin of appreciation” standard to respect State sovereignty and conserve their limited resources while still ensuring that human rights are protected.

Here, it is worth recalling the cautionary words of *Fadeyeva v. Russia*, a European Court of Human Rights case that has been cited by the Commission. *Fadeyeva* emphasized in another context that “States have a wide margin of appreciation,” that “the national authorities . . . are in principle better placed than an international court to evaluate local needs and conditions,” and that it is not for such a court “to substitute for the national authorities any other assessment of what might be best policy in this difficult technical and social sphere.” In this case, Petitioners’ arguments invite the Commission to intervene in domestic policy matters and substitute its policy judgment for that of national authorities with technical expertise in the relevant subject matter, legal competence to address the claims, and authority to impose appropriate remedies. This approach must be rejected because it is not supported by the provisions of the American Declaration on which Petitioners rely or by the facts in the record. Accordingly, Petitioners’ claim under Article XX of the American Declaration is inadmissible under Article 34 of the Rules.

2. Violation of Articles I, II, VI, and XI of the American Declaration

Petitioners allege that, “[a]s a consequence of the violation of the right to democracy, the United States violated numerous other rights under Inter-American treaty law.” Specifically, Petitioners argue that PA 346, “in undermining democracy, violated the right to life” as well as other rights defined by Petitioners, including under Articles I, II, VI, and XI of the Declaration. Petitioners attempt to bootstrap these subsidiary claims to their Article XX claim—perhaps in an effort to bypass their inadmissibility under Article 31 of the Rules—must be rejected under Article 34 of the Rules.

a. *Article I (Right to Life)*

Article I of the Declaration provides that “[e]very human being has the right to life, liberty and the security of his person.” As an initial matter, the Petition does not state facts that tend to establish that any of the thirteen named Petitioners suffered a violation of their right to life. Moreover, even if any of the named Petitioners could allege that their right to life had been violated, such deprivation or violation did not result (and as a matter of logic could not have resulted) from an alleged violation of the right to political participation under Article XX of the Declaration.

b. *Article II (Right to Equality Before the Law)*

Article II of the Declaration provides that “[a]ll 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.” The named Petitioners have failed to state facts that tend to establish that they have suffered from unequal treatment before the law on the basis of race, sex, language, creed or any other factor within the meaning of Article II of the Declaration. Moreover, again,

even if any of the named Petitioners could allege that their right to equality before the law had been infringed, such deprivation or violation did not result from an alleged violation of the right to political participation under Article XX of the Declaration.

c. Article VI (Right to Establish a Family)

Article VI of the Declaration provides that “[e]very person has the right to establish a family, the basic element of society, and to receive protection therefore.” Petitioners argue that “violation of the right to democracy also resulted in a violation of the right to protection of the family.” Petitioners’ claim that the alleged violation of Article XX of the Declaration by PA 346 also violated Article VI should be dismissed for failure to establish a claim and as manifestly groundless. Again, even if any of the named Petitioners could allege that their right to establish a family had been infringed, such deprivation or violation did not result from an alleged violation of the right to political participation under Article XX of the Declaration.

Moreover, the right to family reflected in Article VI was not intended to apply to the Petitioners’ situation. Rather, the language of this provision makes clear that it was intended to provide that all persons have the right to procreate and raise a family. The Commission’s own practice bears out this interpretation. In a case regarding the persecution of the Aché people in Paraguay, for instance, the Commission noted that the sale of children constitutes a “very serious” violation of the right to a family and to receive protection therefor. Moreover, in the case of the Gelman family in Uruguay, the Commission found the Gelman’s 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 similar direct State action, as required by Articles VI. Petitioners allege that the violation of their right to political participation, in and of itself, violated their right to family; even if this were true, this is not the type of direct state action that Article VI sought to target. Beyond this defect, the claim that one named Petitioner was “afraid” to procreate cannot be construed as a denial by the United States through PA 346 of the ability to procreate and raise a family within the meaning of Article IV.

d. Article XI (Right to Preservation of Health)

Article XI of the American Declaration provides that every person “has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.” Petitioners have failed to establish facts that could support a claim of violation of this provision. Article XI of the American Declaration articulates the “right to the preservation of health” through specific means: “sanitary and social measures” relating to “food, clothing, housing and medical care.” The right to the preservation of health through such measures under Article XI is further qualified “to the extent permitted by public and community resources.”

Petitioners have failed to articulate any violation of their rights to the preservation of health in the context of “sanitary and social measures” relating to “food, clothing, housing and medical care.” Instead, the Petition attempts to expand the scope of Article XI and relies on cases interpreting other, inapposite international instruments. It is important to emphasize that Article XI is not an open-ended right encompassing all things related to the concept of “health.” Rather, Article XI specifically contemplates the right to the preservation of health through “sanitary and social measures” relating specifically to “food, clothing, housing and medical care,” and further qualifies that right with the clause “to the extent permitted by public and community resources.” Article XI not only allows, but in fact requires, the balancing of the considerations enumerated therein, including scientific and technical resources and economic and social impacts. In other

words, even if Petitioners had successfully articulated a claim with respect to sanitary and social measures relating to food, clothing, housing and medical care—which they have not—such claim must further be weighed against the resource limitations expressly contemplated by Article XI itself.

The evaluation and balancing required by Article XI rests with the regulatory regime of the State and, for the reasons so cogently expressed in *Fadeyeva*, discussed above, must be accorded great deference. Section I of this Response demonstrates that the state of Michigan’s system under PA 346 is comprehensive and affords ample opportunity for participation by affected individuals and groups, and that Michigan has been, and continues to be, actively engaged in addressing the subsidiary concerns raised by Petitioners. This system may not be perfect, but its processes and results are entitled to the “wide margin of appreciation” demanded by *Fadeyeva*. Such deference to the expertise of domestic institutions is particularly mandated here, where the process of remediation is ongoing and evolving. And, even if Petitioners had, their claim is not cognizable *ab initio* under Article XI of the American Declaration because it falls beyond the preservation of health through sanitary and social measures relating to food, clothing, housing and medical care. Petitioners’ claim under Article XI of the American Declaration is therefore inadmissible under Article 34 of the Rules because it does not establish facts that could support a claim of a violation of this provision of the Declaration.

Taken together, Petitioners’ claim that their rights under Articles I, II, VI, and XI of the American Declaration were violated by PA 346, because that legislation allegedly violated Petitioners’ right to political participation, must be rejected under Articles 34(a) and 34(b) of the Rules. The claims are inadmissible under Article 34(a) of the Rules because the Petition does not state facts that tend to establish that PA 346 violated Petitioners’ rights under the American Declaration as Petitioners alleges; such claim is manifestly groundless within the meaning of Article 34(b) of the Rules.

* * * *

d. Petition No. P-3034-18: Dr. Ismail Elshikh and the Muslim Association of Hawai’i

The petition on behalf of Dr. Elshikh and others was filed after the Supreme Court of the United States upheld Presidential Proclamation 9645 (the final iteration of the so-called “Muslim Ban”) in *Trump v. Hawaii*, 585 U.S. ___, 138 S. Ct. 2392 (2018). The petition challenges the proclamation under the American Declaration. Excerpts follow from the U.S. response, submitted on November 13, 2020.

* * * *

The matter addressed by the Petition is not admissible and must be dismissed because it is, at least in part, beyond the *ratione personae*, *ratione materiae*, and *ratione loci* competence of the Commission and because it fails to meet the Commission’s established criteria in Articles 31 and

34 of the Rules. Petitioners failed to exhaust the domestic remedies available in the United States, as required by Article 20(c) of the Commission's Statute and 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 and is "manifestly groundless" under Article 34(b). Finally, review of the Petition would run afoul of the Commission's fourth instance doctrine.

* * * *

As established above, the Commission should find this Petition inadmissible because at least portions of the Petition are beyond the competence of the Commission and because Petitioners failed to exhaust domestic remedies. The Petition is also inadmissible because it fails to state facts that tend to establish violations of Petitioners' rights under Article 34(a) of the Rules and contains claims that are manifestly groundless under Article 34(b) of the Rules.

i. Article II (right to equality before law)

Article II of the American Declaration provides that "[a]ll 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." The Petition alleges that the Proclamation violated the rights of Petitioner Elshikh and members of the Muslim Association of Hawai'i to be free from discrimination. However, Dr. Elshikh and members of the Muslim Association of Hawai'i state they are U.S. citizens and lawful permanent residents of the United States. As such, they are not subject to the Proclamation. The Proclamation does not apply to United States citizens and expressly exempts lawful permanent residents. Therefore, Petitioners could not have been subject to a violation of their right to equality before law by operation of the Proclamation because the Proclamation does not apply to Petitioners. Petitioners may disagree with the Proclamation but such disagreement is insufficient to substantiate a claim of violation of their right to equality before law. Petitioners have therefore failed to state facts that tend to establish a violation of their rights to equality before law under Article 34(a) of the Rules.

ii. Article VI (right to establish a family)

Article VI of the Declaration provides that "[e]very person has the right to establish a family, the basic element of society, and to receive protection therefore." Petitioners assert that their right to establish a family has been violated because, for example, Dr. Elshikh is "unable to receive visits" of family who reside in countries covered by the Proclamation and because some family members of some members of the Muslim Association of Hawai'i "face similar obstacles" with respect to visitation by family members who reside in countries covered by the Proclamation.

The right to establish a family reflected in Article VI was not intended to apply to the Petitioners' situation. Rather, the language of this provision makes clear that it was intended to provide that all persons have the right to procreate and raise a family. The Commission's own reports bear out this interpretation. In a case regarding the persecution of the Aché people in Paraguay, for instance, the Commission noted that the sale of children constitutes a "very serious" violation of the right to a family and to receive protection therefor. Moreover, in the case of the Gelman family in Uruguay, the Commission found the Gelman's 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 similar State action, as required by Article VI. That Petitioners may face obstacles with respect to visits by family members from countries covered by the Proclamation is not sufficient to state facts that tend to establish that the United States has violated the right to establish a family under Article VI of the Declaration. In this respect, it should also be emphasized that the Proclamation expressly provides that a waiver of its restrictions may be granted where “the foreign national seeks to enter the United States to visit or reside with a close family member (*e.g.*, a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry would cause the foreign national undue hardship.” As noted above, it is unclear which Petitioners have allegedly suffered a violation of their right to establish a family, much less whether the individuals on behalf of whom Petitioners purport to assert claims pursued a visa and exhausted such waivers if they were determined to be inadmissible under the Proclamation, before submitting this Petition to the Commission. The Petition’s claim based on Article VI of the Declaration is inadmissible under Article 34(a) and 34(b) of the Rules.

iii. Article XXVII (right of asylum)

Article XXVII of the Declaration provides that “[e]very person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.” The Petition presents a generalized claim that asylum seekers from certain countries who were present in the United States were expelled without an asylum hearing. However, as noted earlier, Petitioners, Dr. Elshikh and members of the Muslim Association of Hawai’i, state they are U.S. citizens and lawful permanent residents of the United States; as such, Petitioners are not in a position to seek and receive asylum in the United States and therefore their right of asylum cannot have been violated by the United States. Moreover, the Proclamation exempts from its restrictions “any foreign national who has been granted asylum by the United States; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.” The Proclamation further provides that “[n]othing in this proclamation shall be construed to limit the ability of an individual to seek asylum, refugee status, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States.” Therefore, the Proclamation could not have violated Petitioners’ right to seek and receive asylum in the United States even if they had been in a position to exercise such a right. Petitioners’ claim under Article XXVII of the American Declaration is therefore inadmissible under Article 34(a) and Article 34(b) of the Rules.

iv. Article XXVI (right to due process of law)

Article XXVI provides that “[e]very accused person is presumed to be innocent until proved guilty,” and further provides that “[e]very person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.” Article XXVI, by its express terms, is limited to the criminal context as it refers to persons “accused of an offense.” As such, Petitioners have failed to state facts that tend to establish a violation of Article XXVI and this claim must be dismissed under Article 34(a) of the Rules.

Even if the Commission adopts a broader interpretation of Article XVII beyond the criminal context, it remains the case that Petitioners have failed to establish that the Proclamation deprived

them of any process to which they were due. As discussed above, Petitioners—Dr. Elshikh and the Muslim Association of Hawai’i—state they, or in the case of the Association, its members, are U.S. citizens and lawful permanent residents of the United States, and as such, are not subject to entry restrictions under the Proclamation. Therefore, entry restrictions under the Proclamation could not have deprived them of due process. For this additional reason, Petitioners have failed to state facts that tend to establish a violation of Article XXVI and this claim must be dismissed under Article 34(a) of the Rules.

To the extent that the Petition might refer to otherwise inadmissible, unexhausted claims on behalf of individuals who are not petitioners in this matter (i.e., neither Dr. Elshikh nor members of the Muslim Association of Hawai’i), who were allegedly denied entry into the United States, the United States notes that visas were not revoked pursuant to the Proclamation and that individuals subject to the Proclamation who possess a valid visa or valid travel document generally will be permitted to travel to the United States, irrespective of when the visa was issued. Any claim to the contrary is groundless and must be rejected under Article 34(b) of the Rules.

Lastly, to the extent that the Petition might refer to otherwise inadmissible, unexhausted claims on behalf of individuals who are not petitioners in this matter, who, under either the Proclamation or a different executive action, were allegedly denied entry into the United States, the United States notes that there is no right to a visa or entry under U.S. law. Further, a visa permits its holder to seek entry into the United States, but does not constitute a “vested legal right” to enter the United States under the Immigration and Nationality Act or any other authority. Nor does the American Declaration reflect any commitment on the part of the United States to create such a right. To the contrary, international law recognizes that every state has the sovereign right to control admission to its territory, and to regulate the admission and expulsion of foreign nationals consistent with its domestic laws and any international obligations it has undertaken. This principle has long been recognized as a fundamental attribute of State sovereignty. Accordingly, denial of admission to an alien—regardless of visa issuance—is not violative of any legal right and, accordingly, such denial does not constitute a violation of due process. Petitioners’ reference to the Inter-American Court of Human Rights advisory opinion, *The Juridical Condition and Rights of Undocumented Migrants*, is irrelevant to the instant matter because that opinion concerned due process rights associated with deportation, which is not at issue in the Petition, rather than admission.

In sum, Petitioners have failed to state facts that tend to establish a violation of Article XXVI of the American Declaration and the Petition must be deemed inadmissible under Article 34(a) of the Rules. Moreover, Petitioners’ claim that the United States has failed to live up to its commitments under Article XVIII is baseless and the Petition must also be deemed inadmissible under Article 34(b) of the Rules.

* * * *

e. Petition No P-502-18: G A-C- and others

On August 30, 2020, the United States submitted its response to the petition filed on behalf of “G A-C-” and others challenging the pardon of Joseph Arpaio, the elected sheriff of Maricopa County, Arizona, from 1993 through 2016.

* * * *

The matter addressed by the Petition is not admissible and must be dismissed because it fails to meet the Commission’s established criteria in Article 20(c) of the Commission’s Statute and Articles 31 and 34 of the Rules. Claims presented in the Petition are beyond the *ratione materiae* and *ratione personae* competence of the Commission. Moreover, Petitioner has not exhausted the domestic remedies available in the United States, as required by Article 31 of the Rules. The Petition is also 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 and is manifestly groundless under Article 34(b). Finally, consideration of the Petition would be inappropriate in light of the Commission’s fourth instance doctrine.

* * * *

The Petition is also inadmissible under Article 34 of the Rules because it does not state facts that establish a violation of the American Declaration and it is manifestly groundless.

1. Violation of Articles I, II and XXV of the American Declaration

Petitioner’s first claim is that the grant of executive clemency from any criminal sentence arising from Arpaio’s criminal conviction for contempt of court violated his rights to liberty, equal protection of the law, and fair trial under the American Declaration. This claim is inadmissible under Article 34 of the Rules.

Article I of the Declaration provides that “[e]very human being has the right to life, liberty and the security of his person.” Relatedly, Article XXV of the Declaration provides, *inter alia*, that “[n]o person may be deprived of his liberty except in cases and according to the procedure established by pre-existing law.” Although Petitioner claims that the grant of executive clemency from any criminal sentence arising from Arpaio’s criminal conviction for contempt of court violated his right to liberty, there are not facts in the Petition that tend to establish such a violation. Assuming that Petitioner suffered a violation or deprivation of his right to liberty in 2013 as he alleges, such deprivation or violation did not result (and as a matter of logic could not have resulted) from the 2017 pardon at issue. The 2017 pardon, and not Petitioner’s alleged detention in 2013, is the basis for the claims in the Petition. The pardon at issue had no impact on Petitioner’s right to liberty.

Article II of the Declaration provides that “[a]ll 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.” Petitioner has failed to state facts that tend to establish that the grant of executive clemency from any criminal sentence arising from Arpaio’s criminal conviction for contempt of court subjected Petitioner to treatment that is unequal before the law. Again,

assuming that Petitioner suffered a violation of his right to equal protection in 2013 as he alleges, such violation did not result (and as a matter of logic could not have resulted) from the 2017 pardon at issue. The pardon at issue had no impact on Petitioner's enjoyment of his right to equality before the law.

Taken together, Petitioner's claim that his rights under Articles I, II, and XXV of the American Declaration were violated by the 2017 grant of executive clemency must be rejected under Articles 34(a) and 34(b) of the Rules. The claims are inadmissible under Article 34(a) of the Rules because the Petition does not state facts that tend to establish that the 2017 grant of executive clemency violated Petitioner's rights under the American Declaration; such claim is manifestly groundless within the meaning of Article 34(b) of the Rules.

2. Violation of Article XVIII of the American Declaration

Petitioner's second claim is that the grant of executive clemency from any sentence that could have resulted from Arpaio's criminal conviction for contempt of court violated his right to resort to the courts under Article XVIII of the American Declaration. This claim is inadmissible under Article 34 of the Rules.

Article XVIII provides that "[e]very person may resort to the courts to ensure respect for his legal rights." Petitioner has failed to state facts that tend to establish that the grant of executive clemency from any criminal sentence arising from Arpaio's criminal conviction for contempt of court deprived Petitioner of access to the courts. The pardon at issue had no impact on Petitioner's access to courts in the United States. Nor has Petitioner stated facts that tend to establish that he was, at any point, deprived access to courts in the United States. In addition to this defect, Petitioner presents a series of related arguments that are beyond the scope of Article XVIII because they do not allege deprivation of Petitioner's access to courts within the meaning of Article XVIII; the United States will nevertheless address the points in turn.

Although Petitioner claims that the pardon "quashed the possibility of effective remedies to the victims of Arpaio's *continued* acts of discrimination and arbitrary detention," Arpaio had ceased to hold office in 2016, some two years before the Petition was filed; there could exist no "continued acts of discrimination and arbitrary detention" by Arpaio at the time the Petition was filed in 2018, much less to this date. Moreover, as early as 2016, plaintiffs in relevant underlying class action litigation no longer alleged that the MCSO remained in violation of the Court's 2011 preliminary injunction through continued engagement in unlawful detention practices. Petitioner's attempt to obfuscate the fact that Arpaio's unlawful conduct has long since been halted—and indeed, that Arpaio was voted out of office by the residents of Maricopa County—is unavailing.

Moreover, assuming that Petitioner qualified as a member of the *Melendres* plaintiff class—which his allegations, if true, suggest—he would have benefitted (and would continue to benefit) from the remedial orders issued in favor of the plaintiff class. These remedies included the creation of an independent disciplinary process to impose the MCSO employee discipline policies in a fair and impartial manner. These remedies also included an extensive victim compensation program to provide monetary remedy to victims of the unlawful practices of the MCSO. Again, these injunctive and other remedial measures were unaffected by the pardon at issue and remain in place. Although Petitioner alleges that the pardon "effectively terminated and made futile pursuit of [remedies]," Petitioner has not explained what such remedies he envisions

or how such remedies became unavailable to him as a consequence of the pardon as a factual matter. In any event, this claim is plainly refuted by the factual record. Petitioner would benefit from the remedies secured for the *Melendres* plaintiff class, and has failed to establish that he has been deprived any remedy as a result of the pardon at issue.

Relatedly, although Petitioner takes issue with the fact that Arpaio benefited from clemency in connection with any sanction that could have arisen from Arpaio's criminal contempt charge, it should be emphasized that the criminal conviction itself remains in place. As Judge Bolton noted in her decision not to vacate Arpaio's criminal conviction, the pardon "did not, however, 'revise the historical facts' of this case." Petitioner's invocation of the *Barrios Altos* line of cases in this context is misplaced. In *Barrios Altos*, the Inter-American Court of Human Rights found that domestic law purporting to confer amnesty over violations of certain "non-derogable rights recognized by international human rights law" is incompatible with the American Convention on Human Rights. In addition to the fact that the United States is neither a party to the American Convention nor subject to the jurisdiction (or jurisprudence) of the Inter-American Court, the reasoning of the *Barrios Altos* decision is not relevant to the claims in the Petition because the Petition does not allege that amnesty has been conferred over "non-derogable rights," identified by the court in that case as "serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance." Instead, the Petition concerns a prospective pardon for possible sanction arising from a contempt of court conviction. Whatever limitations international law may impose upon the effectiveness of domestic amnesty provisions over certain crimes under international law, those limitations are not implicated by the pardon at issue in the Petition.

Finally, the American Declaration does not prescribe sanction for a criminal charge of contempt of court, and the mere fact that Arpaio did not ultimately face such sanction does not give rise to an actionable claim by Petitioner under the American Declaration of a violation of any human right Petitioner enjoys under the Declaration. Petitioner's human rights were no more impacted by the pardon than they would have been had Arpaio not been referred for criminal prosecution for contempt of court in the first instance; Petitioner was not entitled to such referral, nor was he entitled to any particular outcome from such referral, including any imposition of a sanction upon a contempt of court conviction. Petitioner has failed to state facts that tend to establish a violation of Article XVIII and his claim is baseless; it must be rejected under Article 34 of the Rules.

3. Violation of Article II of the American Declaration

Petitioner's third claim, also under Article II of the American Declaration, alleges that the pardon at issue itself violated Petitioner's right to equality before the law. Petitioner's principal support for this allegation is that the pardon was allegedly not processed through certain administrative channels prior to being granted, which allegedly support's Petitioner's claim that the "pardon lacked a legitimate objective." Whatever internal administrative process within the executive branch by which requests for executive clemency are evaluated is not mandated by the American Declaration and, in any event, cannot form the basis of an allegation of a violation of Petitioner's right to equality before the law. Nor can Petitioner's disagreement with the stated objective of the pardon provide such basis. In this respect, Petitioner has failed to state facts that tend to establish a violation of his rights under Article II and the claim is without basis; it must

be dismissed under Article 34 of the Rules.

* * *

Petitioner's claims that the grant of executive clemency from any criminal sentence arising from Arpaio's criminal conviction for contempt of court violated his rights under Articles I, II, XVIII, and XXV of the American Declaration are inadmissible under Article 34 of the Rules. In addition, the Commission has repeatedly found that, where a Petitioner's claims have been addressed at the domestic level, the Commission does not consider *prima facie* that such claims constitute a potential violation of a right. Plaintiffs in associated class action litigation secured remedies for the plaintiff class for the underlying conduct at issue, providing an additional reason for the inadmissibility of Petitioner's claims under Article 34 of the Rules.

* * * *

f. Petition No. P-1274-14: Islamic Shura Council for Southern California

The petition on behalf of the Islamic Shura Council for Southern California makes claims regarding litigation under the Freedom of Information Act ("FOIA") and access to information. The United States filed its response, excerpted below, on June 12, 2020.

* * * *

The matter addressed by the Petition is not admissible and must be dismissed because it is, at least in part, beyond the *ratione personae* competence of the Commission and because it fails to meet the Commission's established criteria in Articles 31 and 34 of the Rules. Petitioner failed to exhaust 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 and is manifestly groundless under Article 34(b). Finally, review of the Petition would run afoul of the Commission's fourth instance doctrine.

A. THE COMPETENCE OF THE COMMISSION IS LIMITED

To the extent that Petitioners articulate generalized allegations of violations of the American Declaration beyond those cognizable in relation to individual Petitioners, the Petition must be dismissed because the Commission lacks competence *ratione personae* to entertain claims that non-governmental organizations are themselves the beneficiaries of human rights commitments.

The Petition is filed on behalf of six organizations and five individuals. The Commission only has competence to review particularized claims with respect to these five individuals. As it has explained on numerous occasions, the Commission has competence to review individual petitions that allege "concrete violations of the rights of specific individuals, whether separately or as part of a group, in order that the Commission can determine the nature and extent of the

State's responsibility for those violations... ." Relatedly, the Commission's governing instruments "do not allow for an *actio popularis*."

Although Petitioner contends that the six organizations named in the Petition have suffered violations of their human rights, it is axiomatic that the beneficiaries of human rights obligations and commitments are individuals. Generally speaking, a claimant alleging a violation of international human rights law is required to show that the rights of that particular individual have been violated—in other words, international law requires the identification of a specific victim. Absent particularized facts that a specific individual has been the victim of a violation of international human rights law, a human rights violation is not cognizable—irrespective of the severity or gravity of the violation. This requirement is enshrined in Article 28 of the Commission's Rules of Procedure. Relatedly, Article 23 of the Rules, which concerns the presentation of petitions, clearly distinguishes nongovernmental entities from "person or persons" in such a way as to preclude the latter from encompassing the former by any reasonable canon of construction. Where an organization petitions on behalf of a "person or persons," the organization would not itself be an alleged victim and would not be construed as a "person or persons."

The language of the American Declaration makes clear that the subjects of the rights and duties articulated therein are individuals, not any legal subject more broadly...

The American Convention on Human Rights ("American Convention"), which followed the American Declaration, expressly defines "person" for purposes of the protections set out in the Convention to mean "every human being." While Petitioners invite the Commission to adopt a different and much broader definition of "person" for purposes of the Declaration—and to expand the scope of rights and duties enumerated in the Declaration to apply to all corporate legal persons—Petitioners have failed to provide a basis for adopting a different meaning of "person" than that articulated in the Convention. The absence of such an explanation is fatal where, as here, Petitioners' proposed construction is contrary to the language of the Declaration itself and the resolution by which it was adopted. Petitioners' reference to the Vienna Convention on the Law of Treaties is misplaced because the Declaration is not a treaty within the meaning of the Vienna Convention. Petitioners' reliance on the *Mossville* case in support of their interpretation of the *ratione personae* competence of the Commission is similarly misplaced because, in that case, the organization that submitted the Petition (*Mossville Environmental Action Now*) expressly did so on behalf of alleged individual victims: "'Mossville residents' or the 'alleged victims'." There is no indication that the organization, *Mossville Environmental Action Now*, represented itself to be a victim, independent from the individuals it represented, or that the Commission somehow expressed its intent to expand the protections of the American Declaration to corporate entities. It also bears noting that the rights and duties articulated in the American Declaration would in many instances be entirely nonsensical if applied to corporate entities such as non-governmental organizations.

Abstract corporate entities such as non-governmental organizations are not the beneficiaries of human rights contemplated by the American Declaration. As such, alleged violations of "rights" of organizations are beyond the competence *ratione personae* of the Commission. The Petition is therefore inadmissible insofar as it purports to represent six organizations as "victims" of human rights violations.

B. FAILURE TO EXHAUST DOMESTIC REMEDIES

The Commission should declare the Petition inadmissible because Petitioners have not satisfied their duty to demonstrate they have “invoked and exhausted” domestic remedies under Article 20(c) of the Commission’s Statute and Article 31 of the Rules.

A petitioner before this Commission has the duty to pursue all available domestic remedies. As Article 31(1) of the Rules states, “In 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.” The requirement for exhaustion of domestic remedies stems from customary international law and promotes respect for State sovereignty. It ensures the State within whose jurisdiction a human rights violation allegedly occurred has the opportunity to redress the allegation by its own means within the framework of its own domestic legal system. A State has the sovereign right to be given the opportunity to determine the merits of a claim and decide the appropriate remedy before the dispute falls within the competence of an international body. The Inter-American Court of Human Rights has remarked that the exhaustion requirement is of particular importance “in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction.” Petitioners have the duty to pursue *all* available domestic remedies. Exhaustion is only realized where such a remedy has been pursued to the highest appellate level, resulting in a final judgment. The arguments raised in the domestic proceedings must be the same as those intended to be raised in international proceedings. In short, “for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success.” And, as the Commission has stated, “[m]ere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies.”

This Petition fails to satisfy those exhaustion requirements with respect to each of the avenues of relief sought by Petitioners: (1) access to information under FOIA, and (2) FRCP Rule 11 sanctions for alleged misrepresentations to the court. Each is addressed below in turn.

1. Petitioners failed to exhaust their remedy to access information under FOIA

As described in the factual background section above, Petitioners challenged the Government’s production of information under FOIA to the U.S. District Court for the Central District of California. That court ultimately concluded that “Plaintiffs are not entitled to any further information regarding the Government’s previous searches for documents, and the Government does not need to conduct any additional searches for responsive documents.” Petitioners chose not to appeal this decision to the Ninth Circuit. Petitioners have provided no explanation for their decision not to appeal this determination by the district court and have failed to allege, much less demonstrate, the applicability of any exception to the Commission’s exhaustion requirement with respect to the adequacy of information produced to Petitioners by the United States under FOIA. Therefore, to the extent that Petitioners allege that they have been deprived access to information, the Commission cannot entertain this claim because Petitioners plainly failed to exhaust their remedy in this regard.

2. Petitioners failed to exhaust their motion for FRCP Rule 11 sanctions for alleged representations to the court

Petitioners also pursued judicial sanctions under FRCP Rule 11 against the FBI for its characterization of documents not subject to the requirements of FOIA. FRCP Rule 11(b) provides guidelines for representations to federal courts. FRCP Rule 11(c) provides that, if the court determines that Rule 11(b) has been violated, “the court may impose an appropriate sanction.” It should be noted that this remedy is distinct in kind from the FOIA remedy described above, by which Petitioners could have pursued a challenge to the adequacy of the Government’s disclosure of information. Petitioners’ FRCP Rule 11 motion for sanctions against the FBI was an attempt to penalize the agency for representations it had initially made, but subsequently amended, to the district court. The district court initially granted the motion for sanctions; however, the Ninth Circuit reversed the district court’s order granting the motion and vacated the accompanying order awarding fees. While Petitioners sought *en banc* review of the Ninth Circuit’s reversal, which was denied, Petitioners declined to seek review by the United States Supreme Court.

To the extent that Petitioners may rely on their motion for FRCP Rule 11 sanctions as a remedy for purposes of satisfying the Commission’s exhaustion requirement, failure to seek Supreme Court review must result in a determination of inadmissibility before this Commission. Petitioners had a clear statutory right to file a petition with the United States Supreme Court seeking review. Under U.S. law, Supreme Court review is not an “extraordinary” remedy. Rather, U.S. law provides that seeking Supreme Court review is part of “[d]irect review.” It is an ordinary remedy. To the extent any previous decision by the Commission suggests otherwise, the Commission should revisit the question. It would be inconsistent with respect for an OAS Member State’s sovereignty for an international body to consider a petition filed without ever having given the Member State’s highest court an opportunity to consider the issue where there was no bar in domestic law to seeking such review. As this Commission has observed, “the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts imputed to it, before it has the opportunity to remedy them by internal means.”

Moreover, in marked contrast to the “Juvenile Offenders Sentenced to Life Imprisonment Without Parole” Report, the Petition contains no indication that the United States Supreme Court has ever been given the opportunity to rule on the issue now being brought before the Commission: whether or not under the circumstances of this case a motion for sanctions made after the judicial rejection of the offending contention should have been granted. Importantly, in “Juvenile Offenders,” the Supreme Court had received a certiorari petition “which presented substantially similar questions to those advanced in the petition received by the Commission, including the allegation that life imprisonment without parole represents cruel or unusual punishment, and the allegation of the necessity of differential treatment for adults and persons below the age of 18.” The Commission emphasized that one of the petitioners *did* seek review by the United States Supreme Court, giving that court an opportunity to address the matter. Here, on the other hand, Petitioners fail to demonstrate—or even allege—the Supreme Court has *ever* been given an opportunity to rule on a motion for sanctions in the present context made after the judicial rejection of the offending contention.

Finally, although Petitioners cite the exceptions to the exhaustion requirements at Article 31(2) of the Rules, Petitioners have failed to demonstrate that any of those circumstances applied to their motion for Rule 11 sanctions against the Government, the particular remedy upon which Petitioners attempt to rely to satisfy the Commission's exhaustion requirement. Specifically, Petitioners have failed to demonstrate (a) that there has been no due process of law; (b) that petitioners have been denied access to domestic remedies or prevented from exhausting them; or (c) that there has been an unwarranted delay. Instead, Petitioners assert that "a petition for certiorari would have been undertaken at great cost with almost no chance of success, and thus is not necessary for exhaustion of domestic remedies." To the extent that Petitioners are pessimistic about their chances of success, such pessimism is not an excuse from the exhaustion requirement. Again, as the Commission has stated, "[m]ere doubt as to the prospect of success in going to court is not sufficient to exempt a petitioner from exhausting domestic remedies." Petitioners' curious assertion that they "exhausted the requirements for certiorari" is no substitute for actually seeking certiorari from the Supreme Court.

* * *

In sum, Petitioners pursued two remedies under U.S. law but failed to exhaust either remedy. Therefore, the Commission should declare the Petition inadmissible because Petitioners have not satisfied their duty to demonstrate they have "invoked and exhausted" domestic remedies under Article 20(c) of the Commission's Statute and Article 31 of the Rules.

C. FAILURE TO ESTABLISH FACTS THAT COULD SUPPORT A CLAIM OF VIOLATION OF THE AMERICAN DECLARATION

As established above, the Commission should find this Petition inadmissible because at least portions of the Petition are beyond the competence of the Commission and because Petitioners failed to exhaust domestic remedies. The Petition is also inadmissible because it fails to state facts that tend to establish violations of Petitioners' rights under Article 34(a) of the Rules and contains claims that are manifestly groundless under Article 34(b) of the Rules.

1. Article IV (Right to Freedom of Expression)

Article IV of the American Declaration provides that "[e]very person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever." Petitioners' claim that their right under Article IV has been violated by the United States is baseless and Petitioners have plainly failed to establish facts that could support a violation of this provision of the Declaration. Petitioners simply have not demonstrated any infringement of their rights to freedom of investigation, of opinion, or expression and dissemination of ideas, by any medium whatsoever. Petitioners have therefore failed to establish facts that could support a violation of this provision of the Declaration.

To overcome this defect, Petitioners attempt to construe Article IV to include a "right of access to information." However, Article IV plainly does not contemplate access to information—much less the disclosure of specific information at all. The Petition therefore overstates the reach of Article IV, misinterprets Commission cases pertinent to that Article, and relies on cases interpreting other, inapposite international instruments. Petitioners' principal argument in this regard is an attempt to impose a provision of the American Convention, which contemplates information access, upon the United States "because Article IV of the American Declaration corresponds to Article 13 of the American Convention." This is obviously not how

States become subject to obligations and commitments under international law. States undertake treaty obligations and commitments under international law through their consent, and the United States has not consented to be bound by any provision of the American Convention. Elsewhere in their Petition, Petitioners concede as much: “the United States is not a party to the American Convention, thus its definition of the rights of ‘persons’ . . . does not supersede the . . . language of the American Declaration.” Petitioners’ attempt to reverse course on this point where it suits their argument is disingenuous and without basis under international law. Worryingly, taking Petitioners’ arguments together, they invite the Commission to (1) impose Article 13 of the American Convention upon the United States without its consent and (2) broaden its scope by rejecting the application of the American Convention at Article 1(2) to “human beings” only. This slipshod approach to inventing new commitments under the American Declaration must be rejected.

It also bears noting that Article 13 of the American Convention, even if it could be applied to the United States—which it cannot—does not contain such a “right of access to information” that Petitioners seek to attribute to it. The right to freedom of thought and expression at Article 13 of the American Convention “includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.” Therefore, neither the American Declaration nor the American Convention contains a “right of access to information.”

Even if Article IV of the American Declaration contained a “right of access to information”—which it does not—FOIA would be consistent with such a right as a general matter and as applied in the instant case. It is well established that Petitioners received all of the information to which they were entitled with respect to the relevant FOIA requests. Moreover, Petitioners did not contest this determination by a U.S. district court.

Instead, Petitioners now assert that the FBI’s release of information to them was untimely and, apparently as such, incomplete. This claim is baseless as the FBI’s release of information to Petitioners was consistent with U.S. law, a legal conclusion by the U.S. district court that Petitioners chose not to challenge. Indeed, Petitioners concede that the FBI’s disclosure of information was “fully corrected” on June 23, 2009. As explained above, the crux of this correction was the Government’s characterization of documents not subject to the requirements of FOIA and, to the extent that the U.S. district court disagreed with the Government’s construction of FOIA, the Government’s production of information to Petitioners was “fully corrected.” Thus, even if Article IV of the American Declaration could be construed to include a right of access to information, Petitioners would not have articulated a failure by the United States to live up to such a right.

Petitioners also contend that the withholding of certain information by the FBI from the U.S. district court limited the Petitioners’ right of access to information unnecessarily and disproportionately; but this contention is difficult to reconcile with Petitioners’ admission that the FBI provided Petitioners all of the information to which they were entitled. To support their claim in this regard, Petitioners quote the Inter-American Court of Human Rights decision in *Myrna Mack Chang v. Guatemala*:

[I]n cases of human rights violations, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, *to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceedings.*

Although the United States is not a party to the Inter-American Court—and so the court’s interpretation of obligations of States party to the American Convention are not relevant to a State, such as the United States, that is not party to that instrument—it bears emphasizing that the United States did *not* “refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceedings” with respect to the FOIA production at issue in the Petition. To the contrary, in its order on the FOIA production, the U.S. district court concluded, in reference to the Government’s compliance with FOIA, that “Plaintiffs are not entitled to any further information regarding the Government’s previous searches for documents, and the Government does not need to conduct any additional searches for responsive documents.” Petitioners did not contest this finding. In other words, even by Petitioners’ preferred standard borrowed from the Inter-American Court, Petitioners have failed to articulate any “unnecessary or disproportionate limitation of a right to access.” Further, Petitioners admit that the Government’s initial characterization of documents not subject to the requirements of FOIA had no material impact on Petitioners: “the end results would have been the same: an *in camera* review with a determination that the documents were properly withheld.”

Finally, Petitioners claim that the United States “failed to comply with its obligation to change its domestic legislation to ensure the protection of the right to access information as required by international law.” However this claim is baseless as the United States is not subject to any such commitment under the American Declaration and did not violate any applicable obligations under international law.

In sum, Petitioners have failed to state facts that tend to establish a violation of Article IV of the American Declaration and the Petition must be deemed inadmissible under Article 34(a) of the Rules. Moreover, Petitioners’ claim that the United States has failed to live up to its commitments under Article IV is baseless and the Petition must also be deemed inadmissible under Article 34(b) of the Rules.

2. Article XVIII (Right to Judicial Protection)

Article XVIII of the American Declaration provides that “[e]very person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.” Petitioners allege that the United States has violated this right in two ways.

First, Petitioners claim that judicial remedies were “not sufficiently prompt.” Specifically, Petitioners seem to claim that the delay between (1) either the initial lodging of a FOIA request on May 15, 2006, or initiation of their judicial challenge to the Government’s response to that request on June 7, 2007, and (2) the provision of additional documents on March 14, 2008, represents a violation of the United States’ commitments under Article XVIII. This claim is baseless. Petitioners may have disagreed with the Government’s construction of FOIA in this matter, but there are simply no facts to substantiate a claim that Petitioners were denied their right to resort to the courts due to the pace of litigation.

Second, Petitioners claim that the judicial remedies provided in this matter were “ineffective,” thereby constituting a denial of Petitioners’ right to access the courts within the meaning of Article XVIII. This claim, too, is baseless. Petitioners were able to challenge the Government’s production of information under FOIA in U.S. courts, and U.S. courts concluded that the Government was not required to produce any further information under that statute. The Commission has reiterated that “the fact that the outcome [of a domestic proceeding] was unfavorable ... does not constitute a violation.” Petitioners additionally claim that the remedies received were not effective because they were not prompt; but this attempt at bootstrapping is unavailing, in part because Petitioners cannot show that they were deprived access to the courts on the basis of promptness of the proceedings. Petitioners also attempt to resuscitate their claim in this regard by arguing that domestic remedies were ineffective because they were ultimately unsuccessful in seeking Rule 11 judicial sanctions against the Government. Again, the fact that Petitioners are dissatisfied with the outcome of their attempt to seek Rule 11 judicial sanctions cannot provide the basis for a violation of Article XVIII because “the fact that the outcome [of a domestic proceeding] was unfavorable ... does not constitute a violation.”

In sum, Petitioners have failed to state facts that tend to establish a violation of Article XVIII of the American Declaration and the Petition must be deemed inadmissible under Article 34(a) of the Rules. Moreover, Petitioners’ claim that the United States has failed to live up to its commitments under Article XVIII is baseless and the Petition must also be deemed inadmissible under Article 34(b) of the Rules.

D. FOURTH INSTANCE DOCTRINE PRECLUDES REVIEW OF U.S. COURT DECISIONS

The Petition plainly constitutes an effort by Petitioners 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 fourth instance doctrine 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. As the Commission has explained, “[t]he 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.” With respect to application of FOIA and Rule 11 judicial sanctions, such substitution is precisely what Petitioners seek from the Commission. 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. Under the fourth instance doctrine, the Commission’s review of Petitioners’ claims is precluded.

The United States’ domestic law provided Petitioners with a basis to seek relief for claims of denial of access to information under FOIA and, as described in detail above, U.S. courts ruled on Petitioners’ claims as well as their attempt to seek sanctions against the United States. The central theory of Petitioners’ claims in both fora is the same: that the United States is responsible for a violation of Petitioners’ right of access to information and should be penalized.

Indeed, the bulk of Petitioners' submission to the Commission seeks to re-litigate the merits of Petitioners' litigation over Rule 11 judicial sanctions. Rather than appealing the district court's finding that the FOIA production was appropriate in a U.S. court of appeals, or appealing the Ninth Circuit's determination that sanctions were not warranted in this case, Petitioner chose instead to pursue an "appeal" internationally. It is well established that the Commission cannot be used as a substitute for appeal in the U.S. judicial system. Moreover, if the Commission were to accept a petition based on the same secondary arguments that Petitioners litigated and lost in U.S. courts, it would be acting precisely as the type of fourth instance review mechanism it has consistently refused to embody.

The Commission must consequently decline this invitation to sit as a court of fourth instance. Acting to the contrary would have the Commission second-guessing the legal and factual determinations of U.S. courts, conducted in conformity with due process protections under U.S. law and fully consistent with U.S. commitments under the American Declaration. The Commission has long recognized that "if [a petition] contains nothing but the allegation that the decision [by a domestic court] was wrong or unjust in itself, the petition must be dismissed under [the fourth instance doctrine]." The Commission has reiterated that "the fact that the outcome [of a domestic proceeding] was unfavorable ... does not constitute a violation." The fourth instance doctrine precludes the review sought by Petitioner.

* * * *

g. Request by Colombia for advisory opinion on withdrawal

As discussed in *Digest 2019* at 277-80, Colombia requested an advisory opinion regarding the consequences of a State denouncing and withdrawing from the American Convention on Human Rights and the OAS Charter. The United States provided a written submission on the request in 2019. On June 15, 2020, the United States provided an oral submission on the request, presented by Thomas Weatherall, attorney-adviser in the Office of the Legal Adviser at the U.S. Department of State. Excerpts follow from that submission.

* * * *

This system includes the valuable work of the Inter-American Commission on Human Rights and the Court, for those States that submit to its jurisdiction, in interpreting the scope of human rights obligations under the binding instruments of the Inter-American system and monitoring States' compliance with these obligations. However it is also important to recall that the American Convention on Human Rights, and the Charter of the Organization of American States, authorize withdrawal by State Parties. A State that chooses to exercise its right to withdraw from the Convention and the OAS Charter in accordance with the instruments' respective terms is released, upon the effective date of its withdrawal, from any obligations further to perform the Convention or OAS Charter.

It is against the backdrop of these considerations that the questions submitted to the Court must be considered.

I. Competence of the Court

Madam President, Members of the Court, I will begin by briefly addressing the competence of the Court in the present proceeding. Article 64, paragraph 1, of the American Convention sets out the Court's authority to issue advisory opinions with respect to the Convention and "other treaties concerning the protection of human rights in the American states." As Colombia identified in its request, this competence encompasses a number of human rights treaties in the Americas, for those States that have ratified them, including not only the American Convention, but also the Inter-American Convention to Prevent and Punish Torture, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, and the Inter-American Convention on the Forced Disappearance of Persons.

From the perspective of the Court's competence to render advisory opinions, however, it is appropriate for the Court to avoid addressing any nonbinding instruments, such as the American Declaration, instruments (binding or otherwise) that exist outside of the Inter-American human rights system, or customary international law, including *jus cogens*. This limit on the Court's competence is because the Court is not a body of general jurisdiction, as reflected by the parameters set out in Article 64, paragraph 1 of the Convention, and in particular the specification in that paragraph that the Court has the authority to issue advisory opinion only with respect to the Convention and certain other "treaties."

II. Obligations of a Denouncing State, and of States Parties vis-à-vis a Denouncing State

To be sure, a State remains bound by other obligations which it has undertaken regardless of its status under the OAS Charter or the Convention, and this brings me to my second point. There would undoubtedly remain other human rights obligations incumbent upon a State that denounces the Convention and the OAS Charter—in particular under customary international law, including *jus cogens*, and applicable human rights instruments outside the Inter-American system to which that State is party. Withdrawal from the OAS does not affect a State's obligations under other treaties to which it is a party unless those treaties so provide.

Accordingly, following a State's withdrawal from the OAS, in general, it would remain bound by the terms of any treaties from within the Inter-American human rights system to which it is a party. Relatedly, suspension of an OAS Member State from participation in the OAS under Article 21 of the Inter-American Democratic Charter does not affect its human rights obligations.

States Parties would not be subject to obligations arising under the OAS Charter vis-à-vis a State that has withdrawn from the OAS Charter. Nor would States Parties to the American Convention be subject to obligations arising under that treaty vis-à-vis a State that has withdrawn from it. Whether or not OAS Member States have obligations in matters of human rights vis-à-vis such a denouncing State, beyond any applicable obligations under customary international law, would depend on the provisions of instruments to which OAS Member States and the denouncing State remain parties.

However, it is not feasible to catalog these obligations in the abstract and, even if it were, the Court is not a body of general jurisdiction. Given the Court's limited jurisdiction, the United

States respectfully submits that the Court must refrain from addressing elements of the request that invite the Court to address the scope or enforcement of human rights obligations established under customary international law or outside of the Inter-American system.

III. Competence of the Commission vis-à-vis Denouncing State

Madam President, Members of the Court, the third point I would like to make is that it remains the case that the Commission—which is charged by the OAS Charter “to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters”—has competence with respect to instruments within its purview that a member State has recognized as binding on it. With respect to a State’s denunciation of the American Convention, this raises the question, discussed in at least one participant’s submission for this advisory proceeding, of the ability of the Commission to exercise what might be characterized as “residual competence”—that is, competence over matters after the effective date of such State’s denunciation of the American Convention alleging violations of the Convention arising before that date.

Article 78 of the Convention provides that “denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation.” While Article 78 does not specifically address the competence of the Commission following the effective date of denunciation, a state’s obligations under the Convention with respect to its acts prior to denunciation would presumably include obligations regarding the Commission’s possible consideration of those acts. Article 78 therefore at least implies that the Commission would retain “residual competence” with respect to such acts. Article 78 so interpreted is consistent with the general rule that withdrawal by a State from an international agreement does not eliminate the consequences of breaches of obligations arising while that State was party to the agreement.

IV. Mechanisms of Enforcement

Madam President, Members of the Court, I will briefly make one final point. Whether mechanisms exist for enforcing a denouncing State’s obligations depends on the relevant provisions of the treaties to which the denouncing State remains a party. As already addressed, the Court should decline to opine on the availability of alternate mechanisms of human rights enforcement which may exist outside of the Inter-American system or otherwise outside of the Court’s competence.

* * * *

h. Request by Colombia for advisory opinion on indefinite presidential re-election

Colombia also requested an advisory opinion from the IACHR on the question of “indefinite presidential re-election.” Specifically, Colombia submitted two questions to the court:

1. Is indefinite presidential re-election a human right protected by the American Convention on Human Rights? Relatedly, do term limits restrict the political rights of an incumbent leader or those of voters?
2. If a State modifies its legal order toward “the permanence of an incumbent leader in power through indefinite presidential re-election,” does this impact that State’s human rights obligations?

Colombia framed the request within the American Convention on Human Rights—to which the United States is not a party. However, Colombia also requested that the court opine on relevant provisions of the OAS Charter, to which the United States is a party, as well as the American Declaration on the Rights and Duties of Man and Inter-American Democratic Charter, non-binding instruments that the United States recognizes to be applicable. Excerpts follow from the July 24, 2020 written observations of the United States on Colombia’s 2020 request for an advisory opinion. Request for an Advisory Opinion by the Republic of Colombia, Written Observations of the United States, CDH-OC-4-2019/068 (July 24, 2020), https://www.corteidh.or.cr/sitios/observaciones/oc28/3_estadosunidos.pdf.

* * * *

Colombia raises two questions in its request for an advisory opinion. The first is presented as follows:

In the light of international law, is indefinite presidential re-election human rights protected by the American Convention on Human Rights? In this sense, are regulations that limit or prohibit presidential election contrary to Article 23 of the American Convention on Human Rights, whether by restricting the political rights of the incumbent leader who seeks to be elected, or by restricting the political rights of the voters? Or on the contrary, is the limitation or prohibition of presidential re-election a restriction of political rights which is in accordance with the principles of legality, necessity and proportionality, in line with the jurisprudence of the Inter-American Court of Human Rights on this matter?

The second question is related to the first:

In the event that a State modifies or seeks to modify its legal order in order to assure, promote, propitiate or prolong the permanence of an incumbent leader in power through indefinite presidential re-election, what are the effects of that modification on the obligations of that State in area of respect and guarantees of human rights? Is that modification contrary to the international obligations of States in matters of human rights, and particularly, their obligation to guarantee the effective exercise of rights a) to participate in the management of public affairs, directly or through freely elected representatives; b) to vote and be elected in authentic and regular elections, conducted by universal and equal suffrage or by secret ballot, to guarantee the free expression of the will of the electors, and c) to have access, in general conditions of equality, to the public functions of that country?

Alongside these questions, Colombia identifies a host of obligations and commitments arising from various Inter-American instruments and invites the Court to interpret such provisions in light of in its request. Colombia’s request for the Court’s advice on these questions is animated by the risk of “abuse” of the regulation of democratic governance by an incumbent head of State in pursuit of “indefinite presidential re-election.”

I. Representative Democracy in the Inter-American System

The Charter of the Organization of American States (“OAS Charter”) regards representative democracy within its constituent States to be a condition of its stability and a purpose of the organization. Article 3(d) of the OAS Charter specifically articulates that “[t]he solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy.”

American States affirmed their commitment to this principle, and elaborated on its content, in the Declaration of Santiago, Chile, adopted at the Fifth Meeting of Consultation of Ministers of Foreign Affairs in 1959 (“the Santiago Declaration”). The fifth preambular paragraph of the Santiago Declaration reiterates that “[h]armony among the American republics can be effective only insofar as human rights and fundamental freedoms and the exercise of representative democracy are a reality within each one of them.” The Santiago Declaration further identifies some features of the democratic system in this hemisphere to enable “national and international public opinion to gauge the degree of identification of political regimes and governments with that system.” One such principle is that “[p]erpetuation in power, or the exercise of power without a fixed term and with the manifest intent of perpetration, is incompatible with the effective exercise of democracy.” In this way, as early as 1959, American States can be seen to have taken a position on the important role limiting time in office can play in the effective exercise of democracy, in the particular context of preventing entrenchment or concentration of political power.

The Inter-American Democratic Charter (“the Democratic Charter”) articulates a right of the peoples of the Americas to democracy and restates that “[t]he effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the member states of the Organization of American States.” The Democratic Charter also identifies elements essential to the effective exercise of representative democracy, to include, *inter alia*, “access to and the exercise of power in accordance with the rule of law” and “the holding of periodic, free, and fair elections.”

The United States supported each of these instruments affirming the importance of representative democracy within the member states of the OAS.¹² The Inter-American Court has

¹² The United States respectfully recalls that the Court’s authority to issue advisory opinions is set forth in Article 64 of the American Convention and, under Article 64.1, is limited to interpretations of the Convention and “other treaties concerning the protection of human rights in the American states.” Article 64.1 does not empower the Court to interpret instruments which do not qualify as “treaties.” As reflected in Article 2(a) of the Vienna Convention on the Law of Treaties, a treaty is “an international agreement concluded between States in written form and governed by international law”—i.e., a legally binding instrument. Vienna Convention on the Law of Treaties, art. 2(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. The Court should decline to address in its advisory opinion the interpretation of instruments that are not legally binding and thus do not constitute treaties. In this regard, the United States has consistently maintained that the American Declaration of the Rights and Duties of Man is a nonbinding instrument which does not create legal rights or obligations on OAS member States. United States courts have viewed it as such. *See, e.g.,* Garza v. Lapin, 253 F.3d 918, 925 (7th Cir. 2001) (assessing that “OAS’s Charter reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members”). The text of the American Declaration and the circumstances of its conclusion demonstrate that the negotiating States did not intend for it to become a binding instrument. Similarly, neither the Santiago Declaration nor the Democratic Charter

also concluded that “representative democracy is a determinant factor of the entire system” of which Inter-American instruments are a part.¹³

II. Political Participation in the Inter-American System

The affirmation in Inter-American human rights instruments of rights associated with political participation follows from the importance of the effective exercise of representative democracy to the OAS. The American Declaration of the Rights and Duties of Man, at Article XX, states that every person is “entitled to participate in the government of his country, directly or through his representatives.” The American Convention, for parties to that instrument, expanded upon the “rights and opportunities” to participate in government at Article 23, to include the ability to “take part in the conduct of public affairs,” “to vote and be elected in genuine periodic elections,” and “to have access, under general conditions of equality to the public service of his country.” These provisions of Article 23 of the American Convention closely parallel Article 25 of the International Covenant on Civil and Political Rights, to which thirty-one of the thirty-five OAS member States are parties.

The rights of individuals associated with participation in political affairs support the effective exercise of representative democracy repeatedly affirmed by the American States. The Inter-American Court has affirmed this premise: “[t]he political rights embodied in the American Convention, as well as in diverse international instruments, promote the strengthening of democracy and political pluralism.”¹⁸ From this point of departure, the Court has also contemplated the permissibility of reasonable restrictions on such political rights with a view toward promoting the effective exercise of representative democracy.¹⁹ The principles enumerated in the Santiago Declaration are relevant in this context, and in particular, that “[p]erpetuation in power, or the exercise of power without a fixed term and with the manifest intent of perpetration, is incompatible with the effective exercise of democracy.” Interpreting political rights in a way that undermines the effective exercise of democracy is inconsistent with the longstanding view, reflected in relevant Inter-American instruments and previously endorsed by the Court, that political rights should facilitate the effective exercise of representative democracy.

III. Presidential Term Limits in the United States

That individuals’ rights associated with political participation should be interpreted in a manner that facilitates the effective exercise of representative democracy is reflected in the practice of the United States. Most relevant to the present discussion is the 22nd Amendment to the United States Constitution, which imposes a limitation on the number of terms that may be served by a U.S. President.

Article II, Section 1 of the U.S. Constitution provides for re-election of a sitting President after a term of four years but sets no limit on how many such terms might be served. From the

are “treaties” for purposes of Article 64.1 of the American Convention, and thus fall beyond the scope of the Court’s advisory opinion authority.

¹³ *Castañeda Gutman v. México*, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 184, ¶ 141 (Aug. 6, 2008).

¹⁸ *Castañeda Gutman v. México*, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 184, ¶ 141 (Aug. 6, 2008).

¹⁹ *See, e.g., Castañeda Gutman v. México*, Preliminary Objections, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 184, ¶¶ 141 *et seq.* (Aug. 6, 2008); *Case of Yatama v. Nicaragua*, Preliminary Objections, Merits, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶¶ 195 *et seq.* (June 23, 2005).

presidency of George Washington, the first president of the United States (1789-1797), a practice emerged that a U.S. president would serve only two terms. The third president of the United States, Thomas Jefferson, was the first to cite concern for “perpetual reeligibility” as informing his decision not to pursue a third term in office. Jefferson felt that “a representative Government responsible at short periods is that which produces the greatest sum of happiness to mankind,” and that he had “a duty to do no act which shall essentially impair that principle.” This practice held until 1940, when President Franklin D. Roosevelt was re-elected for a third term following the outbreak of World War II. Roosevelt ran for and was re-elected to a fourth term in 1944, which he served until his death in April 1945.

Following Roosevelt’s departure from the two-term precedent established by President Washington, the United States Congress sought to formally establish the two-term presidential term limit through constitutional amendment. The 22nd Amendment to the U.S. Constitution was proposed by the U.S. Congress in March 1947 and ratified by the states in February 1951. The 22nd Amendment limits the number of terms to which a President may be elected to two. The 22nd Amendment expressly did not apply to the occupant of the office of the presidency at the time the Amendment was proposed, and expressly did not prevent the occupant of the office at the time the Amendment became operative from serving out the remainder of that term. As such, the incumbent President could not be removed from office by the Amendment’s establishment of term-limits. The Amendment was deliberately crafted in this way to demonstrate its nonpartisan character, i.e., it was not an effort directed toward the incumbent. President Harry Truman, the incumbent both at the time the 22nd Amendment was proposed and at the time it became operative, supported the Amendment, remarking at a press conference in 1952 that, “[w]hen we forget the example of such men as Washington, Jefferson, and Andrew Jackson, all of whom could have had a continuation of the office, then we will start down the road to dictatorship and ruin.”

IV. Opposition to Constitutional Backsliding around the World

The United States has consistently expressed support for reasonable executive term limits in representative democracies and cautioned against attempts by political incumbents to erode such restrictions. For example, in an address to the African Union in 2015, President Barack Obama extolled the benefits of preserving conditions for regular transfers of power and articulated the risks of backsliding:

When a leader tries to change the rules in the middle of the game just to stay in office, it risks instability and strife And this is often just a first step down a perilous path. And sometimes you’ll hear leaders say, well, I’m the only person who can hold this nation together. If that’s true, then that leader has failed to truly build their nation.

You look at Nelson Mandela – Madiba, like George Washington, forged a lasting legacy not only because of what they did in office, but because they were willing to leave office and transfer power peacefully. And just as the African Union has condemned coups and illegitimate transfers of power, the AU’s authority and strong voice can also help the people of Africa ensure that their leaders abide by term limits and their constitutions. Nobody should be president for life.

That same year, Secretary of State John Kerry also addressed the alteration of presidential term limits to favor an incumbent:

Elections are vitally important Just as important is respect for term limits. No democracy is served when its leaders alter national constitutions for personal or political gain. . . . A free, fair and peaceful presidential election does not guarantee a successful

democracy, but it is one of the most important measuring sticks for progress in any developing nation. . . . The United States remains committed to helping make those aspirations a reality.

The United States Congress has also articulated the importance of respect for presidential term limits. For example, in “A resolution supporting democratic principles and standards in Bolivia and throughout Latin America,” adopted by the United States Senate in 2019, the Senate resolved that it:

(3) expresses concern for efforts to circumvent presidential term limits in the Bolivian constitution;

(4) supports presidential term limits prevalent in Latin America as reasonable checks against a history of coups, corruption, and abuses of power;

. . .

(6) agrees with the Organization of American States Secretary General’s interpretation of the American Convention of Human Rights as not applicable to presidential term limits; [and]

. . .

(8) calls on Latin American democracies to continue to uphold democratic norms and standards[.]

The United States remains committed to promoting term limits in representative democracies. Term limits promote accountability and prevent entrenchments of power. The United States will continue to caution against efforts by incumbents to undermine the effective exercise of representative democracy by modifying limitations to re-election for their own political gain.

* * * *

The United States also presented remarks on September 28, 2020 to the Inter-American Court of Human Rights on the subject of Colombia’s request for an advisory opinion on executive term limits. The remarks reiterate the points in the U.S. written submission, with additional points responding to other written submissions such as one from Nicaragua. The U.S. remarks follow.

* * * *

Thank you Madam President, Mr. Vice-President and Members of the Court. My name is Thomas Weatherall, and I am honored to appear today on behalf of the United States in my capacity as an attorney-adviser in the Office of the Legal Adviser of the U.S. Department of State. I am joined today by my colleague, Oliver Lewis, the Assistant Legal Adviser for Western Hemisphere Affairs in the Office of the Legal Adviser. These remarks will supplement the United States’ written submission in this matter.

Today’s hearing provides an opportunity to discuss the political principle at the core of the Organization of American States: representative democracy. As has been noted today and in a number of the written submissions, democracy is essential to the exercise and enjoyment of human rights and fundamental freedoms. The OAS Charter regards representative democracy within its constituent States to be a condition of its stability and a purpose of the organization.

The affirmation in Inter-American human rights instruments of rights associated with political participation follows from the importance of the effective exercise of representative democracy to the OAS. Individuals' rights associated with political participation should be interpreted by this Court in a manner that facilitates the effective exercise of representative democracy.

Colombia's request for the Court's advice on these matters is animated by the potential for "abuse" of the regulation of democratic governance by an incumbent head of State in pursuit of what has been characterized as "indefinite presidential re-election." In light of this concern, our presentation today will address the importance of the effective exercise of representative democracy and interpretation of individual rights associated with political participation to this end, particularly from the perspective of U.S. practice.

I. Representative Democracy in the Inter-American System

Madam President, Members of the Court, I will begin by briefly addressing representative democracy in the Inter-American system. Consideration of representative democracy in the Inter-American system begins with the OAS Charter. The OAS Charter expressly articulates in Article 3(d) the principle that the "solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy."

American States affirmed their commitment to this principle, and elaborated on its content, in the Declaration of Santiago, Chile, adopted at the Fifth Meeting of Consultation of Ministers of Foreign Affairs in 1959. The Santiago Declaration reiterates that "Harmony among the American republics can be effective only insofar as human rights and fundamental freedoms and the exercise of representative democracy are a reality within each one of them." The Santiago Declaration further identifies some features of the democratic system in this hemisphere to enable "national and international public opinion to gauge the degree of identification of political regimes and governments with that system." One such principle is that "Perpetuation in power, or the exercise of power without a fixed term and with the manifest intent of perpetuation, is incompatible with the effective exercise of democracy." In this way, as early as 1959, American States can be seen to have taken a position on the important role limiting time in office can play in the effective exercise of democracy, in the particular context of preventing entrenchment or concentration of political power.

The Inter-American Democratic Charter articulates a right of the peoples of the Americas to democracy and restates that "The effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the member states of the Organization of American States." The Democratic Charter also identifies elements essential to the effective exercise of representative democracy, to include, *inter alia*, "access to and the exercise of power in accordance with the rule of law" and "the holding of periodic, free, and fair elections."

The United States supported each of these instruments affirming the importance of representative democracy within the member states of the OAS. The Inter-American Court has also concluded, in its 2008 *Gutman v. México* Judgment, that "representative democracy is a determinant factor of the entire system" of which Inter-American instruments are a part.

II. Political Participation in the Inter-American System

Madam President, Members of the Court, against this backdrop, I will turn now to the rights associated with political participation. The affirmation in Inter-American human rights instruments of rights associated with political participation follows from the importance of the effective exercise of representative democracy to the OAS. The American Declaration of the

Rights and Duties of Man, at Article 20, states that every person is “entitled to participate in the government of his country, directly or through his representatives.”

The American Convention, for parties to that instrument, expanded upon the “rights and opportunities” to participate in government at Article 23, to include the ability to “take part in the conduct of public affairs,” “to vote and be elected in genuine periodic elections,” and “to have access, under general conditions of equality to the public service of his country.” These provisions of Article 23 of the American Convention closely parallel Article 25 of the International Covenant on Civil and Political Rights, to which thirty-one of the thirty-five OAS member States are parties. Article 23, paragraph 2 of the American Convention refers to certain bases for regulating the exercise of the rights and opportunities set out in paragraph 1 of Article 23 regarding participation in government. However, practice by States with respect to executive term limits raises serious questions about whether this provision could reasonably be interpreted as indicating that States parties intended the Convention to preclude such term limits. Indeed—as cataloged in the Inter-American Commission’s written submission in these proceedings—many States parties to the Convention impose such term limits. As a general matter, the question of whether an individual enjoys rights associated with political participation is separate from the structure of representative democracy—including the definition of elective terms and their limitations—within which she or he participates.

The rights of individuals associated with participation in political affairs support the effective exercise of representative democracy, a relationship repeatedly affirmed by the American States. The Inter-American Court has affirmed this premise: it has found that “The political rights embodied in the American Convention, as well as in diverse international instruments, promote the strengthening of democracy and political pluralism.” From this point of departure, the Court has also contemplated the permissibility of reasonable restrictions on such political rights with a view toward promoting the effective exercise of representative democracy, including in cases cited for this point in our written submission. The principles enumerated in the Santiago Declaration are relevant in this context, and in particular, that “Perpetuation in power, or the exercise of power without a fixed term and with the manifest intent of perpetuation, is incompatible with the effective exercise of democracy.” The notion that such limitations are somehow inherently discriminatory or run afoul of equal protection is nonsensical. To the contrary, such limitations can apply with equal force to everyone. And interpreting political rights in a way that undermines the effective exercise of democracy is inconsistent with the longstanding view, reflected in relevant Inter-American instruments and previously endorsed by the Court, that political rights should facilitate the effective exercise of representative democracy.

Madam President, Members of the Court, let me now turn the floor over to my colleague, Oliver Lewis.

III. Presidential Term Limits in the United States

Madam President, Members of the Court, let me now turn to the practice of the United States, which reflects interpretation of rights associated with political participation in a manner that facilitates the effective exercise of representative democracy. Most relevant to the present discussion is the 22nd Amendment to the United States Constitution, which imposes a limitation on the number of terms that may be served by a U.S. President.

Article II, Section 1 of the U.S. Constitution provides for re-election of a sitting President after a term of four years but sets no limit on how many such terms might be served. From the presidency of George Washington, the first president of the United States (from 1789 to 1797), a practice emerged that a U.S. president would serve only two terms. The third president of the United States, Thomas Jefferson, was the first to cite concern for “perpetual reeligibility” as informing his decision not to pursue a third term in office. Jefferson felt that “a representative Government responsible at short periods is that which produces the greatest sum of happiness to mankind,” and that he had “a duty to do no act which shall essentially impair that principle.” This practice held until 1940, when President Franklin D. Roosevelt was re-elected for a third term following the outbreak of World War II. Roosevelt ran for and was re-elected to a fourth term in 1944, which he served until his death in April 1945.

Following Roosevelt’s departure from the two-term precedent established by President Washington, the United States Congress sought to formally establish the two-term presidential term limit through constitutional amendment. The 22nd Amendment to the U.S. Constitution was proposed by the U.S. Congress in March 1947 and ratified by the states in February 1951. The 22nd Amendment limits the number of terms to which a President may be elected to two. The Amendment was deliberately crafted in a manner that demonstrates its nonpartisan character, in other words, it was not an effort directed toward the incumbent. Specifically, the 22nd Amendment expressly did not apply to the occupant of the office of the presidency at the time the Amendment was proposed, and expressly did not prevent the occupant of the office at the time the Amendment became operative from serving out the remainder of that term. As such, the incumbent President could not be removed from office by the Amendment’s establishment of term-limits. President Harry Truman, the incumbent both at the time the 22nd Amendment was proposed and at the time it became operative, supported the Amendment: he remarked in 1952 that, “When we forget the example of such men as Washington, Jefferson, and Andrew Jackson, all of whom could have had a continuation of the office, then we will start down the road to dictatorship and ruin.”

IV. Opposition to Constitutional Backsliding around the World

Madam President, Members of the Court, let me make one final point: the United States has consistently expressed support for reasonable executive term limits in representative democracies and cautioned against attempts by political incumbents to erode such restrictions. For example, in an address to the African Union in 2015, President Barack Obama extolled the benefits of preserving conditions for regular transfers of power and articulated the risks of backsliding:

When a leader tries to change the rules in the middle of the game just to stay in office, it risks instability and strife And this is often just a first step down a perilous path. And sometimes you’ll hear leaders say, well, I’m the only person who can hold this nation together. If that’s true, then that leader has failed to truly build their nation. [...]

That same year, Secretary of State John Kerry also addressed the alteration of presidential term limits to favor an incumbent:

Elections are vitally important Just as important is respect for term limits. No democracy is served when its leaders alter national constitutions for personal or political gain. . . . A free, fair and peaceful presidential election does not guarantee a successful

democracy, but it is one of the most important measuring sticks for progress in any developing nation. . . . The United States remains committed to helping make those aspirations a reality.

In other words, the fact of an election does not alleviate the danger to democracy presented by the alteration of presidential term limits to favor an incumbent.

The United States Congress has also articulated the importance of respect for presidential term limits. For example, last year, the United States Senate adopted a resolution supporting democratic principles and standards in Latin America, in which the Senate expressed concern for efforts to circumvent certain presidential term limits and resolved, *inter alia*, that it:

supports presidential term limits prevalent in Latin America as reasonable checks against a history of coups, corruption, and abuses of power;

. . .

agrees with the Organization of American States Secretary General's interpretation of the American Convention of Human Rights as not applicable to presidential term limits; [and]

. . .

calls on Latin American democracies to continue to uphold democratic norms and standards[.]

The United States remains committed to promoting term limits in representative democracies. Term limits promote accountability and prevent entrenchments of power. The United States will continue to caution against efforts by incumbents to undermine the effective exercise of representative democracy by modifying limitations to re-election for their own political gain.

V. Conclusion

Madam President, Members of the Court: the effective exercise of representative democracy in the American States is a pillar of the OAS. Individuals' rights associated with participation in political affairs should support the effective exercise of representative democracy, as repeatedly affirmed by the American States. Reasonable restrictions on such rights, as contemplated by Article 25 of the ICCPR, such as term limits on incumbent office-holders, have been adopted by many of the American States, including the United States, with a view toward promoting the effective exercise of representative democracy. The United States has consistently expressed support for term limits in representative democracies and will continue to caution against attempts by political incumbents to erode such restrictions for their own political gain.

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Cross References

International Tribunals and Accountability Mechanisms, **Ch. 3.C.**

The UN Treaty System, **Ch.4.A.2**

Withdrawal from World Health Organization, **Ch. 4.B.2**

Iran-United States Claims Tribunal, **Ch. 8.C**

Venezuela, **Ch. 9.A.1**

Privileges and Immunities of International Organizations, **Ch. 10.D**

World Intellectual Property Organization (“WIPO”), **Ch. 11.F.5**

Comments to the International Law Commission (“ILC”) regarding sea-level rise, **Ch. 12.A.1.a**

The Global Health Response to the COVID-19 Pandemic, **Ch. 13.C.1**

UNCITRAL, **Ch. 15.A.1.**

Iran, **Ch. 16.A.1**

China sanctions related to Hong Kong, **Ch. 16.A.4.b**

Venezuela sanctions, **Ch. 16.A.5**

CHAPTER 8

International Claims and State Responsibility

A. CLAIMS AGAINST THE PALESTINIAN AUTHORITY AND PLO

On February 3, 2020, the State Department provided notice of the method by which U.S. nationals may contact the Department about claims covered under the Promoting Security and Justice for Victims of Terrorism Act of 2019 (Div. J, Pub. L. 116–94) (“the Act”). 85 Fed. Reg. 6010 (Feb. 3, 2020). The notice is excerpted below.

* * * *

Section 903(b)(4) of the [Act] provides that it is the sense of Congress that (A) covered claims should be resolved in a manner that provides just compensation to the victims; (B) covered claims should be resolved and settled in favor of the victim to the fullest extent possible and without subjecting victims to unnecessary or protracted litigation; (C) the United States Government should take all practicable steps to facilitate the resolution and settlements of all covered claims, including engaging directly with the victims or their representatives and the Palestinian Authority and the Palestine Liberation Organization; and (D) the United States Government should strongly urge the Palestinian Authority and the Palestine Liberation Organization to commit to good-faith negotiations to resolve and settle all covered claims.

Section 903(b)(2)(A) provides that the Department of State shall publish a notice in the **Federal Register** identifying the method by which a national of the United States, or a representative of a national of the United States, who has a covered claim, may contact the Department of State to give notice of the covered claims. Section 903(b)(2)(B) further provides that the Secretary of State, or a designee of the Secretary, shall meet (and make every effort to continue to meet on a regular basis thereafter) with any national of the United States, or a representative of a national of the United States, who has a covered claim and has informed the Department of State of the covered claim using the method established pursuant to subparagraph

(A) to discuss the status of the covered claim, including the status of any settlement discussions with the Palestinian Authority or the Palestine Liberation Organization.

Consistent with section 903(b)(2)(A), the Department of State hereby provides notice that nationals of the United States, or their representatives, may submit notice of and information concerning their covered claim to *PalestinianClaims@state.gov* by May 3, 2020. Such information shall include, at a minimum, the method by which the Department of State may contact a claimant, as well as sufficient documentation to establish that the claim constitutes a “covered claim” within the meaning of section 903. Section 903 defines a “covered claim” to mean any pending action by, or final judgment in favor of, a national of the United States, or any action by a national of the United States dismissed for lack of personal jurisdiction, under section 2333 of title 18, United States Code, against the Palestinian Authority or the Palestine Liberation Organization. In the event notice and information of a covered claim is submitted by the representative of a national of the United States, the information provided shall also include such documentation as necessary to establish the representative’s legal capacity to act on behalf of the national of the United States.

* * * *

B. HOLOCAUST ERA CLAIMS

On July 29, 2020, the State Department released a report to Congress pursuant to the Justice for Uncompensated Survivors Today (“JUST”) Act of 2017. Pub. L. No. 115-171, 132 Stat. 1288 (2018). The Department press statement announcing the release of the report is available at <https://2017-2021.state.gov/release-of-the-just-act-report/>, and excerpted below.

* * * *

The JUST Act Report highlights the important actions taken by countries to provide restitution of or compensation for property confiscated during the Holocaust era or subsequently nationalized during the Communist era, consistent with commitments those countries undertook when they endorsed the Terezin Declaration at the conclusion of the Prague Holocaust Era Assets Conference in June 2009. The report also describes the vital work that countries are doing to commemorate the Holocaust, open archives, and promote Holocaust education in order to honor survivors and victims and to ensure such atrocities never happen again.

As we mark the 75th anniversary of the end of the Holocaust and more than 10 years after the adoption of the Terezin Declaration, the legacy of the Nazis’ mass looting and subsequent Communist-era nationalizations of such property, remains largely unaddressed in too many places.

The Report details the critical work that remains to be done to provide a belated measure of justice to Holocaust survivors and their families, and to Jewish communities destroyed by the Holocaust. Given the advanced age of Holocaust survivors around the world—many of whom live in or near poverty—the need for action is urgent. All victims of the Nazi regime should be able to live out their remaining days in dignity.

When President Trump signed a landmark Executive Order on combatting anti-Semitism in December 2019, he also stressed the importance of strengthening restitution efforts. I am proud of the Department of State's work in this area, which is led by our Special Envoy for Holocaust Issues, and I will continue to make it a priority.

* * * *

C. IRAN CLAIMS

On March 10, 2020, the Iran-United States Claims Tribunal ("Tribunal") issued a partial award in cases A15 (II:A), A/26 (IV) and B43 (Award No. 604-A15 (II:A)/A26 (IV)/B43-FT) with seven separate dissenting and concurring opinions. The awards and separate opinions are available at <https://iusct.com/cases/>. The summary below references paragraphs from Partial Award 604, available at <https://iusct.com/cases/a15ii-a-doc-2350-t-award-10-march-2020-en/>.

In these consolidated cases, Iran asserts violations by the United States of its obligation under the Algiers Accords to transfer certain Iranian properties to Iran. In a previous partial award issued on May 6, 1992 (Award No. 529-A15-FT, <https://iusct.com/cases/a15ii-a-doc-1083-t-award-6-may-1992-2/>), the Tribunal decided a number of general issues concerning the United States' transfer obligation and concluded that certain U.S. conduct was inconsistent with that obligation in general respects. However, the Tribunal was unable to determine whether, *inter alia*, such breaches caused any losses to Iran or the specific properties to which the breaches may have applied without further proceedings.

In Award 604, the Tribunal decided several additional general issues related to the scope of the U.S. obligation under Paragraph 9 of the Algiers Accords. Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration), 19 Jan. 1981, [https://iusct.com/wp-content/uploads/2021/02/1-General-Declaration .pdf](https://iusct.com/wp-content/uploads/2021/02/1-General-Declaration.pdf). The text of Paragraph 9 of the General Declaration of the Algiers Accords requires the United States to "arrange, subject to the provisions of U.S. law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad and which are not within the scope of the preceding paragraphs." In Partial Award 604, one of the Tribunal's main tasks was to interpret the meaning of "Iranian properties." As the Tribunal noted (¶¶ 98-99), it had interpreted the phrase "Iranian properties" in an earlier award to mean tangible properties that were "solely owned by Iran." The Tribunal concluded in Partial Award 604 that, in determining whether specific properties were "solely owned by Iran," title is the key consideration (¶ 129) and "the objective means by which to determine the question of ownership over the property claimed and to conclude whether the property falls within the scope of Paragraph 9." (¶ 131.)

For purposes of assessing whether and when the passage of title occurred, the Tribunal noted that general public international law does not provide any applicable rules or principles and, accordingly, it would look to "the relevant domestic law

governing passage of title” (¶ 137) and specifically the *lex rei sitae*, i.e., “the law of the place where the goods are located at the time of their transfer.” (¶¶ 144, 164.)

Beyond the interpretation of “Iranian properties,” the Tribunal also ruled on other aspects of the U.S. obligation under Paragraph 9. *First*, the Tribunal concluded that the U.S. obligation arose on January 19, 1981, the date that both Iran and the United States adhered to the Algiers Accords (¶ 173). However, the Tribunal qualified this ruling by explaining that the United States was not required to have already taken steps to arrange for the transfer of properties to Iran by this date. Rather, it was necessary for the Tribunal “to carry out a claim-by-claim analysis in order to determine when the United States should have taken additional steps in light of the specific circumstances of each Individual Claim,” such as when Iran provided “direction to the property holders and indication to the United States of any need for assistance.” (¶¶ 175-76.)

Second, the Tribunal rejected Iran’s argument that Paragraph 9 imposed on the United States an obligation of result, i.e., an obligation to ensure that properties were, in fact, transferred to Iran (¶ 190). The Tribunal concluded instead that the precise nature of the obligation “very much depend[s] on the circumstances of the specific case and cannot be determined in general terms.” (¶¶ 189, 191.)

Third, the Tribunal found that, while the U.S. obligation under Paragraph 9 arose independent of any action by Iran, assessing whether the United States had fulfilled that obligation required consideration of “(i) whether Iran had provided the holders [of the property at issue] with the information necessary for them to effect the transfer and (ii) whether Iran had informed the United States that holders were not transferring Iranian properties that should have been transferred pursuant to the transfer directive contained in Executive Order No. 12281.” (¶ 204.) According to the Tribunal, these were “burdens in Iran’s own interest, in the sense that, absent their performance, in principle, the United States’ responsibility for failing to take steps to ensure that holders would transfer Iranian properties to Iran could not be engaged.” (¶ 205.) On the other hand, “in situations where direction to holders or indication to the United States was unnecessary or futile, Iran could not reasonably have been expected to take those actions.” (¶ 207.)

The Tribunal dismissed two alternative claims that Iran asserted for cash sums it had paid to private contractual partners toward the purchase of properties. Iran’s primary claim was under Paragraph 8 of the Algiers Accords, which provides in relevant part that:

the United States will act to bring about the transfer to the Central Bank of all Iranian financial assets (meaning funds or securities) which are located in the United States and abroad . . . to be held by the Central Bank in escrow until their transfer or return is required by Paragraph 3 above.

The Tribunal concluded that the phrase “Iranian financial assets,” as used in Paragraph 8, could not possibly include the sums that Iran was attempting to claim, which “were typically held in bank accounts in the name of Iran’s business partners themselves

rather than in Iran's name." (¶ 230.) As the Tribunal observed, "Iran was not the beneficiary of those accounts and had no claims vis-à-vis the banks to the monies deposited therein." (*Id.*)

The Tribunal also rejected Iran's alternative claim, made under General Principle A of the General Declaration of the Algiers Accords, for these same sums. Iran argued that General Principle A, in providing that "the United States will restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979," effectively obligated the United States to ensure the return of payments that Iran had made to private contractors by that date. The Tribunal concluded, however, that to the extent General Principle A could serve as a "free-standing source of rights and obligations," the United States satisfied its obligations thereunder "by removing, on 19 January 1981, all restrictions it had imposed on the mobility and free transfer of all Iranian assets between 14 November 1979 and 19 January 1981 through Executive Order No. 12281." (¶ 247.)

The Tribunal made a number of specific rulings in its analysis of claims relating to specific properties for which Iran argued the United States had breached its obligations. The Tribunal rejected Iran's claims for a wide range of properties, and accepted its claims for other properties, awarding compensation to Iran for the fair market value of the properties as of the date of the breach. The Tribunal also awarded Iran "post-award interest at the successive prevailing prime bank lending rates in the United States for the period of non-payment of this Partial Award." (¶ 2610.) The Tribunal rejected Iran's claim for compounding pre-award interest, instead calculating interest on a simple basis.

In total, inclusive of its claims for interest, Iran sought nearly \$1.9 billion in compensation. In its Award, the Tribunal awarded Iran approximately \$29 million in compensation (inclusive of pre-award interest). The Tribunal also ordered the United States to transfer certain properties to Iran within four months of the Award. (¶ 2611(12), (13).) If the United States did not do so, the Tribunal ruled that it must pay to Iran \$7,882,829.43 in damages and pre-award interest.

On April 9, 2020, the United States sought corrections to certain aspects of the Tribunal's Award, as well as an additional award on a defense that the Tribunal had failed to address. On November 27, 2020, the Tribunal issued its decision on the U.S. request. The Tribunal granted some of the corrections that the United States sought, while denying others and denying the request for an additional award. The Tribunal's decision resulted in a \$5,605.00 reduction in the amount of damages awarded to Iran and a \$8,828.03 reduction in the amount of pre-award interest, for a total reduction of \$14,433.03.

D. SUDAN CLAIMS

See Chapter 10 for discussion of the Supreme Court's 2020 decision in *Opati v. Republic of Sudan*, 590 U.S. ___, 140 S. Ct. 1601 (2020) (also relating to claims arising from the 1998 embassy bombings in Tanzania and Kenya).

1. Claims Settlement Agreement

On October 30, 2020, the United States and Sudan signed the Claims Settlement Agreement between the Government of the United States of America and the Government of the Republic of the Sudan (“Agreement”). Together, the Agreement with a side letter clarifying Article IV(2) of the Agreement, the Sudan Claims Resolution Act (“Act”), discussed *infra*, and an agreement pertaining to the release of escrowed funds, provide the framework to address claims against Sudan related to the 1998 East Africa embassy bombings, the 2000 attack on the U.S.S. Cole, and the 2008 killing of a USAID employee. Pending claims against Sudan related to the September 11 attacks were not affected by the Agreement or the Act.

On November 2, 2020, the State Department announced the Agreement in a press statement, available at <https://2017-2021.state.gov/u-s-sudan-signing-ceremony-on-bilateral-claims-agreement/>. The press statement says, in part:

The agreement also provides for the transfer of compensation for victims of the 2000 attack on the USS Cole and the 2008 killing of U.S. Agency for International Development employee John Granville. This agreement is the culmination of more than a year of negotiations between both countries. It memorializes Sudan’s agreement to provide \$335 million in compensation for victims of terrorism, which will be released to the United States following the rescission of Sudan’s State Sponsor of Terrorism designation and the enactment of legislation that would restore its immunities to those of a country not so designated.

The Agreement, excerpted below, addresses the restoration of sovereign, diplomatic, and official immunities to Sudan and the barring and precluding of litigation of covered claims against Sudan in U.S. courts through the enactment of legislation. The full text of the agreement and the side letter clarifying Article IV(2) are available at <https://www.state.gov/sudan-21-209>.

* * * *

ARTICLE II

The objective of this Agreement is to reach a comprehensive settlement that:

1. settles the claims of the United States of America and, through espousal, those of U.S. nationals;
2. provides meaningful compensation in connection with claims of foreign nationals employed or performing a contract awarded by the United States and establishes a fair process through which to distribute compensation for such claims; and
3. bars and precludes all U.S. national and foreign national suits and actions (including suits and actions with judgments that are still subject to appeal or other forms of direct

judicial review, as well as suits or actions to wholly or partially satisfy final judgments through execution or attachment) and future suits and actions in the courts of the United States of America through legislation providing to Sudan the sovereign, diplomatic and official immunities normally provided by the United States to other states

if such claims, suits, or actions are against Sudan or, where the claims, suits, or actions implicate in any way the responsibility of Sudan, against Sudan's nationals; and such claims, suits, or actions are brought by or on behalf of U.S. nationals or such claims, suits, or actions are brought by or on behalf of foreign nationals; and such claims, suits, or actions arise from personal injury (whether physical or non-physical, including emotional distress), death, or property loss caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking or detention or other terrorist act, or the provision of material support or resources for such an act, occurring outside of the United States of America and prior to the date of execution of this Agreement.

ARTICLE III

1. Upon entry into force of this Agreement, the Government of the United States of America confirms the enactment of legislation that Sudan may invoke, upon the receipt by the United States of the funds referred to in Paragraph 2 of this Article, that:

- a. provides the same sovereign, diplomatic, and official immunity to Sudan and its property and to its agencies, instrumentalities, officials, and their property, as is normally provided by the United States to other states and their property and to their agencies, instrumentalities, officials, and their property; and
- b. bars and precludes all suits and actions specified in Article II of this Agreement pending in the courts of the United States of America whether brought by or on behalf of U.S. nationals or foreign nationals (including suits or actions with judgments that are still subject to appeal or other forms of direct judicial review, as well as any pending suits or actions to wholly or partially satisfy final judgments through execution or attachment) and future suits and actions specified in Article II.

2. The Government of the Republic of the Sudan shall transfer to the Government of the United States a payment of U.S.\$335,000,000, as the basis for settling the claims and the legislation barring and precluding the suits and actions specified in Article II of this Agreement, to be used by the Government of the United States of America for making distribution payments as specified in the annex to this Agreement ("Annex").

* * * *

ARTICLE IV

1. The Government of the United States of America shall accept the funds specified in Article III(2) of this Agreement for distribution as a full and final settlement of its claims, suits, and actions and, through espousal, those of U.S. nationals as specified in Article II of this Agreement, and for payment of compensation, as specified in Article II, to resolve claims, suits, and actions of foreign nationals.

2. Upon receipt of the funds from the Government of the Republic of the Sudan specified in Article III(2) of this Agreement, the Government of the United States of America:

- a. Shall certify that Sudan has made final payment of the funds to the United States in accordance with any certification requirement set forth in the legislation referred to in Article III(1) of this Agreement.
- b. Shall take action as appropriate and necessary, consistent with its constitutional structure, to help bring about the success of Sudan's efforts to secure
 - i. the termination of legal proceedings in U.S. federal or state courts involving any claims, suits, or actions specified in Article II of this Agreement, regardless of the nationality of the claimant; and
 - ii. the nullification of any and all attachments and measures in support of attachments, and the vacatur of any judgments rendered by a U.S. federal or state court,consistent with the legislation referred to in Article III(1) of this Agreement.
- c. Shall avoid any action that:
 - i. contradicts the terms of this Agreement, and in particular challenges the sovereign immunity of Sudan concerning any of the claims, suits, or actions specified in Article II of this Agreement; or
 - ii. stands as an obstacle to the accomplishment and execution of this Agreement.

* * * *

In connection with the signing of the Agreement, Assistant Secretary of State for African Affairs Tibor Nagy sent a side letter to Sudan, excerpted below, providing an exemplar of the U.S. practice with respect to the termination of litigation based on the 2008 Libya claims settlement process. The full text of the letter is appended to the Agreement.

* * * *

[Article IV(2) paragraphs (a)-(b) of the Agreement] address the termination of litigation and reflect the process by which the termination of litigation would be secured in the U.S. judicial system.

As discussed during the negotiations between the Parties to the Agreement, Sudan, as the defendant in any cases covered by the Agreement, and consistent with the Foreign Sovereign Immunities Act, would be responsible for moving to dismiss any such case in the court in the United States in which it is pending. The legislation referred to in Article III(1) presumably would be a basis for the motion to dismiss.

The United States, which is currently not a party to such cases, nonetheless has the ability to participate in the litigation. For example, the United States has the authority to make filings in cases pursuant to 28 U.S.C. § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in a state or federal court. The United States has made such filings in many cases in the courts of the United States, and in particular, in cases that were covered by the 2008 Libya Claims Settlement Agreement. In those cases, Libya moved for

dismissal, and the United States supported Libya's request for dismissal with a filing that explained the United States' interest in the litigation.

The process for initiating the United States' participation in those cases began with a request by the Department of State to the Department of Justice to make such a filing, invoking among other things, the 2008 Libya Claims Resolution Act, which restored to Libya immunities normally enjoyed by states that are not designated as state sponsors of terrorism. The Department of Justice agreed with the recommendations in those cases, filed the appropriate papers to support dismissal requested by Libya, and the cases were dismissed in due course.

As explained during the negotiations, while the Department of State cannot guarantee that the United States will appear in any particular case in advance, it would expect that once Sudan were to move to request dismissal of a case covered by the Agreement on the basis of the legislation referred to in Article III(1), the Department of State would send a request to the Department of Justice for participation by the United States to support Sudan's request for dismissal on that basis and that such a request by the Department of State would receive favorable consideration. This would apply to all cases covered by the Agreement, including, but not limited to, *Opati v. Republic of Sudan* (D.D.C), 12-cv-1224 (JDB).

* * * *

2. Sudan Claims Resolution Act

On December 27, 2020, the Sudan Claims Resolution Act ("Act") was signed into law in furtherance of the claims settlement with the Government of Sudan. Title XVII, Div. FF, Pub. L. No. 116-260, 134 Stat. 1182 (2020). Section 1704(a), excerpted below, provides for the restoration of Sudan's sovereign immunity from terrorism-related claims in U.S. federal and state courts, upon certification by the Secretary of State that the United States has received sufficient funds pursuant to the Agreement. Pursuant to § 1706, this provision does not apply to September 11 claims that were pending in the multi-district litigation in the U.S. District Court for the Southern District of New York on December 27, 2020. Otherwise, pursuant to 1704(b), the provision applies to "all conduct and any event occurring before [March 20, 2021]."

* * * *

(a) Immunity.—

(1) IN GENERAL.—Subject to section 1706, and notwithstanding any other provision of law, upon submission of a certification described in paragraph (2)—

(A) Sudan, an agency or instrumentality of Sudan, and the property of Sudan or an agency or instrumentality of Sudan, shall not be subject to the exceptions to immunity from jurisdiction, liens, attachment, and execution under section 1605(a)(7) (as such section was in effect on January 27, 2008) or section 1605A or 1610 (insofar as section 1610 relates to a judgment under such section 1605(a)(7) or 1605A) of title 28, United States Code;

(B) section 1605A(c) of title 28, United States Code, section 1083(c) of the National Defense Authorization Act for Fiscal Year 2008 ([Public Law 110–181](#); [28 U.S.C. 1605A](#) note), section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 ([Public Law 104–208](#); [28 U.S.C. 1605](#) note), and any other private right of action relating to acts by a state sponsor of terrorism arising under Federal, State, or foreign law shall not apply with respect to claims against Sudan, or any of its agencies, instrumentalities, officials, employees, or agents in any action in a Federal or State court; and

(C) any attachment, decree, lien, execution, garnishment, or other judicial process brought against property of Sudan, or property of any agency, instrumentality, official, employee, or agent of Sudan, in connection with an action that is precluded by subparagraph (A) or (B) shall be void.

(2) CERTIFICATION.—A certification described in this paragraph is a certification by the Secretary to the appropriate congressional committees stating that—

(A) the August 12, 1993, designation of Sudan as a state sponsor of terrorism has been formally rescinded;

(B) Sudan has made final payments with respect to the private settlement of the claims of victims of the U.S.S. Cole attack; and

(C) the United States Government has received funds pursuant to the claims agreement that are sufficient to ensure—

(i) payment of the agreed private settlement amount for the death of a citizen of the United States who was an employee of the United States Agency for International Development in Sudan on January 1, 2008;

(ii) meaningful compensation for claims of citizens of the United States (other than individuals described in section 1707(a)(1)) for wrongful death or physical injury in cases arising out of the August 7, 1998, bombings of the United States embassies located in Nairobi, Kenya, and Dar es Salaam, Tanzania; and

(iii) funds for compensation through a fair process to address compensation for terrorism-related claims of foreign nationals for wrongful death or physical injury arising out of the events referred to in clause (ii).

(b) Scope.—Subject to section 1706, subsection (a) of this section shall apply to all conduct and any event occurring before the date of the certification described in subsection (a)(2), regardless of whether, or the extent to which, application of that subsection affects any action filed before, on, or after that date.

* * * *

In a December 30, 2020 press statement, the State Department confirmed the enactment of the Act. The press statement is available at <https://2017-2021-translations.state.gov/2020/12/30/enactment-of-legal-peace-legislation-to-restore-sudans-sovereign-immunities/index.html> and excerpted below.

* * * *

With the enactment of the Consolidated Appropriations Act . . . , the way is clear for victims of the 1998 East African Embassy bombings, the 2000 attack on USS Cole, and the 2008 murder of USAID employee John Granville, to receive long-awaited compensation for their immeasurable losses. The \$335 million previously provided by Sudan and to be released to the United States from escrow is in addition to the compensation Sudan has already paid to some victims of the Cole attack as part of a private settlement.

Achieving compensation for these victims of terrorism has been a top priority of the Department. We are pleased to have been able to work with Congress on this legislation while also preserving the ability of 9/11 victims with pending claims against Sudan to continue to pursue those claims.

The enactment of this legislation represents a fundamental change in Sudan's relationship with not only the United States but also the entire international community. It removes a major impediment to Sudan's full reintegration into the global economy by reducing the risk of attachment of Sudan's assets, opening the possibility for substantially increased trade and investment.

This historic step is possible because of the courageous actions of the Sudanese people, who have placed their country on a path towards democracy and economic prosperity. The leadership of the civilian-led Transitional Government in delivering on the demands of the people of Sudan is integral to the success of this transition. We commend the Sudanese people for their continued insistence on freedom, peace, and justice, and we congratulate Prime Minister Hamdok and the civilian-led Transitional Government for their courage in advancing both the aspirations of the people they serve and the cause of regional peace under the Abraham Accords.

* * * *

E. IRAQ CLAIMS UNDER THE 2014 REFERRAL TO THE FCSC

The Foreign Claims Settlement Commission ("FCSC" or "Commission") began issuing decisions in 2016 in the Second Iraq Claims Program ("Iraq II"), 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. The FCSC announced the Iraq II program was completed April 13, 2020. 85 Fed. Reg. 19,029 (Apr. 3, 2020). Several of the final decisions issued in 2020 relate to the Commission's standard for hostage-taking under international law (i.e. whether claimants were "seized or detained" by Iraq). Three such decisions are summarized below. The final decisions are available at <https://www.justice.gov/fcsc/final-opinions-and-orders-5#s3>.

1. Claim No. IRQ-II-346, Decision No. IRQ-II-322 (2020)

This claim under Category A involves a minor U.S. national who was living with his family in Kuwait when Iraq invaded on August 2, 1990. The Claimant asserted that he was held hostage from August 2 through October 10, 1990, when he boarded a bus to Basra, Iraq, and boarded an evacuation flight to London. In its Proposed Decision, the Commission held that Claimant was only held hostage through August 28, 1990, when the Iraqi

government announced that all female and minor U.S. nationals were permitted to leave Kuwait and Iraq. Thus, Claimant was only awarded compensation through that date. On objection, Claimant argued, *inter alia*, that, despite the August 28 announcement, he continued to be detained by Iraq because of continued threats to U.S. nationals, such as the criminalization of hiding of foreigners, door-to-door searches for U.S. citizens, and the establishment of neighborhood checkpoints. In its Final Decision, the Commission rejected this argument, noting that the evidence did not indicate that “Iraqi soldiers in Salmiya continued to target *women and children* for detention after the August 28, 1990 release.” Moreover, Claimant was unable to “establish that he remained confined, and thus detained, merely because” of Iraq’s decree criminalizing the hiding of foreigners, because he had not provided evidence that he was among the U.S. nationals subject to the decree after the August 28 announcement regarding women and children. Thus, the Commission affirmed its Proposed Decision denying the portion of the claim for hostage-taking after August 28, 1990, since he had not proven that he was “seized or detained” by Iraq after that date, as required by the Commission’s standard for hostage-taking in violation of international law.

2. Claim No. IRQ-II-365, Decision No. IRQ-II-323 (2020)

This Category A claim also involves a minor U.S. national who was living with her family in Kuwait when Iraq invaded on August 2, 1990. She too asserted that she was held hostage from August 2 through October 10, 1990, when she boarded an evacuation flight to London in Basra, Iraq. In the Proposed Decision, the Commission held, again, that Claimant was only held hostage through August 28, 1990, when the Iraqi government announced that all female and minor U.S. nationals were permitted to leave Kuwait and Iraq. On objection, Claimant argued, *inter alia*, that, despite the August 28 announcement, she continued to be detained by Iraq because Iraq required exit visas for all departing women and children, which she claims required a U.S. passport, which she did not possess. She claims that Iraq would not allow her mother, who held Claimant’s U.S. passport, to enter Kuwait until September 30, 1990, and the next available evacuation flight was October 10. In its Final Decision, the Commission noted that other claimants had been able to obtain exit visas by presenting documents “in lieu of a U.S. passport” by the U.S. Embassy in Baghdad due to a shortage of blank passports. Claimant was thus unable to prove that a U.S. passport “was an ‘absolute . . . requirement’ for her departure and that Iraq ‘prohibited [her] from leaving Kuwait at any time until she had her [U.S.] passport,’ i.e. until September 30.” The Commission therefore affirmed its Proposed Decision denying the portion of the claim for hostage-taking after August 28, 1990, because she had not proven that she was “seized or detained” by Iraq after that date, as required by the Commission’s standard for hostage-taking in violation of international law.

3. Claim No. IRQ-II-374, Decision No. IRQ-II-329 (2020)

This Category A claim involves yet another minor U.S. national who was living with his family in Kuwait at the time of the Iraqi invasion. As in the other claims discussed *supra*, Claimant asserted that he was held hostage from August 2 through October 10, 1990, when he boarded an evacuation flight from Kuwait to London via Baghdad. In the Proposed Decision, the Commission held, again, that Claimant was only held hostage through August 28, 1990, when the Iraqi government announced that all female and minor U.S. nationals were permitted to leave Kuwait and Iraq. On objection, Claimant argued, *inter alia*, that, despite the August 28 announcement, he continued to be detained by Iraq after that date because his parents “‘subjectively believed . . . they could not leave Kuwait or even come out of hiding’ and ‘did not “choose” to stay’ until October 10, 1990.” He maintained that his parents were “‘simply ill-informed” about the evacuation flights or were “‘so extremely skeptical that they believed that they could not go to the U.S. Embassy without risking arrest or harm to their family, until just before October 10, 1990.” However, the Commission concluded that Claimant had “not shown that he remained in Kuwait due to actions taken by Iraqi authorities to restrict his movements or to otherwise prevent him from leaving Kuwait[.]” after August 28, 1990. The Commission therefore affirmed its Proposed Decision denying the portion of the claim for hostage-taking after August 28, 1990, since he had not proven that he was “seized or detained” by Iraq after that date, as required by the Commission’s standard for hostage-taking in violation of international law.

Cross References

International Tribunals and Accountability Mechanisms, **Ch. 3.C**

International Court of Justice, **Ch. 7.B**

Sudan, **Ch. 9.A.2**

Expropriation Exception to Immunity, **Ch. 10.A.3**

Opati v. Sudan, **Ch. 10.A.5**

Investment Dispute Resolution, **Ch. 11.B**

Iran, **Ch. 16.A.1**

Sudan (rescission of state sponsor of terrorism designation), **Ch. 16.A.7**

Sudan, **Ch. 17.B.5**

CHAPTER 9

Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues

A. DIPLOMATIC RELATIONS, SUCCESSION, AND CONTINUITY ISSUES

1. Venezuela

As discussed in *Digest 2019* at 299, the United States and other governments recognized Juan Guaidó as the interim president of Venezuela in 2019. On January 6, 2020, U.S. Special Representative for Venezuela Elliott Abrams held a special briefing, in which he extended the congratulations of the U.S. government to Juan Guaidó after his re-election as president of the National Assembly. The special briefing is excerpted below and available at <https://2017-2021.state.gov/special-representative-for-venezuela-elliott-abrams-3/>.^{*}

* * * *

As you recall, we have been warning about the Maduro dictatorship's efforts to steal the vote through bribery, jailings, and intimidation. More than 30 deputies are in hiding, in prison, or in exile. Others were bought.

And yet this brutal and corrupt campaign failed. Obviously, if the regime had had the votes, it would not have ordered soldiers to keep elected deputies out of the National Assembly in shameful scenes you've probably all seen in videos. Those actions have been condemned and rejected by countries all over the world.

^{*} Editor's note: References to a "regime" or "Maduro regime" in the *Digest*, including in the excerpts, are not intended to indicate that the United States considers such entity a government.

The new Foreign Minister of Argentina said, quote, “To impede by force the functioning of the legislative assembly is to condemn oneself to international isolation.” And Argentina called the regime’s actions, quote, “unacceptable.”

Mexico said, quote, “The legitimate functioning of the legislative power is inviolable in democracies.”

Brazil said it would, quote, “not recognize any result of this violence and affront to democracy.”

The Lima Group—Latin American countries, plus Canada—congratulated Guaido on his re-election and said it, quote, “condemns the use of force and intimidation tactics against members of the National Assembly,” and condemns, quote, “the systematic violations of human rights committed by the illegitimate and dictatorial regime of Nicolas Maduro.”

The EU said it, quote, “continues to recognize Juan Guaido as the legitimate president of the National Assembly.”

We look forward to working this year with Juan Guaido, with the firm majority of the Venezuelan parliament, who continue to support democracy, with Venezuela’s democratic political parties, and with the millions of Venezuelans who want the dictatorship to end.

We applaud Guaido’s decision to leave the leadership of the Voluntad Popular Party, and to work instead on building a broad alliance of civil society groups, NGOs, trade unions, and all Venezuelans who want the end of a dictatorship that has brought economic ruin and oppression.

We look forward, as well, to working with democracies around the world in support of democracy in Venezuela. This is a struggle against a regime that, as we saw yesterday, will do anything to prevent the return of democracy. So we will be asking democratic parties and governments and NGOs to step up and do more in support of democrats and democratic institutions in Venezuela.

The United States will also be doing more in support of the National Assembly and its legitimate leadership, and of the Venezuelan people’s efforts through greater pressure on the dictatorship and its leaders and supporters inside and outside of Venezuela, and more direct help to the forces of freedom there. We have no doubt that Venezuelans will win their struggle and return their country to democracy.

* * * *

On March 31, 2020, the United States proposed a framework for a peaceful, democratic transition in Venezuela. See State Department press statement, available at <https://2017-2021.state.gov/the-united-states-proposes-a-framework-for-a-peaceful-democratic-transition-in-venezuela/>. The framework was developed using proposals by Juan Guaidó’s interim government and provides for free and fair presidential elections and the lifting of U.S. sanctions. The State Department issued a fact sheet outlining the framework for a democratic transition in Venezuela. The fact sheet is excerpted below and available at <https://2017-2021.state.gov/democratic-transition-framework-for-venezuela/>. Special Representative Abrams also held a briefing on the framework, transcribed at <https://2017-2021.state.gov/briefing-with-special-representative-for-venezuela-elliott-abrams-on-the-democratic-transition-framework-for-venezuela/>.

* * * *

1. Full return of all members of the National Assembly (AN); Supreme Court (TSJ) lifts order of contempt and restores all powers to the AN, including immunities for deputies; National Constituent Assembly (ANC) is dissolved. The U.S. lifts sanctions imposed on ANC members due to their membership in the ANC.

2. All political prisoners are released immediately.

3. All foreign security forces depart immediately unless authorized by 3/4 vote of the AN.

4. AN elects new National Electoral Council (CNE) and TSJ members who are acceptable to all parties or coalitions of parties representing 25% or more of AN membership. (This would give both the PSUV and the multi-party Guaidó coalition a veto over personnel for any of these posts.) Upon the selection of a new CNE and TSJ, the U.S. lifts sanctions imposed on former CNE and TSJ members due to their membership in those bodies.

5. AN approves “Council of State” Law, which creates a Council of State that becomes the executive branch. Each party or coalition of parties with 25% or more of AN membership selects two members of the Council of State, one of whom must be a state governor. The four members of the Council of State then select a fifth member, to be Secretary General, and who serves as Interim President until the elections and is not permitted to be a candidate for president in the elections. Council members may not be members of the AN or TSJ. Decisions of the Council of State will be reached by majority vote. One member of the National Armed Forces of Venezuela (FANB) will serve as Military Adviser to the Council of State.

6. All of the powers assigned to the President by the Constitution will be vested exclusively in the Council of State. The U.S. and the EU will lift sanctions on those who claimed Presidential authorities which were imposed due to their holding their previous positions once the Council of State is functioning and those individuals renounce any further claims to hold executive positions and acknowledge the Council of State as the exclusive executive power.

7. Once the Council of State is established and foreign security forces have departed (unless approved by 3/4 vote at the AN), U.S. sanctions on the Government of Venezuela, PDVSA, and the oil sector are suspended.

8. Council of State appoints new cabinet. The U.S. lifts sanctions on former cabinet members due to their holding their previous positions. The U.S. also lifts sanctions on members of the FANB that are based on their position in the institution.

9. The international community provides humanitarian, electoral, governance, development, security, and economic support, with special initial focus on medical care system, water and electricity supply. Existing social welfare programs, now to be supplemented with international support, must become equally accessible to all Venezuelan citizens. Negotiations begin with World Bank, IMF, and Inter-American Development Bank for major programs of support.

10. A Truth and Reconciliation Commission is established with the task of investigating serious acts of violence that occurred since 1999, and reports to the nation on the responsibilities of perpetrators and the rehabilitation of victims and their families. The Commission has five members, who are selected by the Secretary General of the United Nations with the consent of the Council of State. The AN adopts amnesty law consistent with Venezuela’s international obligations, covering politically motivated crimes since 1999 except

for crimes against humanity. Argentina, Canada, Colombia, Chile, Paraguay, and Peru withdraw support for the International Criminal Court referral.

11. The Council of State sets a date for simultaneous Presidential and AN elections in 6-12 months. Any Venezuelan citizen eligible in accordance with the 1999 Constitution can compete in the election.

12. Presidential and AN elections are held. With a consensus of international observers that elections were free and fair, remaining U.S. sanctions are lifted.

13. Bi-partisan commission within the AN is developed to create long term solutions to rehabilitating the economy and refinancing the debt.

Guarantees

1. The military high command (Defense Minister, Vice Defense Minister, CEOFANB Commander, and Service Chiefs) remains in place for the duration of the transitional government.

2. State or local authorities remain in place for the duration of the transitional period.

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On May 29, 2020, the State Department issued a press statement reaffirming the U.S. commitment to democratic government in Venezuela, particularly the National Assembly and President Juan Guaidó. The statement is excerpted below and available at <https://2017-2021.state.gov/in-defense-of-democracy-in-venezuela/>.

... We strongly condemn the illegitimate former Maduro regime's most recent attempt to destroy Venezuela's last remaining democratic institution, the National Assembly, and depose National Assembly President and interim President of Venezuela Juan Guaido. The May 26 sham ruling—by the former Maduro regime-aligned and illegitimate Supreme Court—purporting to confer the National Assembly presidency on a deputy who received regime bribes to orchestrate a pretended takeover of the institution... is appalling.

Maduro, his security forces, and his lackeys in the illegitimate Supreme Court have led a sustained assault on the National Assembly. They issued sham sentences against dozens of parliamentarians, forcing them into exile. They continue the arbitrary detention of political prisoners, including Guaido's Chief of Staff Roberto Marrero, and National Assembly deputies Gilber Caro, Tony Geara, Ismael Leon, Renzo Prieto, and Juan Requesens. We demand their release and we reiterate again our demand that the unjust imprisonment of the CITGO 6 be ended.

On June 15, 2020, the State Department issued a further press statement condemning the Maduro affiliate-controlled Supreme Court's actions to rig elections in Venezuela. The press statement, available at <https://2017-2021.state.gov/the-united-states-condemns-maduros-latest-step-to-rig-the-next-venezuelan-election/>, follows.

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Free elections are the path out of Venezuela's deep political crisis. Unfortunately, on June 12, the Maduro regime-controlled Supreme Court continued to manipulate the Venezuelan Constitution by illegally naming a new, regime-aligned National Electoral Council (CNE).

Venezuelans deserve an independent CNE. The Venezuelan Constitution gives the democratically elected National Assembly the responsibility of electing the CNE members. Without following this process, elections that represent the will of the people are impossible.

The regime has selected a CNE that will rubber-stamp its decisions and ignore the conditions required for free elections.

As we have previously stated, an independent CNE is a central prerequisite for free and fair elections. <https://2017-2021.state.gov/free-and-fair-presidential-and-parliamentary-elections-in-venezuela>.

Key areas include:

- Lifting the ban on political parties and candidates
- Lifting politically motivated judicial procedures against opposition politicians
- Releasing all political prisoners
- Respecting freedom of speech, the press, and association
- Resolving in a transparent manner all the technical challenges to free and fair elections including registration of voters and the procurement and handling of voting machines

The Venezuelan people demand and deserve free and fair elections. This step by the regime and its Supreme Court takes Venezuela even further away from a democratic transition.

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On August 14, 2020, the United States joined with other democracies around the world in a joint statement reiterating support for democratic efforts in Venezuela. The signatory parties include: Albania, Australia, Bahamas, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Estonia, Georgia, Guatemala, Haiti, Honduras, Hungary, Israel, Kosovo, Latvia, Lithuania, Panama, Paraguay, Peru, Republic of Korea, Saint Lucia, Ukraine, and the United Kingdom, in addition to the United States. The State Department press statement on the joint statement is available at <https://2017-2021.state.gov/u-s-and-concerned-nations-stand-together-for-democratic-change-in-venezuela/> and describes the joint statement as calling for "a transitional government that will hold free and fair presidential and parliamentary elections." The joint statement is available at <https://2017-2021.state.gov/joint-declaration-of-support-for-democratic-change-in-venezuela/>.

On December 8, 2020, the State Department issued a statement from Secretary Pompeo, available at <https://2017-2021.state.gov/the-united-states-applauds-the-interim-governments-peoples-vote/>, reiterating support for Interim President Juan Guaidó, the National Assembly, and the Venezuelan people. In particular, Secretary Pompeo stated U.S. support for the *Consulta Popular*, or People's Vote, conducted by the National Assembly in December, in accordance with the Venezuelan Constitution:

It provides a platform for Venezuelans, including those forced to flee abroad under threat of persecution, torture, or death, to demand free and fair presidential and legislative elections. It is an opportunity to voice their support for a transition to democracy in Venezuela and reject the regime's fraudulent legislative elections.

2. Sudan

As discussed in *Digest 2019* at 302-04, the United States supported the transition in the government of Sudan, with the exit of President Omar al Bashir. On April 11, 2020, the one-year anniversary of the ouster of al Bashir, the State Department issued, as a media note, the joint statement of the Troika (the governments of the United States, the United Kingdom, and the Kingdom of Norway). The joint statement appears below and the media note is available at <https://2017-2021.state.gov/troika-statement-one-year-anniversary-of-omar-al-bashirs-ouster/>.

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The United States, the United Kingdom, and the Kingdom of Norway (the Troika) congratulate the civilian-led transitional government and the people of Sudan on the one-year anniversary of the ouster of Omar al-Bashir and his regime. This created the opportunity to forge a new political order and social contract in Sudan. We commend Prime Minister Abdalla Hamdok and the civilian-led transitional government, as well as other stakeholders, especially those representing civil society, on their efforts to deliver peace, justice, and freedom to the Sudanese people. We recognize the efforts being made to ensure that the people of Sudan enjoy equality and respect for their human rights, including religious freedom. Sustainable progress in these areas reflects the values and fulfils the aspirations of the Sudanese people. The Troika, as a witness to the Political Agreement between the Forces for Freedom and Change and the Transitional Military Council in August 2019, remains steadfast in supporting Sudan's peaceful, democratic transition.

Sudan has an unprecedented opportunity to advance justice, peace, and development for all people in Sudan and to empower women, youth, and those from traditionally marginalized areas. Much urgent work remains to achieve the goals of the revolution. As an immediate next step, we look forward to seeing progress on forming the Transitional Legislative Council, appointing civilian governors, concluding peace agreements with armed opposition groups, undertaking serious, although initially painful, economic reforms, and increasing the transparency of government finances, including those of the security institutions.

The way forward is more difficult because several of Sudan's ongoing conflicts are unresolved. The transitional government's commitment to the permanent ceasefire it announced in October 2019, and the recent extensions of the unilateral ceasefires declared by two rebel groups, are important signs of good will. We support the UN Secretary-General's call for a global Coronavirus ceasefire and we call on all parties involved in Sudan's armed conflicts to commit to permanent ceasefires and unhindered humanitarian access. Yet, peace is more than the

absence of war, and it is urgent that all parties agree on the terms of a comprehensive peace. We appreciate and welcome reports of progress in the peace negotiations in Juba. We call on all parties, especially those that so far have refused to engage in meaningful negotiations, to join in a comprehensive peace agreement.

We recognize the COVID-19 pandemic has brought significant additional challenges for Sudan and the Sudanese people. This a test for the all those working for the new Sudan. As well as responding to the pandemic, we recognize the significant economic problems that Sudan continues to face. Progressing a reform program to help address these problems and help stabilize and stimulate the economy would allow the international community to work with and support the civilian led transitional government. It would also help in the response to the pandemic. The Troika countries are committed to helping Sudan in this time of need.

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3. South Sudan

On February 22, 2020, Ambassador Kelly Craft delivered a statement on behalf of the U.S. mission to the UN on South Sudan's Revitalized Transitional Government of National Unity. The statement follows and is available at <https://usun.usmission.gov/statement-by-ambassador-craft-on-south-sudans-revitalized-transitional-government-of-national-unity/>.

South Sudan is a nation longing for peace, stability and a brighter future for its people. I welcome the decision by the government and opposition parties to form a new, transitional unity government. This is the first in a series of critical steps that must be taken to bring dignity and peace to the people of South Sudan.

The real work—the hardest work—begins now, and I urge President Salva Kiir, Dr. Riek Machar, and all of South Sudan's leaders to show the courage and fortitude needed at this moment to translate hope into a better future for South Sudan. I am personally prepared to assist in these efforts, as is the government of the United States. Peace, security, and prosperity are within grasp, and now is the moment to reach.

On February 23, 2020, the State Department released as a media note the Troika statement regarding South Sudan's Revitalized Transitional Government of National Unity. The media note is available at <https://2017-2021.state.gov/troika-statement-formation-of-south-sudans-revitalized-transitional-government-of-national-unity/>. The joint statement includes the following:

The Troika congratulates the people of South Sudan and the parties to the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) on the announcement of the formation of an inclusive transitional government on February 22. We welcome the fact that the

government and opposition parties have made the necessary compromises to allow this important step. For the transitional period to be a success, a spirit of continuous collaboration, supported by the active, engaged, and free voices of citizens and civil society, must continue. Nearly nine years since South Sudan's independence, this is an opportunity for the political leadership to take their country forward towards prosperity and peace by making meaningful progress on security sector arrangements, the reform agenda, transitional justice and accountability, and preparations for credible and safe elections.

The Troika commends the work of the Intergovernmental Authority on Development (IGAD) as a guarantor of the R-ARCSS. We are committed to working with the new transitional government, IGAD, and other regional and international partners to support the people of South Sudan in their pursuit of peace and stability.

On March 19, 2020, the Troika issued a further statement after the South Sudanese government formed a cabinet. The joint statement is available as a State Department media note at <https://2017-2021.state.gov/troika-statement-south-sudanese-government-forms-cabinet/>, excerpted below.

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The Troika welcomes the formation of the Executive of the Revitalized Transitional Government of National Unity, with all ministerial portfolios now allocated between the parties to the agreement. We welcome the appointment of women as key Cabinet ministers while encouraging the government to take all necessary measures to allocate at least 35 percent of positions in the Executive to women as outlined in the peace agreement. Expectations from the people of South Sudan are high, and the way forward fraught with challenges.

To succeed, the unity government and other stakeholders can work together to ensure their deeds and words inspire collaboration and trust. Leadership working together, genuinely united, can put their country firmly on the path towards peace and prosperity. They face an early and unprecedented challenge presented by the COVID-19 global pandemic, which will require a quick and decisive response, in coordination with international partners.

The Troika looks forward to working in close partnership with a genuinely united government as it establishes its priorities and starts to develop plans to deliver the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan in full. This will require a sustained focus on building unified security forces, ensuring transparency and ending corruption, establishing political space and democratic institutions, respecting human rights, and implementing transitional justice mechanisms. To this end, we welcome the renewal of the UN Mission in South Sudan (UNMISS); it will have a key role to play in this critical phase. The people of South Sudan have waited a long time for peace to come and to have a government that puts their needs first; the country's political leaders owe it to them to ensure that their wait has not been in vain.

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4. **Libya**

On October 5, 2020 Under Secretary of State for Political Affairs David Hale participated in a ministerial meeting on Libya. The State Department issued a media note, available at <https://2017-2021.state.gov/under-secretary-hales-participation-in-the-ministerial-level-meeting-on-libya/>, which includes the following about the meeting:

The Under Secretary underscored the United States’ support for the UN-facilitated political process and called on all Berlin Process members to uphold their commitments by respecting the UN arms embargo, supporting a Libyan-led ceasefire and political agreement, and taking every measure to de-escalate the tensions in Libya.

The Under Secretary commended UN and Libyan efforts to advance the political process, especially the resumption in October of the UN-facilitated Libyan Political Dialogue Forum, which aims to create a new transitional government and chart the path to national elections. The Under Secretary also credited the recent progress to the simultaneous calls by Libyan Prime Minister Sarraj and Libyan House of Representatives Speaker Saleh for political dialogue, a ceasefire, and the reopening of the energy sector. The Under Secretary advocated for the swift appointment of a UN Special Envoy of the Secretary-General for Libya to carry forward the current political momentum. The United States will continue to engage stakeholders on all sides of the conflict—both internal and external—to stop the fighting and reach a peace agreement.

5. **Belarus**

On August 20, 2020, the State Department issued a press statement in support of the sovereignty and territorial integrity of Belarus, as well as the Belarusian people’s peaceful demonstrations in favor of free and fair national elections, without external intervention. The press statement is available at <https://2017-2021.state.gov/supporting-the-aspirations-of-the-belarusian-people/> and also includes the following:

We remain deeply concerned by serious flaws in the August 9 presidential election in Belarus and strongly condemn the violence carried out against peaceful protesters and journalists, the arrest of opposition candidates and peaceful protesters, the blockage of Belarus’ internet service, and the abuse of detainees. We call for the immediate release of those unjustly detained, and an accounting for those reported missing.

The United States supports free and fair elections that reflect the will of the Belarusian people as a matter of principle. The August 9 elections did not meet that standard. Belarus, like the United States, is a member of the OSCE, which upholds those standards. We urge the government of Belarus to accept the OSCE chairmanship's offer to facilitate dialogue and engage all stakeholders. We support international efforts to independently look into Belarus' electoral irregularities, the human rights abuses surrounding the election, and the crackdown that has followed.

We urge the Belarusian government to actively engage Belarusian society, including through the newly established National Coordination Council, in a way that reflects what the Belarusian people are demanding, for the sake of Belarus' future, and for a successful Belarus.

On November 5, 2020, the State Department issued a press statement on the OSCE Moscow Mechanism report detailing widespread violations of human rights in Belarus. The press statement, available at <https://2017-2021.state.gov/osce-moscow-mechanism-report-details-widespread-rights-violations-in-belarus/>, is excerpted below.

The Organization for Security and Cooperation in Europe (OSCE)'s Moscow Mechanism report on Belarus released on November 5 describes sustained human rights violations and abuses committed on a massive scale and with impunity by the Belarusian authorities during the fraudulent August 9 election and its aftermath. The abuses against peaceful demonstrators, opposition activists, and journalists include torture, arbitrary detention, and curtailment of the exercise of freedom of expression, association, and peaceful assembly.

We remain inspired by the resilience and dignity of the Belarusian people. The United States continues to call on the Belarusian authorities to cease their crackdown and heed the demands of the Belarusian people for free and fair elections under independent observation.

The recommendations in this report provide the Belarusian authorities with a roadmap out of this crisis. This includes: a robust OSCE/ODIHR (Office for Democratic Institutions and Human Rights) observation mission; an end to the violence against their own people and ensuring accountability for those found responsible for past abuses; the release of all those who have been unjustly detained; and engagement in meaningful national dialogue with authentic representatives of the political opposition and civil society.

6. Western Sahara

On December 10, 2020, President Trump issued a proclamation recognizing the entire Western Sahara territory as part of the Kingdom of Morocco. The December 10, 2020 proclamation is available at <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-recognizing-sovereignty-kingdom-morocco-western-sahara/>, and excerpted below. See discussion in section B.8.a, *infra*, of the December 22, 2020 joint

statement by the United States, Morocco, and Israel regarding Western Sahara and the normalization of Morocco-Israel relations.

The United States affirms, as stated by previous Administrations, its support for Morocco's autonomy proposal as the only basis for a just and lasting solution to the dispute over the Western Sahara territory. Therefore, as of today, the United States recognizes Moroccan sovereignty over the entire Western Sahara territory and reaffirms its support for Morocco's serious, credible, and realistic autonomy proposal as the only basis for a just and lasting solution to the dispute over the Western Sahara territory. The United States believes that an independent Sahrawi State is not a realistic option for resolving the conflict and that genuine autonomy under Moroccan sovereignty is the only feasible solution. We urge the parties to engage in discussions without delay, using Morocco's autonomy plan as the only framework to negotiate a mutually acceptable solution. To facilitate progress toward this aim, the United States will encourage economic and social development with Morocco, including in the Western Sahara territory, and to that end will open a consulate in the Western Sahara territory, in Dakhla, to promote economic and business opportunities for the region.

In a December 24, 2020 press statement, available at <https://2017-2021.state.gov/announcement-of-new-virtual-presence-post-for-western-sahara/>, the State Department announced the beginning of the process to establish a U.S. consulate in Western Sahara, initially with a "virtual presence post," under the management of Embassy Rabat, focused on promoting economic and social development.

B. STATUS ISSUES

1. Ukraine

On February 26, 2020, the State Department issued a third "Crimea is Ukraine" statement. See *Digest 2019* at 308 and *Digest 2018* at 355-56 for previous statements. The 2020 statement is excerpted below and available at <https://2017-2021.state.gov/crimea-is-ukraine-3/>.

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February 27 will mark the sixth anniversary of Russia's attempted annexation of Ukraine's Crimean peninsula, and the United States reaffirms: Crimea is Ukraine. As underscored in our July 2018 Crimea Declaration, the United States does not and will not ever recognize Russia's claims of sovereignty over the peninsula. We call on Russia to end its occupation of Crimea. Russia's occupation of Crimea and its increasing militarization of the peninsula is a threat to our common security. Russian occupation authorities continue their assault on human rights and fundamental freedoms, brutally silencing critics in civil society and the media, and curtailing

religious freedom. Over 80 individuals from Crimea, including members of the Crimean Tatar community, have been imprisoned by Russia—and some subjected to torture—for peaceful opposition to the occupation. Members of the Crimean Tatar community continue to experience unjustified raids on their homes and mosques, surveillance and intimidation by occupation authorities, restrictions on cultural events, and the criminalization of their representative body, the Mejlis. Russia has forcibly conscripted nearly 20,000 Crimean men, in violation of international law. Occupation authorities severely limit religious freedom, target religious believers with bogus terrorism charges, and seized the Orthodox Church of Ukraine cathedral in Simferopol. The United States calls on Russia to free all Ukrainians it has wrongfully imprisoned in retaliation for their peaceful dissent and to end Russian abuses of fundamental freedoms in Crimea.

Six years on, Russia continues to rely on lies and disinformation in its failed attempt to legitimize the illegitimate. Its efforts are doomed to failure. The world will never forget Russia's unprovoked invasion of Ukraine. The United States condemns Russia's illegal actions in Crimea and its continued aggressive actions against Ukraine, including in the Donbas, and will maintain sanctions against Russia until it returns control of Crimea to Ukraine and fully implements its commitments under the Minsk agreements.

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2. Georgia

On June 29, 2020, the State Department issued a press statement welcoming Georgia's adoption of constitutional amendments to make its electoral system more proportional. The press statement is available at <https://2017-2021.state.gov/on-the-passage-of-georgian-constitutional-reform/> and includes the following:

Enacted as a result of the important March 8 agreement among a majority of political parties, [the constitutional reforms] will help promote greater stability and parliamentary pluralism in Georgia's October parliamentary elections.

We urge Georgia's parliament to pass election reform legislation that fully incorporates OSCE/ODIHR recommendations, and Georgia's authorities to effectively implement such legislation. A key test for Georgia's democratic evolution will be the holding of a free, fair, and transparent electoral process that represents the choice of the Georgian people. The fairness of the pre-election and post-election periods is equally as important as the conduct of election day.

The United States will continue to support Georgia's efforts to strengthen its democracy, electoral practices, and the rule of law, as well as its broader Euro-Atlantic aspirations, which are among the best defenses against Russian aggression.

On August 5, 2020, a member of the German mission to the UN delivered a joint statement, on behalf of Belgium, Estonia, France, Germany, Ireland, Norway, the United Kingdom, and the United States, regarding the ongoing Russian occupation of Georgian territory. The statement follows, and is available at <https://usun.usmission.gov/joint-statement-on-the-continued-russian-occupation-of-georgia-via-vtc/>.

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This week marks 12 years since the beginning of the conflict between Russia and Georgia on 7 August 2008. Today the Security Council heard a briefing by Assistant-Secretary-General Miroslav Jenča (DPPA), and discussed developments since then. We remember those who died and those who lost their homes, and regret that little progress has been made towards resolving the conflict since concluding the Agreements of 12 August and 8 September 2008. We firmly support Georgia's independence, sovereignty and territorial integrity within its internationally recognized borders.

The continuing Russian military presence in the Georgian regions of Abkhazia and South Ossetia as well as Russia's recognition of the so-called independence of these regions violates the territorial integrity of Georgia and undermines Georgia's sovereignty, as well as the Rules Based International Order. It further divides communities and puts at risk the health and lives of the conflict-affected population. We are extremely concerned about the intensification of the so-called "borderisation process" over the past year, including during the global COVID-19 pandemic. Throughout this already challenging time, the de-facto authorities exercising effective control over the Georgian regions of Abkhazia and South Ossetia have continued the practice of arbitrary detentions along the Administrative Boundary Lines. De facto South Ossetian authorities have repeatedly denied emergency medical evacuations and incoming humanitarian aid. We are also concerned about the ongoing disinformation campaign by Russia about the pandemic and related health issues as well as false propaganda about the life-saving work of the Lugar Center.

These acts prolong the conflict, threaten peace and stability, interfere with the enjoyment of human rights and fundamental freedoms, and negatively impact the health and safety of people across Georgia, destabilizing the region as a whole. Today we call again on the Russian Federation to fully implement her obligation and commitments under the Agreements of 12 August and 8 September 2008. The Six Point Agreement of 12 August includes an obligation by Russia to withdraw its armed forces to positions held before hostilities began. The ceasefire agreement also committed the parties to establish an international security mechanism.

We reiterate our support for the respect and protection of human rights, including the rights of forcibly displaced persons, as well as the importance of enabling their safe, voluntary, dignified and unhindered return to their homes in accordance with international law. The topic of refugees and internally displaced persons (IDPs) remains a core issue of discussion within the Geneva International Discussions (GID). Despite the initial promise of significant progress towards reconciliation, we regret the lack of commitment on the part of the Russian Federation and resulting lack of progress achieved in the GID format. We further call on the de-facto authorities exercising effective control over the Georgian regions of Abkhazia and South Ossetia to facilitate unhindered access to these regions, including religious sites, for relevant

humanitarian and human rights actors and other individuals.

We remain steadfast in our support for a peaceful resolution of the conflict in Georgia and encourage all parties to redouble their efforts within the Geneva International Discussions.

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3. The Baltics

On July 22, 2020, the State Department issued a press statement by Secretary Pompeo marking the 80th anniversary of the Welles Declaration, which recognized the sovereignty of Estonia, Latvia, and Lithuania in the face of their illegal incorporation into the Soviet Union. The statement is excerpted below and available at <https://2017-2021.state.gov/message-on-the-80th-anniversary-of-the-welles-declaration/>.

... The Soviet Union's criminal act was accomplished through the signing of secret protocols to the Molotov-Ribbentrop Pact with Nazi Germany in August 1939. Through decades of Soviet occupation and attempts at forced assimilation, the United States never ceased to recognize the sovereignty of the three Baltic states. Throughout those dark days, the peoples of Estonia, Latvia and Lithuania never lost hope that the doors of the Soviet "prison of nations" would one day open; nor did the United States.

The Welles Declaration is no mere historical artifact. Just as the United States never recognized the Baltic States' forced incorporation into the Soviet Union, so it will never accept Russia's attack on the sovereignty and territorial integrity of Ukraine and Georgia, through its purported annexation of Crimea, its support for destabilizing proxies in eastern Ukraine, or its occupation of Abkhazia and South Ossetia.

The partnership between the United States of America and Estonia, Latvia, and Lithuania is based on our joint dedication to democracy, human rights, and rule of law. Today as always, we remain firmly committed to respect for the sovereignty, territorial integrity, and political independence of all states. I join the governments and peoples of Estonia, Latvia, and Lithuania in commemorating this date, reaffirming our alliance and democratic partnership, and looking forward to further close cooperation in the years to come.

4. Mostar, Bosnia and Herzegovina

On June 18, 2020, the State Department issued a press statement, available at <https://2017-2021.state.gov/agreement-on-elections-in-mostar-bosnia-and-herzegovina/>, welcoming "the agreement between the SDA and HDZ-BiH political parties in Bosnia and Herzegovina to restore the right of Mostar residents to elect their

local government and end the decade-long impasse over the conduct of local elections.” The press statement further explains:

The city of Mostar, and the country as a whole, will significantly benefit from this breakthrough. Both SDA President Bakir Izetbegovic and HDZ-BiH President Dragan Covic demonstrated leadership and political courage in pursuit of the necessary compromise. The United States also commends the hard work of the two parties’ local boards and the cooperative spirit in which they approached the negotiations. Compromise reached through negotiation is an essential feature of thriving democracies. We hope today’s achievement will be the first among many actions to empower the citizens of Bosnia and Herzegovina as the country advances on the path toward Euro-Atlantic integration.

5. Kosovo

On September 4, 2020, the State Department issued a statement by Secretary Pompeo commending the Serbian president and the prime minister of Kosovo on the agreements reached at the White House that day on normalizing economic relations. The statement, available [at https://2017-2021.state.gov/economic-normalization-between-kosovo-and-serbia/](https://2017-2021.state.gov/economic-normalization-between-kosovo-and-serbia/), also reaffirms U.S. support for continued negotiations toward comprehensive normalization of relations between Kosovo and Serbia. In addition, Secretary Pompeo congratulated the two governments on steps taken with regard to their relations with Israel.

6. Cyprus

On September 12, 2020, the State Department issued a fact sheet regarding the Cyprus Center for Land, Open-seas, and Port Security (“CYCLOPS”), available at <https://2017-2021.state.gov/the-cyprus-center-for-land-open-seas-and-port-security/>, which references the strengthened security relationship with the Republic of Cyprus leading up to the establishment of CYCLOPS as a facility for technical assistance and training. Also on September 12, 2020, Secretary Pompeo delivered remarks at the signing in Cyprus of the memorandum of understanding for CYCLOPS. The Secretary’s remarks are available at <https://2017-2021.state.gov/at-the-cyprus-center-for-land-open-seas-and-port-security-memorandum-of-understanding-signing-ceremony/>, and include the following regarding relations with Cyprus:

We remain deeply concerned by Turkey’s ongoing operations surveying for natural resources in areas over which Greece and Cyprus assert jurisdiction in the Eastern Mediterranean. The Republic of Cyprus has the right to exploit its natural resources, including the right to hydrocarbons found in its territorial sea and its economic – exclusive economic zone.

We also believe that the resources of Cyprus should be shared equitably among the Greek Cypriots and Turkish Cypriots communities.

Finally, the United States continues to support a comprehensive settlement to reunify the island as a bi-zonal, bi-communal federation which would benefit all Cypriots as well as the wider region.

7. Hong Kong

On May 27, 2020, Secretary Pompeo certified to the U.S. Congress that Hong Kong no longer warrants treatment under U.S. law in the same manner as U.S. laws were applied to Hong Kong before July 1, 1997. Secretary Pompeo's press statement announcing the determination, responding to the PRC's National People's Congress imposition of national security legislation for Hong Kong, is available at <https://2017-2021.state.gov/prc-national-peoples-congress-proposal-on-hong-kong-national-security-legislation/> and excerpted below.

Last week, the People's Republic of China (PRC) National People's Congress announced its intention to unilaterally and arbitrarily impose national security legislation on Hong Kong. ... After careful study of developments over the reporting period, I certified to Congress today that Hong Kong does not continue to warrant treatment under United States laws in the same manner as U.S. laws were applied to Hong Kong before July 1997. No reasonable person can assert today that Hong Kong maintains a high degree of autonomy from China, given facts on the ground.

Hong Kong and its dynamic, enterprising, and free people have flourished for decades as a bastion of liberty, and this decision gives me no pleasure. But sound policy making requires a recognition of reality. While the United States once hoped that free and prosperous Hong Kong would provide a model for authoritarian China, it is now clear that China is modeling Hong Kong after itself. The United States stands with the people of Hong Kong as they struggle against the CCP's increasing denial of the autonomy that they were promised.

On May 27, 2020, the State Department held a special briefing by Assistant Secretary of State David R. Stilwell of the Bureau of East Asian and Pacific Affairs regarding the Hong Kong national security legislation and the Secretary of State's determination on May 27 that Hong Kong does not continue to warrant the same treatment under U.S. law that it had previously received. The transcript of the briefing is available at <https://2017-2021.state.gov/briefing-with-assistant-secretary-for-east-asian-and-pacific-affairs-david-r-stilwell-on-prc-national-peoples-congress-proposal-on-hong-kong-national-security-legislation/> and excerpts follow.

* * * *

The ... world is finally recognizing that ... Beijing is pushing a form of government that many only now are beginning to recognize as problematic. And this most recent step from the National People's Congress in walking away from its obligations with respect to Hong Kong only demonstrate that more clearly.

The way they've done that is they are the Chinese Communist Party, but ... you hear them speaking a lot about socialism with Chinese characteristics. ...

This administration has worked very hard to make the language and the reality match, so we've chosen our words carefully. This is an authoritarian system. ...

... We believe that democratic processes and we still believe democratic processes are really the only way to go, right—you have to give your people a voice and a choice to moderate government behavior. Government works for the people, not vice versa.

So recent events now have shown that Beijing seeks more global prominence, and they want that to go with this newfound wealth and economic help that they've been using. In the process, though, they've gained additional scrutiny.

In October 2017, the 19th Party Congress Work Report said that China will move closer to the center of the global stage. This process has moved their authoritarian system closer to the limelight as well...

So we're all faced with a[n] authoritarian government that we thought had been relegated to history. ...

So given the massive dislocations that have been brought on globally by China's mishandling of what should have been a minor public health issue in Wuhan, the world right now is focused on survival, not focused on Hong Kong. It appears that Beijing has used this opportunity to accelerate its agenda going into its next political season.

Over the last two weeks, Beijing has really picked up the pace. They've made hints that this National People's Congress would be different, and they've been hinting that Hong Kong's status might change. But in the last two weeks, ... they've made very strong comments that they do not plan to honor the joint declaration they made with the UK in 1997.

And so they do intend to impose national security legislation on Hong Kong. The agreement says that Hong Kong itself will determine what Article 23 national security legislation looks like. ...

So in response, ... the Secretary's statement says that we have determined that Hong Kong no longer enjoys a high degree of autonomy. We are designing our responses to be sure to help Beijing understand that as a nation of law, we will invoke the law that the Congress passed in the Hong Kong Policy Act and Human Rights and Democracy Act. But at the same time, we will do our best to ensure the people of Hong Kong are not adversely affected to the best we can.

But I will note that this decision was made by the government in Beijing and not by the U.S. ... [O]ur approach is to mitigate the impact globally on the Hong Kong people while at the same time helping Beijing understand our concerns.

* * * *

...[T]his has been ongoing for a while. ...American NGOs were there to simply help Hong Kong people that were banned from operating in Hong Kong. They're no longer allowed to set up shop in Hong Kong and do what they did. When the PRC kicked out journalists from reputable American outlets, they also threatened the same journalists in Hong Kong.

And so the point is that that special status that Hong Kong enjoyed—that wall, maybe, if you want to put it that way—is being penetrated and Beijing is no longer acknowledging its special status. And so it's not just the presidential determination, the actions he chooses to take, but I think businesses and others would notice these facts as well and make prudent choices as far as whether they—whether the environment in a year from now is going to be conducive to fair business, transparent operations, and all the rest that they've enjoyed to date. And so the administration will take action. I would expect others also seeing Chinese actions would respond to those. ...

* * * *

The PRC I think has tried to paint this as they would respect the economic freedom in Hong Kong without feeling obligated to respect political freedom. You can't have one without the other. ...

* * * *

... Obviously, [people in Hong Kong] have a voice as well and they used that voice to great effect last summer when a watered-down version of this national security legislation was attempted to be foisted on them in the form of the extradition treaty, and they protested. ...[I]t was characterized as riots by Beijing, but they were simply protesting something that was in violation of an agreement and in violation of the rule of law that they had come to expect over time.

* * * *

... It's actually a one-two action, one being the State Department making the assessment that Hong Kong no longer enjoys a high degree of autonomy, and then of course the determination by the White House as to ... how we're going to respond. ...

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On May 28, 2020, the State Department issued, as a media note, the joint statement released by the governments of the United States, Australia, Canada, and the United Kingdom. The media note is available at <https://2017-2021.state.gov/joint-statement-on-hong-kong/>. The signatories reiterated their concern about the national security law in Hong Kong and further stated the following:

* * * *

Hong Kong has flourished as a bastion of freedom. The international community has a significant and long-standing stake in Hong Kong's prosperity and stability. Direct imposition of national security legislation on Hong Kong by the Beijing authorities, rather than through Hong Kong's own institutions as provided for under Article 23 of the Basic Law, would curtail the Hong Kong people's liberties, and in doing so, dramatically erode Hong Kong's autonomy and the system that made it so prosperous.

China's decision to impose a new national security law on Hong Kong lies in direct conflict with its international obligations under the principles of the legally-binding, UN-registered Sino-British Joint Declaration. The proposed law would undermine the One Country, Two Systems framework. It also raises the prospect of prosecution in Hong Kong for political crimes, and undermines existing commitments to protect the rights of Hong Kong people—including those set out in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

We are also extremely concerned that this action will exacerbate the existing deep divisions in Hong Kong society; the law does nothing to build mutual understanding and foster reconciliation within Hong Kong. Rebuilding trust across Hong Kong society by allowing the people of Hong Kong to enjoy the rights and freedoms they were promised can be the only way back from the tensions and unrest that the territory has seen over the last year.

The world's focus on a global pandemic requires enhanced trust in governments and international cooperation. Beijing's unprecedented move risks having the opposite effect.

As Hong Kong's stability and prosperity are jeopardized by the new imposition, we call on the Government of China to work with the Hong Kong SAR Government and the people of Hong Kong to find a mutually acceptable accommodation that will honor China's international obligations under the UN-filed Sino-British Joint Declaration.

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On June 17, 2020, the State Department released, as a media note, the text of a joint statement on China's decision to impose a national security law on Hong Kong by the governments of the G7 (the United States, Canada, France, Germany, Italy, Japan, the United Kingdom) and the High Representative of the European Union. The joint statement is excerpted below and available at <https://2017-2021.state.gov/g7-foreign-ministers-statement-on-hong-kong/>.

* * * *

China's decision is not in conformity with the Hong Kong Basic Law and its international commitments under the principles of the legally binding, UN-registered Sino-British Joint Declaration. The proposed national security law would risk seriously undermining the "One Country, Two Systems" principle and the territory's high degree of autonomy. It would jeopardize the system which has allowed Hong Kong to flourish and made it a success over many years.

Open debate, consultation with stakeholders, and respect for protected rights and freedoms in Hong Kong are essential.

We are also extremely concerned that this action would curtail and threaten the fundamental rights and freedoms of all the population protected by the rule of law and the existence of an independent justice system.

We strongly urge the Government of China to reconsider this decision.

* * * *

On June 30, 2020, the State Department issued another press statement by Secretary Pompeo regarding the imposition of national security legislation on Hong Kong. For further discussion of Hong Kong-related sanctions, see Chapter 16. The June 30, 2020 statement, available at <https://2017-2021.state.gov/on-beijings-imposition-of-national-security-legislation-on-hong-kong/>, includes the following:

The Chinese Communist Party’s decision to impose draconian national security legislation on Hong Kong destroys the territory’s autonomy and one of China’s greatest achievements. Hong Kong demonstrated to the world what a free Chinese people could achieve – one of the most successful economies and vibrant societies in the world. But Beijing’s paranoia and fear of its own people’s aspirations have led it to eviscerate the very foundation of the territory’s success, turning “One Country, Two Systems” into “One Country, One System.”

The CCP’s action demonstrates once again that Beijing’s commitments—in this case, the 1984 Sino-British Joint Declaration and the Basic Law—are empty words. The CCP promised 50 years of freedom to the Hong Kong people, and gave them only 23.

On July 6, 2020, the State Department released a press statement by Secretary Pompeo on the Chinese Communist Party’s censorship in Hong Kong. The statement follows, and is available at <https://2017-2021.state.gov/on-the-ccps-orwellian-censorship-on-hong-kong/>.

The Chinese Communist Party’s destruction of free Hong Kong continues. With the ink barely dry on the repressive National Security Law, local authorities—in an Orwellian move—have now established a central government national security office, started removing books critical of the CCP from library shelves, banned political slogans, and are now requiring schools to enforce censorship.

Until now, Hong Kong flourished because it allowed free thinking and free speech, under an independent rule of law. No more. The United States condemns Beijing’s repeated failure to live up to its obligations under the Sino-British Joint Declaration, and these latest assaults on the rights and freedoms of the people of Hong Kong.

Executive Order 13936 of July 14, 2020 is the “President’s Executive Order on Hong Kong Normalization.” 85 Fed. Reg. 43,413 (July 17, 2020). E.O. 13936 is excerpted below. See Chapter 14 for discussion of the order’s provision terminating the Fulbright

program for China and Hong Kong. See Chapter 16 for discussion of the economic sanctions and visa restrictions authorized by E.O. 13936.

* * * *

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the United States-Hong Kong Policy Act of 1992 (Public Law 102–393), the Hong Kong Human Rights and Democracy Act of 2019 (Public Law 116–76), the Hong Kong Autonomy Act of 2020, signed into law July 14, 2020, the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) (NEA), section 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code,

I, DONALD J. TRUMP, President of the United States of America, determine, pursuant to section 202 of the United States-Hong Kong Policy Act of 1992, that the Special Administrative Region of Hong Kong (Hong Kong) is no longer sufficiently autonomous to justify differential treatment in relation to the People’s Republic of China (PRC or China) under the particular United States laws and provisions thereof set out in this order. In late May 2020, the National People’s Congress of China announced its intention to unilaterally and arbitrarily impose national security legislation on Hong Kong. This announcement was merely China’s latest salvo in a series of actions that have increasingly denied autonomy and freedoms that China promised to the people of Hong Kong under the 1984 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong (Joint Declaration). As a result, on May 27, 2020, the Secretary of State announced that the PRC had fundamentally undermined Hong Kong’s autonomy and certified and reported to the Congress, pursuant to sections 205 and 301 of the United States-Hong Kong Policy Act of 1992, as amended, respectively, that Hong Kong no longer warrants treatment under United States law in the same manner as United States laws were applied to Hong Kong before July 1, 1997. On May 29, 2020, I directed the heads of executive departments and agencies (agencies) to begin the process of eliminating policy exemptions under United States law that give Hong Kong differential treatment in relation to China.

China has since followed through on its threat to impose national security legislation on Hong Kong. Under this law, the people of Hong Kong may face life in prison for what China considers to be acts of secession or subversion of state power—which may include acts like last year’s widespread anti-government protests. The right to trial by jury may be suspended. Proceedings may be conducted in secret. China has given itself broad power to initiate and control the prosecutions of the people of Hong Kong through the new Office for Safeguarding National Security. At the same time, the law allows foreigners to be expelled if China merely suspects them of violating the law, potentially making it harder for journalists, human rights organizations, and other outside groups to hold the PRC accountable for its treatment of the people of Hong Kong.

I therefore determine that the situation with respect to Hong Kong, including recent actions taken by the PRC to fundamentally undermine Hong Kong’s autonomy, constitutes an unusual and extraordinary threat, which has its source in substantial part outside the United

States, to the national security,^[L]^[SEP]foreign policy, and economy of the United States. I hereby declare a national emergency with respect to that threat.

In light of the foregoing, I hereby determine and order:

Section 1. It shall be the policy of the United States to suspend or eliminate different and preferential treatment for Hong Kong to the extent permitted by law and in the national security, foreign policy, and economic interest of the United States.

Sec. 2. Pursuant to section 202 of the United States-Hong Kong Policy Act of 1992 (22 U.S.C. 5722), I hereby suspend the application of section 201(a) of the United States-Hong Kong Policy Act of 1992, as amended (22 U.S.C. 5721(a)), to the following statutes:

- (a) section 103 of the Immigration Act of 1990 (8 U.S.C. 1152 note);
- (b) sections 203(c), 212(l), and 221(c) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1153(c), 1182(l), and 1201(c), respectively);
- (c) the Arms Export Control Act (22 U.S.C. 2751 *et seq.*);^[L]^[SEP](d) section 721(m) of the Defense Production Act of 1950, as amended (50 U.S.C. 4565(m));
- (e) the Export Control Reform Act of 2018 (50 U.S.C. 4801 *et seq.*); and
- (f) section 1304 of title 19, United States Code.

Sec. 3. Within 15 days of the date of this order, the heads of agencies shall commence all appropriate actions to further the purposes of this order, consistent with applicable law, including, to:

- (a) amend any regulations implementing those provisions specified in section 2 of this order, and, consistent with applicable law and executive orders, under IEEPA, which provide different treatment for Hong Kong as compared to China;
- (b) amend the regulation at 8 CFR 212.4(i) to eliminate the preference for Hong Kong passport holders as compared to PRC passport holders;
- (c) revoke license exceptions for exports to Hong Kong, reexports to Hong Kong, and transfers (in-country) within Hong Kong of items subject to the Export Administration Regulations, 15 CFR Parts 730–774, that provide differential treatment compared to those license exceptions applicable to exports to China, reexports to China, and transfers (in-country) within China;
- (d) consistent with section 902(b)(2) of the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991 (Public Law 101–246), terminate the export licensing suspensions under section 902(a)(3) of such Act insofar as such suspensions apply to exports of defense articles to Hong Kong persons who are physically located outside of Hong Kong and the PRC and who were authorized to receive defense articles prior to the date of this order;
- (e) give notice of intent to suspend the Agreement Between the Government of the United States of America and the Government of Hong Kong for the Surrender of Fugitive Offenders (TIAS 98–121);
- (f) give notice of intent to terminate the Agreement Between the Government of the United States of America and the Government of Hong Kong for the Transfer of Sentenced Persons (TIAS 99–418);
- (g) take steps to end the provision of training to members of the Hong Kong Police Force or other Hong Kong security services at the Department of State’s International Law Enforcement Academies;
- (h) suspend continued cooperation undertaken consistent with the now-expired Protocol Between the U.S. Geological Survey of the Department of the Interior of the United States of

America and Institute of Space and Earth Information Science of the Chinese University of Hong Kong Concerning Scientific and Technical Cooperation in Earth Sciences (TIAS 09– 1109);

(i) take steps to terminate the Fulbright exchange program with regard to China and Hong Kong with respect to future exchanges for participants traveling both from and to China or Hong Kong;

(j) give notice of intent to terminate the agreement for the reciprocal exemption with respect to taxes on income from the international operation of ships effected by the Exchange of Notes Between the Government of the United States of America and the Government of Hong Kong (TIAS 11892);

(k) reallocate admissions within the refugee ceiling set by the annual Presidential Determination to residents of Hong Kong based on humanitarian concerns, to the extent feasible and consistent with applicable law; and

(l) propose for my consideration any further actions deemed necessary and prudent to end special conditions and preferential treatment for Hong Kong.

* * * *

Also on July 14, 2020, the State Department issued a press statement in which Secretary Pompeo congratulated Hong Kong on a successful pan-democratic primary election. The press statement is available at <https://2017-2021.state.gov/on-the-pan-democratic-primary-election-in-hong-kong/>, and also includes the following:

We note with grave concern Hong Kong Chief Executive Carrie Lam’s threat that this primary may have violated Beijing’s new “national security” law for the territory, once again demonstrating the Chinese Communist Party’s fear of democracy and its own people’s free thinking. We will be watching developments closely, especially as the September 6 Legislative Council elections draw closer.

On July 15, 2020, Secretary Pompeo issued a press statement regarding the executive action on Hong Kong taken the previous day. That press statement, available at <https://2017-2021.state.gov/on-the-presidents-announcement-on-hong-kong/>, states:

Over the past two weeks, the world has watched as the Chinese Communist Party smothers Hong Kong’s freedom. In 1984, China promised the United Kingdom and the Hong Kong people in front of the world that it would keep Hong Kong free and open and maintain its high degree of autonomy until the year 2047. With the draconian national security legislation that Beijing imposed on Hong Kong, which allows mainland China’s security services to operate with impunity in Hong Kong, China has broken that promise, as it has so many others.

Last night, the President responded, including by taking steps to end U.S. preferential treatment for Hong Kong, terminate the territory’s benefits with regard to U.S. export controls, and direct the initiation of steps to suspend our extradition agreement with Hong Kong. The Hong Kong Autonomy Act will give

the Administration additional tools to promote accountability for those responsible for extinguishing Hong Kong's freedoms. The President also directed the Administration to place a special focus on the admission of Hong Kong residents as refugees based on humanitarian concerns, demonstrating the enduring U.S. commitment to stand with the oppressed.

On August 1, 2020, the United States condemned the Hong Kong government's decision to postpone elections for the Legislative Council, originally scheduled for September 6, 2020, until September 2021. The August 1, 2020 press statement from Secretary Pompeo on the postponement is available at <https://2017-2021.state.gov/on-the-postponement-of-hong-kongs-legislative-council-elections/>, and includes the following:

For decades, [people in Hong Kong] have repeatedly demonstrated their desire and ability to hold free and fair elections. We urge Hong Kong authorities to reconsider their decision. The elections should be held as close to the September 6 date as possible and in a manner that reflects the will and aspirations of the Hong Kong people. If they aren't, then regrettably Hong Kong will continue its march toward becoming just another Communist-run city in China.

On August 9, 2020, the State Department released, as a media note, the joint statement of the foreign ministers of Australia, Canada, New Zealand and the United Kingdom and Secretary Pompeo on the erosion of rights in Hong Kong. The statement, available at <https://2017-2021.state.gov/joint-statement-on-the-erosion-of-rights-in-hong-kong/>, includes the following:

We ... are gravely concerned by the Hong Kong government's unjust disqualification of candidates and disproportionate postponement of Legislative Council elections. These moves have undermined the democratic process that has been fundamental to Hong Kong's stability and prosperity.

We express deep concern at Beijing's imposition of the new National Security Law, which is eroding the Hong Kong people's fundamental rights and liberties.

We support the legitimate expectations of the people of Hong Kong to elect Legislative Council representatives via genuinely free, fair, and credible elections. We call on the Hong Kong government to reinstate the eligibility of disqualified candidates so that the elections can take place in an environment conducive to the exercise of democratic rights and freedoms as enshrined in the Basic Law. Beijing promised autonomy and freedoms under the "One Country, Two Systems" principle to the Hong Kong people in the Sino-British Joint Declaration, a U.N.-registered treaty, and must honor its commitments. We urge the Hong Kong government to hold the elections as soon as possible.

On October 14, 2020, the State Department issued a press statement on the release of the Hong Kong Autonomy Act report to Congress. Hong Kong Autonomy Act, Pub. L. No. 116-149, 134 Stat. 663 (2020). The statement is excerpted below and available at <https://2017-2021.state.gov/release-of-the-hong-kong-autonomy-act-report/>.

* * * *

...Through the imposition of the National Security Law, the CCP has crippled democratic institutions, human rights, judicial independence, and individual freedoms in Hong Kong. The United States has publicly condemned an increasing number of problematic actions taken by Beijing and Hong Kong authorities to stifle dissent and eviscerate Hong Kong's autonomy. These include the installation of a mainland security agency, mass arrests of peaceful protestors, the politically motivated delay of the September 2020 Legislative Council elections, and the capture and detention of Hong Kong democratic activists attempting to leave Hong Kong.

The Hong Kong Autonomy Act requires the Secretary of State to submit a report to Congress identifying foreign persons who are materially contributing to, have materially contributed to, or attempt to materially contribute to the failure of the People's Republic of China (PRC) to meet its obligations under the Sino-British Joint Declaration or Hong Kong's Basic Law. This year's report includes ten PRC and Hong Kong officials whose actions have undermined freedoms of assembly, speech, press, or the rule of law, or whose actions have reduced the high degree of autonomy of Hong Kong. On August 7, the United States imposed sanctions on these same individuals under Executive Order 13936.

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On November 12, 2020, the State Department issued a press statement by Secretary Pompeo decrying the disqualification of four lawmakers in Hong Kong. The statement is excerpted below and available at <https://2017-2021.state.gov/disqualification-of-pan-democratic-lawmakers-in-hong-kong/>.

The United States strongly condemns the "patriotism" resolution passed by the National People's Congress Standing Committee on November 11, which disqualified four members of Hong Kong's Legislative Council for exercising their mandates as lawmakers. This resolution tramples on the rights of the people of Hong Kong to choose their elected representatives as guaranteed by the Basic Law and further exposes Beijing's blatant disregard for its international commitments under the Sino-British Joint Declaration, a U.N.-registered treaty. ...

The United States will continue to work with our allies and partners around the world to champion the rights and freedoms of the people of Hong Kong and call out Beijing's abject failure to honor its commitments. We will hold accountable the people responsible for these actions and policies that erode

Hong Kong's autonomy and freedoms. We stand with the disqualified pan-Democratic lawmakers, the pro-democracy lawmakers who resigned in protest, and the people of Hong Kong.

8. Israel

a. Agreements to normalize relations with Israel (Abraham Accords)

The United States witnessed the texts of several agreements by countries normalizing relations with Israel in 2020 in an effort that is referred to as the Abraham Accords. On August 13, 2020, the State Department issued a statement marking the agreement between Israel and the United Arab Emirates to normalize relations. The statement is available at <https://2017-2021.state.gov/historic-day-for-peace-in-the-middle-east/> and includes the following:

The United States hopes that this brave step will be the first in a series of agreements that ends 72 years of hostilities in the region. Although the peace treaties between Israel and Egypt and Jordan have not yet fulfilled their full potential, since the 1978 Camp David Accords and the 1994 Wadi Arava Agreement, we have witnessed significant economic development in Egypt and Jordan, an unmistakable dividend of peace.

Today's normalization agreement between Israel and the Emirates holds similar potential and the promise for a better day for the entire region. The United States congratulates Israel and the Emirates for their important achievement.

On September 11, 2020, the State Department issued a press statement from Secretary Pompeo welcoming the agreement between Israel and the Kingdom of Bahrain. The press statement is available at <https://2017-2021.state.gov/historic-agreement-between-israel-and-the-kingdom-of-bahrain/>.

On September 15, 2020, representatives of the governments of the United States, the UAE, Bahrain, and Israel signed the Abraham Accords Declaration. The text of that declaration follows, and is available at <https://www.state.gov/the-abraham-accords/>. Also available on the same page are links to the September 15, 2020 "Declaration of Peace, Cooperation, and Constructive Diplomatic and Friendly Relations," by the State of Israel and the Kingdom of Bahrain; the December 22, 2020 Joint Declaration of the Kingdom of Morocco, the United States, and the State of Israel; the September 15, 2020 "Treaty of Peace, Diplomatic Relations and Full Normalization between the United Arab Emirates and the State of Israel;" and the Abraham Accords Declaration signed by the Republic of Sudan and witnessed by the United States on October 23, 2020.

* * * *

We, the undersigned, recognize the importance of maintaining and strengthening peace in the Middle East and around the world based on mutual understanding and coexistence, as well as respect for human dignity and freedom, including religious freedom.

We encourage efforts to promote interfaith and intercultural dialogue to advance a culture of peace among the three Abrahamic religions and all humanity.

We believe that the best way to address challenges is through cooperation and dialogue and that developing friendly relations among States advances the interests of lasting peace in the Middle East and around the world.

We seek tolerance and respect for every person in order to make this world a place where all can enjoy a life of dignity and hope, no matter their race, faith or ethnicity.

We support science, art, medicine, and commerce to inspire humankind, maximize human potential and bring nations closer together.

We seek to end radicalization and conflict to provide all children a better future.

We pursue a vision of peace, security, and prosperity in the Middle East and around the world.

In this spirit, we warmly welcome and are encouraged by the progress already made in establishing diplomatic relations between Israel and its neighbors in the region under the principles of the Abraham Accords. We are encouraged by the ongoing efforts to consolidate and expand such friendly relations based on shared interests and a shared commitment to a better future.

* * * *

On October 23, 2020, Israel and Sudan agreed to make peace and to normalize their relations. See White House fact sheet, available at <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-brokers-historic-peace-agreement-israel-sudan/>.

On December 11, 2020, the State Department issued a press statement from Secretary Pompeo hailing the agreement reached between Israel and Morocco to normalize relations. The press statement is available at <https://2017-2021.state.gov/on-progress-toward-peace/> and excerpted below.

...In the coming weeks, Israel and Morocco will assume full diplomatic relations. This agreement will also grant overflights and direct flights to and from Israel and will promote unfettered economic cooperation between Israeli and Moroccan companies. ...

...

President Trump has also recognized Moroccan sovereignty over Western Sahara. The United States continues to believe only political negotiations are capable of resolving the issues between Morocco and the POLISARIO. As we have long stated, we believe those negotiations should occur within the framework of Morocco's autonomy plan.

On December 22, 2020, the United States signed an agreement framed as a Joint Declaration with the Kingdom of Morocco and the State of Israel in connection with the normalization of relations between Morocco and Israel. The Declaration notes relevant decisions by Morocco and Israel to take steps to normalize and reestablish relations and addresses related actions to be taken (mostly by Morocco and Israel). The Joint Declaration is available at <https://www.state.gov/20-1222>.

b. *Place of birth of U.S. citizens born in Jerusalem*

On October 29, 2020, the State Department announced that U.S. citizens born in Jerusalem may choose to list their place of birth as either “Jerusalem” or “Israel.” See press statement, available at <https://2017-2021.state.gov/u-s-citizens-born-in-jerusalem/index.html>.

Applicants born in Jerusalem will be able to request either “Jerusalem” or “Israel” as their place of birth on consular documents. Those U.S. citizens born in Jerusalem who do not specify their place of birth on applications for consular services as “Israel” will continue to be issued documents that indicate their place of birth as “Jerusalem.” Other guidance on listing of place of birth in Israel, the Gaza Strip, the Golan Heights, Jerusalem, and the West Bank remains unchanged.

As the President stated in his proclamation, the United States recognizes Jerusalem as the capital of Israel and its seat of government but continues to take no position on the boundaries of Israeli sovereignty in Jerusalem. This matter remains subject to final status negotiations between the two Parties.

On October 30, 2020, U.S. Embassy Jerusalem issued the first passport listing the place of birth as “Israel,” for an applicant born in Jerusalem, to Menachem Zivotofsky, whose case regarding the place of birth on his passport was twice before the U.S. Supreme Court. See press release, available at <https://il.usembassy.gov/u-s-embassy-jerusalem-issues-first-passport-listing-place-of-birth-as-israel-for-applicants-born-in-jerusalem/>. See also *Digest* 2015 at 363-72; *Digest* 2012 at 283-86; *Digest* 2011 at 278-82; *Digest* 2009 at 303-10; *Digest* 2008 at 447-54; *Digest* 2007 at 437-43; and *Digest* 2006 at 530-47.

c. *Country of origin marking*

On November 19, 2020, the Department of State issued new guidelines to ensure that country of origin markings for goods originating in the West Bank and Gaza reflect U.S. policy toward Israel and the Palestinians. The press statement announcing the guidelines is available at <https://2017-2021.state.gov/markings-of-country-of-origin/> and excerpted below.

In accordance with this announcement, all producers within areas where Israel exercises the relevant authorities – most notably Area C under the Oslo Accords – will be required to mark goods as “Israel,” “Product of Israel,” or “Made in Israel” when exporting to the United States. This approach recognizes that Area C producers operate within the economic and administrative framework of Israel and their goods should be treated accordingly. This update will also eliminate confusion by recognizing that producers in other parts of the West Bank are for all practical purposes administratively separate and that their goods should be marked accordingly.

Goods in areas of the West Bank where the Palestinian Authority maintains relevant authorities shall be marked as products of “West Bank” and goods produced in Gaza will be marked as products of “Gaza.” Under the new approach, we will no longer accept “West Bank/Gaza” or similar markings, in recognition that Gaza and the West Bank are politically and administratively separate and should be treated accordingly.

The notice of the updated guidelines in the Federal Register includes the following summary:

This document notifies the public that, for country of origin marking purposes, imported goods produced in the West Bank, specifically in Area C under the Israeli-Palestinian Interim Agreement (the Oslo Accords), signed on September 28, 1995, and the area known as “H2” under the Israeli-Palestinian Protocol Concerning Redeployment in Hebron and Related Documents (the Hebron Protocol), signed January 17, 1997, must be marked to indicate their origin as “Israel,” “Product of Israel,” or “Made in Israel.” Goods produced in the West Bank, specifically in Areas A and B under the Oslo Accords and the area known as “H1” under the 1997 Hebron Protocol, must be marked to indicate their origin as “West Bank,” “Product of West Bank,” or “Made in West Bank.” Goods produced in Gaza must be marked to indicate their origin as “Gaza,” “Product of Gaza,” “Made in Gaza,” “Gaza Strip,” “Product of Gaza Strip,” or “Made in Gaza Strip.” Imported goods from any of these territorial areas must not include “West Bank/Gaza,” “West Bank/Gaza Strip,” “West Bank and Gaza,” or words of similar meaning.

Cross References

Suspension or Termination of Agreements with Hong Kong, **Ch. 4.B.1**

Crystallex v. Venezuela, **Ch. 5.A.1**

PDVSA v. MUFG, **Ch. 5.C.3**

Renegotiating Compacts of Free Association, **Chapter 5.D**

Taiwan's exclusion from the World Health Assembly, **Ch. 7.A.1**

Termination of the Fulbright program with China and Hong Kong, **Ch. 14.C.3**

Venezuela sanctions, **Ch. 16.A.5**

Sudan (rescission of state sponsor of terrorism designation), **Ch. 16.A.7**

Export controls relating to Hong Kong, **Ch. 16.B.1.a**

Middle East Peace Process, **Ch. 17.A**

Armenia and Azerbaijan (Nagorno-Karabakh), **Ch. 17.B.4**

Sudan, **Ch. 17.B.5**

Libya, **Ch. 17.B.7**

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 2020 in which the United States filed a statement of interest or participated as *amicus curiae*.

1. Scope of Application: Definition of Foreign State (*Indirect Purchaser Plaintiffs v. Irco Group Corp.*)

Section 1603(a) and (b) of the FSIA define “foreign state” as follows:

- (a) A “foreign state” . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
- (b) An “agency or instrumentality of a foreign state” means any entity—
 - (1) which is a separate legal person, corporate or otherwise, and
 - (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
 - (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title nor created under the laws of any third country.

On July 8, 2020, the United States filed an amicus brief in the U.S. Court of Appeals for the Ninth Circuit in *Indirect Purchaser Plaintiffs v. Irico Group Corp.*, No. 19-17428, a civil action alleging that foreign corporations had conspired to fix the prices of cathode ray tubes (“CRTs”) used in televisions and computer monitors sold in the United States. The district court denied the defendant Irico Group’s motion to dismiss, finding the commercial activity exception to the FSIA applied to the extent the defendants were agencies and instrumentalities of a foreign state. Excerpts below from the *amicus* brief of the United States address whether an ordinary profit-seeking company, not engaged in public activity, and owned only in minority part by the Chinese government, may be considered an agency or instrumentality under Section 1603(b) of the FSIA as an organ of the foreign government. The brief is available in full at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

* * * *

I. The District Court Properly Determined That Irico Display Is Not An Organ Of China

A. Companies Are Not Organs of a Foreign State Unless They Serve a Public Function on Behalf of the Government

Section 1603(b)(2) defines an “agency or instrumentality” of a foreign state to include any entity “[1] which is an organ of a foreign state or political subdivision thereof, or [2] a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.” 28 U.S.C. § 1603(b)(2). In *Dole Food*, the Supreme Court held “that only direct ownership of a majority of shares by the foreign state [itself] satisfies” the majority-share prong. 538 U.S. at 474, 477. Because the two prongs are disjunctive—“[e]ither the entity can be an ‘organ of a foreign state,’ or the entity can have a majority of its shares or other ownership interest owned by a ‘foreign state or a political subdivision thereof,’” see *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 654 (9th Cir. 1996)—an entity can be an “organ of a foreign state” when the state does not directly own a majority of it. *Id.* The critical inquiry for determining whether an entity is an “organ” of a foreign state under this Court’s precedents is whether it “engages in a public activity on behalf of the foreign government.” *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001), *aff’d on other grounds*, 538 U.S. 468 (2003). Typically, organs of a foreign state are “quasi-public entities [such as] national banks, state universities, and public television networks.” *Id.* at 808. While “commercial enterprises” can qualify as organs in certain circumstances, they do not constitute organs when they are “acting to maximize profits rather than pursue public objectives.” *Id.*

In considering whether an entity is an organ of a foreign state, courts in this Circuit examine factors such as whether the entity was created by the foreign state’s law; is controlled by government appointees; employs public servants; and has exclusive responsibility over an important public function. *Corporacion Mexicana*, 89 F.3d at 655; see also *Patrickson*, 251 F.3d at 807 (identifying level of government financial support and obligations and privileges under state law as additional considerations). Courts also consider the entity’s “ownership structure.” *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 209 (3d Cir. 2003). These factors inform the

ultimate inquiry of whether the entity “engag[es] in a public activity on behalf of the foreign government.” *Cal. Dep’t of Water Res. v. Powerex Corp.*, 533 F.3d 1087, 1098 (9th Cir. 2008).

Ninth Circuit courts take a “holistic view” of the evidence, *id.* At 1102, and no single factor is dispositive. For instance, “a company may be an organ of a foreign state for purposes of the FSIA even if its employees are not civil servants” if the evidence otherwise demonstrates its public purpose. *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 641 (9th Cir. 2003). Likewise, a foreign state’s ownership and control are typically relevant because an entity is unlikely to carry out a public function if those factors are absent. *See USX*, 345 F.3d at 209 (“different ownership structures might influence the degree to which an entity is performing a function ‘on behalf of the foreign government’”). A foreign state’s ownership and control of an entity, however, are not sufficient for organ status. As such, an ordinary commercial enterprise without a public purpose will not be considered an organ even when it is wholly owned and controlled by a government agency or instrumentality. *See Gates v. Victor Fine Foods*, 54 F.3d 1457, 1461 (9th Cir. 1995) (holding that an “ordinary pork processing plant[] cannot be considered an ‘organ’ of the Province of Alberta” even though it was wholly owned and controlled by a state agency).

A valid public purpose can take a wide variety of forms but must be something more than just making money for the state as a shareholder. *See Patrickson*, 251 F.3d at 808; *Alperin v. Vatican Bank*, 2007 WL 4570674, at *3 (N.D. Cal. Dec. 27, 2007) (distinguishing circumstances where “the entity serves a public purpose” from where “it acts as an independent commercial enterprise to maximize its own profits”), *aff’d* 365 Fed. App’x 74 (9th Cir. 2010).

B. The Percentage of a Company Owned Directly or Indirectly by a Foreign State Can Be Significant to Whether It Is an Organ

In analyzing whether a company is an organ, courts often examine the percentage owned directly or indirectly by the foreign state and other details showing the nature and extent of state involvement and control over the company. While there may be a variety of ways in which foreign governments organize functions carried out on their behalf, courts readily deem a company to be an organ of a foreign state when the state creates it as a wholly owned subsidiary of a state agency to advance a public objective, and the company engages in sovereign functions on the state’s behalf.

For instance, in *Powerex*, the British Columbian government directed a state agency to establish a wholly owned subsidiary “to market the export of power.” 533 F.3d at 1099. The exporting subsidiary was an organ of British Columbia because it “owes its very existence to the Province,” which used it to further “public policies” concerning a natural resource of the foreign state; it “played a role in treaty formation and implementation”; and “[m]ost importantly,” the Province had “sole beneficial ownership and control” of it through the state agency. *Id.* at 1099-1101 (citations omitted).

Where the state’s direct and indirect ownership share of a company is 50% or less, however, courts have demanded more evidence that it serves a public function. When a foreign state owns 50% or less of a profit-seeking company, organ status has been routinely denied. For instance, in *Patrickson*, the Israeli government privatized its holdings so that it did not own a majority share of two chemical companies (Companies). 251 F.3d at 805. This Court held that the Companies were not organs of Israel although the government had “to approve the appointment of directors and officers, as well as any changes in the capital structure of the Companies,” and the Companies had to present “an annual budget and financial statement to various government ministries.” *Id.* at 808. Rather, the Companies were best viewed “as

independent commercial enterprises, heavily regulated, but acting to maximize profits rather than pursue public objectives.” *Id.*

Similarly, in *Board of Regents v. Nippon Telephone & Telegraph Corp.*, the Fifth Circuit held that a television broadcaster in which the government of Japan indirectly owned 46% was not an organ of Japan. 478 F.3d 274, 279 (5th Cir. 2007). The firm “operate[d] as one of several commercial interests in a competitive telecommunications market” with its ownership structure designed to encourage competition in this market. *Id.* While “Government authorization [was] required for numerous [firm] transactions,” the government “merely provide[d] passive oversight” similar to “the requirements of other governments’ regulatory bodies, such as the United States’ Securities and Exchange Commission (SEC).” *Id.* at 279-80.

Organ status is reserved for entities serving public purposes, because otherwise courts “would open the door to situations in which a party only tangentially related to a foreign state could claim foreign state status and avail itself” of the FSIA’s protections and “be unfair to plaintiffs.” *USX*, 345 F.3d at 208.

C. The District Court’s Non-Clearly-Erroneous Factual Findings Establish That Display Is Not an Organ of China

The district court considered the *Patrickson* factors and found numerous facts that weighed against organ status for Display:

- China only indirectly owned a minority share of Display;
- Display was “established as a form of privately held corporation”;
- The government “did not exercise direct control over Display” instead “interacting with Display in a typical investor role”;
- Display “functioned as an ordinary profit-making entity that happened to partially make profits for [China]”; (5th Cir. 2000). Unlike in *Patrickson*, however, that company was a “non-profit-making entity.” 251 F.3d at 808 n.12.
- The government “did not appoint Display’s executives, [or] pay their salaries, discrediting Display’s contention that its corporate officers were civil servants”; and
- Display did not “exercise[] regulatory authority or other special sovereign privileges.”

ER8-10. While Display received some financial support from China, that did not “outweigh the many factors counting against organ status.” ER10-11.

Based on its factual findings, the district court properly concluded that Display is not an organ of China—rather it is just an ordinary profit-making company that benefits the state as a partial shareholder. Display’s argument to the contrary is unavailing, as it does not show clear error in the court’s factual findings or that the court misweighed the relevant factors. *See EIE Guam*, 322 F.3d at 639 (reviewing factual findings “for clear error” and legal issues, including “organ” status, “de novo”).

Display is wrong that its showing surpasses that in *Powerex*. *See* Appellants’ Opening Br., 9th Cir. Doc. 14, at 33 (Appellants’ Br.). In *Powerex*, the exporter performed public functions, including treaty formulation and implementation, and was wholly-owned and controlled by a state agency. 533 F.3d at 1099-1101. Here, by contrast, the district court found that Display is an ordinary profit-making company indirectly owned only in minority-part by China serving no public function for the government.

While Display is correct that an organ can be profitable, Appellants’ Br. 22, 36, Display is wrong to suggest that a company is an organ *because* the state profits as a partial shareholder, *id.* at 26-27. If that sufficed, China could make all Chinese companies organs by taking an

ownership share instead of taxing profits. That would expand the concept of organ of a foreign state beyond its proper bounds.

Display acknowledges that it might not be seen as having a public function in a “capitalist economic system,” *see* Appellants’ Br. 22, 27-28, but argues that its profit-making for the state should be viewed differently because of China’s “distinctly socialist economy,” *id.* at 36. The FSIA, however, does not give greater protection to ordinary profitmaking entities owned by socialist governments than by capitalist ones. *See Ocean Line Holdings Ltd. v. China Nat’l Chartering Corp.*, 578 F. Supp. 2d 621, 626 (S.D.N.Y. 2008) (rejecting argument that ordinary shipping enterprise is an organ of China); *Edlow Int’l Co. v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827, 831-32 (D.D.C. 1977) (rejecting argument that would characterize “every enterprise operated under a socialist system as an instrumentality of the state” because “there is no suggestion [in the FSIA’s legislative history] that a foreign state’s system of property ownership, without more, should be determinative on the question whether an entity” is an “agency or instrumentality under the Act”).

* * * *

2. Commercial Activities Exception: *Indirect Purchaser Plaintiffs v. Irco Group Corp.*

The commercial activities exception in the FSIA provides:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. 1605(a)(2).

In the U.S. brief in *Irco Group*, discussed *supra*, the second issue is whether the district court erred in applying the FSIA’s commercial-activity exception by finding a direct effect on the United States from a company’s conspiratorial acts raising U.S. prices for televisions and computer monitors. The U.S. brief is excerpted below.

* * * *

II. The District Court Has Jurisdiction Over Group Under The Third Prong Of The Commercial Activity Exception

Under the commercial-activity exception, a foreign state is not immune from jurisdiction when “the action is based”:[1] upon a commercial activity carried on in the United States by the

foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. 28 U.S.C. § 1605(a)(2).

The “action” here is a Sherman Act suit alleging a conspiracy involving Group. In such a case, the relevant acts include joining the unlawful conspiracy and acts in furtherance of that conspiracy. Acts in furtherance of an antitrust conspiracy can include sales on agreed-upon terms, but they also can include other types of acts such as foregoing sales at particular prices, reducing production, or creating an enforcement mechanism to prevent cheating on the agreement. Each of these acts can contribute to the success of the conspiracy as a whole.

The district court held that the record supported “a finding that the Irico Defendants’ commercial activities had a direct effect in the United States” by raising U.S. prices of CRTs and CRT-containing televisions and computer monitors. ER12. Group argues that this determination cannot be sustained because, as a matter of law “[u]nder this Court’s FSIA precedents,” its conspiratorial acts cannot cause a “direct effect” in the United States without “U.S. sales by Group,” yet the district court made no finding of U.S. sales by Group. Appellants’ Br. 4; *id.* at 15 (“Group’s foreign sales of allegedly price-fixed CRTs cannot possibly cause a ‘direct effect’ in the United States.”), 40 (*same*).

There is no such legal rule, however, as there are many situations in which a defendant’s anticompetitive conspiratorial acts can cause a direct effect in the United States even though the defendant had no U.S. sales. Indeed, this case is one example. Even if Group sold no price-fixed CRTs in the United States, the record amply supports the district court’s finding that Group’s conspiratorial acts had a direct effect in the United States. We address Group’s flawed legal and factual arguments in turn.

A. Group Is Incorrect That a Foreign State Must Make Direct U.S. Sales To Satisfy the Third Prong of the Commercial-Activity Exception

Group wrongly argues that, as a matter of law, a foreign state must make direct U.S. sales for its conspiratorial acts to have a direct effect in the United States under the FSIA. See Appellants’ Br. 4, 15, 40. That argument finds no support in the text of the statute or applicable precedent, and could significantly harm antitrust enforcement. If a foreign state makes direct U.S. sales as part of an antitrust conspiracy, it is engaging in “commercial activity carried on in the United States” that falls within the first prong of the commercial-activity exception. The FSIA defines “commercial activity” as “either a regular course of commercial conduct or a particular commercial transaction or act,” 28 U.S.C. § 1603(d), and further defines “commercial activity carried on in the United States by a foreign state” as “commercial activity carried on by such state and having substantial contact with the United States,” *id.* § 1603(e). Direct U.S. sales are a type of commercial transaction carried on in the United States that satisfies the first prong of the commercial-activity exception. See, e.g., *Altmann v. Republic of Austria*, 317 F.3d 954, 969 (9th Cir. 2002) (holding that Austrian gallery’s “publication and sale of [marketing] materials” in the United States were “commercial activities” within the first prong of the commercial activity exception), amended, 327 F.3d 1246 (9th Cir. 2003), *aff’d* on other grounds, 541 U.S. 677 (2004); H.R. Rep. No. 94-1487 (1976), reprinted at 1976 U.S.C.C.A.N. 6604, 6615 (“commercial activity carried on in the United States by a foreign state” includes “import-export transactions involving sales to, or purchases from, concerns in the United States”).

Group’s proposed interpretation of the “direct effect” requirement thus violates the “cardinal principle of statutory construction” that statutes must be construed, if reasonably

possible, so that “no clause, sentence, or word shall be superfluous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); see also *Dole Food*, 538 U.S. at 476-77 (holding that it is improper to construe the FSIA “in a manner that is strained and, at the same time, would render a statutory term superfluous”). Reading “direct effects” to encompass only “direct sales” robs the third prong of any meaningful function.

Moreover, the Supreme Court has recognized that the third prong reaches beyond direct sales to other types of acts “in connection with” commercial activity abroad, so long as the acts cause a “direct effect” in the United States. *Weltover*, 504 U.S. at 618. The Court “reject[ed] the suggestion that [the FSIA commercial-activity exception] contains any unexpressed requirement of ‘substantiality’ or ‘foreseeability.’” *Id.* Although jurisdiction cannot be predicated on “purely trivial effects in the United States,” the Court explained that an effect is “direct” if it follows “as an immediate consequence of the defendant’s . . . activity.” *Id.* Such a direct effect existed for Argentina’s unilateral rescheduling of maturity dates on bonds, even though that commercial activity was “outside this country,” because “[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming.” *Id.* at 611, 619.

Indeed, numerous examples show that actions of a foreign company to join and act in furtherance of an antitrust conspiracy can cause a direct effect in the United States even if that company made no direct sales in the United States. For instance, an agreement among foreign manufacturers to boycott U.S. businesses by refusing to supply them with inputs could cause significant harm in the United States despite the lack of any U.S. sales under the conspiracy. Likewise, a foreign firm could forego U.S. sales as part of a market allocation conspiracy, directly raising U.S. prices by carrying out its agreement not to sell in the United States. Or a foreign firm could directly harm a U.S. labor market by agreeing with a U.S. firm not to poach its employees.

An agreement among foreign manufacturers to fix the price of a component part sold abroad and incorporated into finished products sold in the United States is no different. A manufacturer participating in such a price-fixing conspiracy could directly harm the United States, even if it never sold the price-fixed component or the finished products in the United States, by raising the U.S. prices of finished products sold by its co-conspirators.

Group’s proposed legal rule also is inconsistent with precedent. Although few antitrust cases have applied the FSIA’s “direct effect” requirement, a district court in this Circuit recently found direct effects under the FSIA for conduct other than direct sales by the defendant in the United States. See *Sea Breeze Salt, Inc. v. Mitsubishi Corp.*, No. CV 16-2345-DMG, 2016 WL 8648638, at *3 (C.D. Cal. Aug. 18, 2016). There, a company 51% owned by the Mexican Government (Essa) breached its contract to sell solar sea salt to another Mexican firm, who was supposed “to sell the salt to Sea Breeze,” who “in turn, was unable to meet its obligations to sell to various purchasers within the United States.” *Id.* at *1. The court exercised jurisdiction over Essa under the third prong of the commercial-activity exception, even though another firm had distribution rights to sell Essa’s salt in the United States. The court found a “direct effect” in the United States, because the U.S. was the largest importer of salt, Essa produced 17% of the world’s salt, and the alleged price-fixing and granting of exclusive rights to another firm “leads to less variety in the U.S. salt market, as well as less competition and higher prices for United States consumers.” *Id.* at 1, 3 & n.3. This Court affirmed, likewise finding the “direct effect” requirement satisfied. 899 F.3d 1064, 1068 n.2 (9th Cir. 2018).

Group argues that a defendant must make U.S. sales to directly affect the United States because otherwise “a multitude of ‘intervening object[s], cause[s], [and] agenc[ies]’ ” would be “necessary to bring about that effect,” and the “domestic effects” of foreign price-fixed sales “are too ‘remote and attenuated’ ” to be direct. Appellants’ Br. 41-43, 45-47. These same arguments, however, were rejected in *Hsuing*. ... Likewise, *Sea Breeze* involved a “direct effect” in the United States with “no break in the causal chain” even though the foreign state did not directly sell in the United States. 2016 WL 8648638, at *3 n.3 (discussed p. 26 , supra).

Group also argues that the direct-effect requirement incorporates “minimum contacts standards” from due process cases, which requires direct U.S. sales. Appellants’ Br. 47 -48 (quoting *Sec. Pac. Nat’l Bank v. Derderian*, 872 F.2d 281, 286-87 (9th Cir. 1989)). Yet even assuming that the minimum-contacts standard applies to the direct-effect requirement, Group is wrong that direct sales in a forum are necessary for minimum contacts. While sales in a forum can establish minimum contacts, a plaintiff also can “show[] that a defendant purposefully directed his conduct [outside of the forum] toward the forum.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 803 (9th Cir. 2004). Group’s proposed legal rule, thus, is incorrect.

B. The District Court Did Not Need To Resolve Whether Group Made U.S. Sales To Find That Its Anticompetitive Conspiratorial Acts Directly Affected the United States

Group also is incorrect that it had to make U.S. sales for jurisdiction here. Whether or not Group made price-fixed sales in the United States, the record amply supports the district court’s finding that Group’s anticompetitive conspiratorial acts had a direct effect in the United States. The district court found that Group participated in “over 70 conspiratorial meetings” at which the conspirators allegedly agreed to fix prices, allocate customers, and restrict output of CRT Products in the United States and elsewhere. ER1, ER12, ER1482 -83. Even if none of Group’s price-fixed sales were in the United States, but see Appellees’ Answering Br., 9th Cir. Doc. 25-1, at 14-17 (disputing this proposition), it would have been apparent to Group that its conspiratorial acts would directly affect the United States. Appellees presented evidence that Group priced its CRTs at the agreed price-fixed levels and reduced output to prop-up those fixed prices, see ER1459-6 8 (collecting evidence); and that during the conspiratorial meetings, Group and its co -conspirators specifically discussed U.S. dollar prices, ER1482-83, ER1504, ER1528-29, ER1544, and U.S. market conditions, id. ER1533 (Irico and Chunghwa employees were “bearish on Japanese, U.S., and European CRT TV demand”). Moreover, as the district court found, there was a direct causal connection between raising CRT prices and raising U.S. television and monitor prices, because “the U.S. was the second largest market for CRTs at 18% of the [worldwide] market” and “the CRT accounted for up to 50 percent of the cost of manufacturing a television or computer monitor.” ER12.

Contrary to Group’s assertion (Br. 46), it was not a mere “fortuity” that its acts affected the United States. The conspiratorial agreement included the United States, and CRTs were a large cost of televisions and computer monitors sold in the United States. Thus, this is not a case where the conspiracy covered only foreign markets and the component was a minor part in the finished product sold in the United States, where the existence and directness of any U.S. effect from the conspiracy may be less clear.

3. Expropriation Exception to Immunity: *Germany v. Philipp*

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).

On September 11, 2020, the United States filed its *amicus* brief in the U.S. Supreme Court in *Germany v. Philipp*, No. 19-351. The case arises out of the taking of a collection of medieval relics known as the “Welfenschatz” by the German government after World War II, which the heirs of its original Jewish owners sought to recover. The district court denied Germany’s motion to dismiss. The U.S. Court of Appeals for the D.C. Circuit held that the expropriation exception to jurisdiction applies in the case, because a state’s confiscation of its own citizens’ property, while not a violation of the international law of takings, does violate international law, when it amounts to the commission of genocide. The court of appeals also rejected the argument for abstention under the doctrine of international comity and denied rehearing en banc. The questions in the case before the Supreme Court are: (1) whether the expropriation exception applies to domestic takings by a state of the property of its own nationals in the context of a human-rights violation; and (2) whether a court may abstain from exercising jurisdiction under the FSIA on the basis of international comity. The U.S. brief is excerpted below.* See Chapter 5 for discussion of the section of the brief discussing the doctrine of international comity.

* * * *

I. THE EXPROPRIATION EXCEPTION IN THE FOREIGN SOVEREIGN IMMUNITIES ACT DOES NOT PROVIDE JURISDICTION IN ANY CASE INVOLVING A DOMESTIC TAKING

A. Under The Domestic Takings Rule, The Expropriation Exception Does Not Apply When A Sovereign Has Taken The Property Of Its Own Nationals

The FSIA’s expropriation exception abrogates sovereign immunity in cases in which “rights in property taken in violation of international law are in issue.” 28 U.S.C. 1605(a)(3). Under the long-settled domestic takings rule, “[t]he property which is the subject- matter of expropriation must be *foreign* property.” S. Friedman, *Expropriation in International Law* 163 (1953) (emphasis added). Accordingly, the expropriation exception does not apply to cases in which a sovereign has taken the property of its own nationals.

1. a. The domestic takings rule has been an established principle of international expropriations law since well before World War II. ...

* Editor’s note: The Court issued its unanimous decision on February 3, 2021, holding that the expropriation exception does not cover domestic takings even in the context of a human-rights violation and declining to consider the comity question.

For example, in a 1938 letter asserting that Mexico had violated international law through its uncompensated taking of American-owned property, Secretary of State Cordell Hull observed that he “could not question the right of a foreign government to treat its own nationals in this fashion” because that was “a matter of domestic concern.” *Mexico-United States: Correspondence concerning expropriation by Mexico of agrarian properties owned by Aliens, Extradition, and Naturalization*, 32 Am. J. Int’l L. 181, 184 (Supp. 1938); cf. *United States v. Belmont*, 301 U.S. 324, 332 (1937) (“What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here.”). ...

b. The domestic takings rule continued to hold force after World War II, even as the international community began to recognize a series of human-rights norms that apply to a sovereign’s treatment of its own nationals, ...

This continued focus of international law on the treatment of the property of aliens paralleled the ongoing—and indeed, intensifying—debates regarding whether international law should govern takings *at all*. The rise of the Cold War focused attention on the basic differences in the way communist and capitalist governments treated property, leading this Court to observe in the 1964 *Sabbatino* case—which involved Cuba’s allegedly unlawful taking of the property of American-owned companies—that “[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state’s power to expropriate the property of aliens.” *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). Given the international community’s inability to reach consensus even with respect to the expropriation of foreign property, the prospect of a consensus with respect to domestic takings was remote.

There has been no departure from the domestic takings rule. For example, the Restatement (Third) of Foreign Relations Law of the United States (1987) recognizes that “[a] state is responsible under international law” for “a taking by the state of the property of a national of another state.” *Id.* at § 712(1), at 196 (emphasis added)...

2. In the more than forty years since the FSIA was enacted, courts have repeatedly invoked the domestic takings rule to reject the assertion that the expropriation exception creates jurisdiction over claims that a sovereign has expropriated the property of its own nationals. *Republic of Austria v. Altmann*, 541 U.S. 677, 713 (2004) (Breyer, J., concurring) (observing that the “consensus view” is that the expropriation exception does not apply when the property “belong[s] to a country’s own nationals”); see, e.g., *Mezerhane v. República Bolivariana de Venezuela*, 785 F.3d 545, 549 (11th Cir. 2015), cert. denied, 136 S. Ct. 800 (2016); *Altmann v. Republic of Austria*, 317 F.3d 954, 968 (9th Cir. 2002), aff’d on other grounds, 541 U.S. 677 (2004); *de Sanchez v. Banco Cent. de Nicaragua*, 770 F.2d 1385, 1395-1398 (5th Cir. 1985). The same result should have obtained here. As it comes before the Court, this case presents allegations that the German government expropriated the property of German nationals through the forced sale of the Welfenschatz in 1935. The domestic takings rule dictates that such claims fall outside the bounds of the expropriation exception.

B. The Expropriation Exception Does Not Provide Jurisdiction Over Domestic Takings That Occur In The Context Of A Human-Rights Violation

In the decision below, the court of appeals did not dispute the existence or continued vitality of the domestic takings rule. To the contrary, it acknowledged that “an ‘intrastate taking’—a foreign sovereign’s taking of its own citizens’ property—does not violate the international law of takings.” Pet. App. 7 (citation omitted). And in its prior related decision in *Simon v. Republic of Hungary*, 812 F.3d 127, 142-143 (D.C. Cir. 2016), remanded, 277 F. Supp.

3d 42 (D.D.C. 2017), rev'd and remanded, 911 F.3d 1172 (D.C. Cir. 2018), cert. granted, No. 18-1447 (July 2, 2020), the court explicitly recognized that “[t]he domestic takings rule means that, as a general matter, a plaintiff bringing an expropriation claim involving an intrastate taking cannot establish jurisdiction under the FSIA’s expropriation exception because the taking does not violate international law.” *Id.* at 144-145.

The court of appeals held, however, that the “domestic takings rule has no application” where the takings in question “amount to genocide.” *Hungary I*, 812 F.3d at 143-144. The court reasoned that “genocide itself is a violation of international law” that a sovereign may commit against its own people by—among other things—confiscating property “to bring about [a protected group’s] physical destruction.” *Id.* at 142-143 (quoting Genocide Convention art. 2(c), 78 U.N.T.S. 280) (emphasis omitted). Thus, in the court’s view, respondents’ domestic takings claims fit within the expropriation exception so long as they involve a seizure that allegedly occurred as “part of” the Nazi genocide. Pet. App. 9.

The court of appeals erred, however, in assuming that the expropriation exception should be read broadly to encompass claims involving property seized as part of a genocide. The text, context, and history all demonstrate that the expropriation exception deprives a sovereign of immunity only in cases where the sovereign is alleged to have violated the international law governing expropriations. The FSIA’s reference to “property taken in violation of international law” therefore excludes property taken by a sovereign from its own nationals, even when the taking occurs in the context of a genocide or other human-rights violation.

1. The text excludes property taken from a sovereign’s own nationals

a. The expropriation exception applies in cases involving “rights in property taken in violation of international law.” 28 U.S.C. 1605(a)(3). Congress did not further define those terms, but this Court has previously looked to the “most recent restatement of foreign relations law at the time of the FSIA’s enactment” to discern the contemporary meaning of one of the statute’s provisions. *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199-200 (2007); see *Baker Botts L. L. P. v. Asarco LLC*, 576 U.S. 121, 128 n.2 (2015) (terms must be understood in accordance with their “ordinary meaning * * * at th[e] time” they were enacted). When the FSIA was enacted in 1976, the then-current Restatement (Second) of Foreign Relations Law of the United States (1965) defined a “taking” as “[c]onduct attributable to a state that is intended to, and does, effectively deprive *an alien* of substantially all the benefit of his interest in property.” *Id.* § 192, at 572 (emphasis added). It follows that property “tak[en]” in violation of international law must be the property of “an alien.” *Ibid.*

Moreover, the Restatement (Second) contains a section entitled “When Taking is Wrongful under International Law.” Restatement (Second) § 185, at 553. The section explains that property is taken in violation of international law when there is a “taking by a state of [the] *property of an alien*” for a non-“public purpose,” or without “just compensation,” or where the property is merely “in transit through the territory of the state, or has otherwise been temporarily subjected to its jurisdiction, and is not required by the state because of serious emergency.” *Ibid.* (emphasis added); see also *id.* §§ 165-166, at 501-502, § 185 cmt. a, at 553 (explaining that a taking may also violate international law where it is “discriminatory” against an alien); *id.* §§ 186-187, at 562-563. The statutory phrase “rights in property taken in violation of international law” is therefore best read to encompass rights in property taken from an alien in the specified circumstances and to exclude property taken from a state’s own nationals, no matter the context. 28 U.S.C. 1605(a)(3).

b. That conclusion is reinforced by “settled principles of statutory of construction” under which particular words or phrases should be given “a consistent meaning” across statutes that “pertain to the same subject.” *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972). Twelve years before Congress enacted the FSIA, it enacted the Second Hickenlooper Amendment, which created an exception to the act of state doctrine—the doctrine that generally bars U.S. courts from sitting in judgment of the acts of a foreign state undertaken within its own jurisdiction, *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). The Second Hickenlooper Amendment was a response to this Court’s decision in *Sabbatino*, 376 U.S. at 428, which held that the act of state doctrine bars U.S. courts from adjudicating claims involving the taking of property by a foreign sovereign within its own territory. In the wake of *Sabbatino*, Congress sought to ensure that the act of state doctrine would not prevent courts from adjudicating certain expropriation claims, such as those arising from the Castro government’s expropriation of American-owned businesses. See *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957, 962-963 (S.D.N.Y. 1965), *aff’d*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968) (explaining history of the Amendment).

The text of the Second Hickenlooper Amendment specifies that the exception to the act of state doctrine applies in cases involving a “confiscation or other taking * * * by an act of state in violation of the principles of international law.” 22 U.S.C. 2370(e)(2) (emphasis added). Nine years before the FSIA was enacted, a court interpreted the quoted language to prevent the application of the exception in cases involving “confiscations by a state of the property of its own nationals, no matter how flagrant and regardless of whether compensation has been provided.” *F. Palicio y Compania, S. A. v. Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966), *aff’d*, 375 F.2d 1011 (2d Cir. 1967) (per curiam), *cert. denied*, 389 U.S. 830 (1967). The language has been interpreted in the same way ever since. *Perez v. Chase Manhattan Bank, N.A.*, 463 N.E.2d 5, 10 (N.Y.), *cert. denied*, 469 U.S. 966, (1984); see *Comparelli v. Republica Bolivariana De Venezuela*, 891 F.3d 1311, 1320 (11th Cir. 2018); *Bank Tejarat v. Varsho-Saz*, 723 F. Supp. 516, 520–521 (C.D. Cal. 1989); *Jafari v. Islamic Republic of Iran*, 539 F. Supp. 209, 215 (E.D. Ill. 1982).

The expropriation exception’s reference to “rights in property taken in violation of international law” closely tracks the Second Hickenlooper Amendment’s reference to “takings * * * in violation of principles of international law.” Because the two statutes also “pertain to the same subject”—the facilitation of judicial review of claims involving takings by a foreign state—they should be interpreted in the same way. *Erlenbaugh*, 409 U.S. at 243; see also *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (citation omitted) (when statutory language is “obviously transplanted” from another source, it brings the “old soil with it”). Accordingly, like the Second Hickenlooper Amendment, the expropriation exception excludes any cases involving domestic takings, “no matter how flagrant.” *Palicio*, 256 F. Supp. at 487.

c. Neither the court of appeals nor respondents have offered support for the contrary proposition that the ordinary, contemporary meaning of the text of the expropriation exception covers property excluded by the domestic takings rule if the property was confiscated as part of a genocide. Instead, both the court of appeals and respondents have relied primarily on the proposition that the United Nations’ 1948 definition of genocide is capacious enough to establish that some confiscations amount to genocide. Pet. App. 7. But if the Genocide Convention informed the meaning of the phrase “rights in property taken in violation of international law,” 28 U.S.C. 1605(a)(3), when the phrase was enacted, one would expect to find evidence suggesting as much. Instead, the then-current Restatement (Second) defined wrongful “takings”

to include only those involving the expropriation of foreign owned property, even though the Genocide Convention had been adopted 16 years before the Restatement was published... And no court of appeals espoused the view that the expropriation exception may be understood to cover takings that occur as part of a genocide until 2012—almost 40 years after the FSIA’s enactment and more than 60 years after the 1948 Genocide Convention. See *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 675 (7th Cir. 2012).

This dearth of contemporary support for the court of appeals’ position cannot be excused by analogy to the Alien Tort Statute (ATS), 28 U.S.C. 1350. The court of appeals briefly observed that under the ATS, courts may apply norms of human-rights law that “did not even exist” when the statute was enacted. *Hungary I*, 812 F.3d 145. But there is no reason to assume that Congress intended for the expropriation exception to be interpreted in accordance with the ATS, a statute that employs different statutory language, was drafted in a different context, was enacted almost two centuries earlier, and was not considered in the context of human-rights law until after the FSIA was enacted. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-725 (2004). As noted, the text of the Second Hickenlooper Amendment provides the far more obvious statutory precursor for the expropriation exception. ... In any event, even if Congress were somehow attempting to mirror the ATS in the expropriation exception, that would not help respondents. At the time of the FSIA’s enactment, the ATS had been interpreted to bar a German national’s claims predicated on the forced sale of his property under the Nazi regime. *Dreyfus v. Von Finck*, 534 F.2d 26, 31 (2d. Cir. 1976).

2. Statutory context confirms that the expropriation exception does not encompass property taken as part of a genocide or other human-rights violation

a. “It is a ‘fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’ ” *National Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (citation omitted). With respect to the FSIA in particular, the Court has emphasized that even where a proposed interpretation is “literally possible,” it may be rejected based on an “analysis of the entire statutory text.” *Samantar v. Yousuf*, 560 U.S. 305, 315 (2010); see *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1057-1070 (2019) (adopting the “most natural reading” of FSIA provision based on context).

Here, the FSIA as a whole demonstrates that the expropriation exception does not abrogate sovereign immunity in cases involving genocide. As Judge Katsas explained in his dissent from denial of en banc review, genocide is primarily understood as the intentional “extermination of a national, ethnic, racial, or religious group.” Pet. App. 102. Yet it is undisputed that the FSIA provides no jurisdiction over genocide claims involving mass murder and other inflictions of physical suffering outside the United States. *Ibid.* It would be odd for Congress to provide jurisdiction over claims involving genocide only when, and to the extent, that property is confiscated, while extending no jurisdiction to other acts, including killing members of the group or otherwise inflicting conditions of life calculated to bring about that group’s destruction. See *Hungary I*, 812 F.3d at 146 (acknowledging the “seeming anomaly” in the statute).

Nor is that the only anomaly that is likely to arise from the court of appeals’ interpretation of the expropriation exception. The FSIA leaves a sovereign’s immunity intact in the vast majority of cases in which a plaintiff claims that death or injury resulted from other human-rights violations such as torture, slavery, and extrajudicial killings. See *Saudi Arabia v. Nelson*, 507 U.S. 349, 361 (1993) (holding that U.S. courts lacked jurisdiction over a personal

injury suit alleging “wrongful arrest, imprisonment, and torture” because—while those forms of state action may be “monstrous”—they are nonetheless shielded by sovereign immunity). But under the court of appeals’ reading of the statute, a foreign sovereign’s immunity might be abrogated if it has seized property as part of one of these human-rights violations. The unlikely consequence would be a system of foreign sovereign immunity that offers more protection for an individual’s property than for her person.

b. The FSIA’s terrorism exception, 28 U.S.C. 1605A, supplies additional contextual support. The terrorism exception is the sole provision of the FSIA that expressly permits a sovereign to be sued for a human-rights violation that occurs outside the United States. Notably, the terrorism exception allows plaintiffs to seek damages not only with respect to their property losses, but also with respect to the personal injuries that are more typically associated with human-rights violations. 28 U.S.C. 1605A(a)(1) and (d).

Further, the terrorism exception is narrowly tailored to abrogate sovereign immunity only with respect to specific acts—namely, “torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act.” 28 U.S.C. 1605A(a)(1). It also restricts the plaintiffs who may bring a cause of action, see 28 U.S.C. 1605A(a)(2)(A)(ii) and (c), and it mandates that any claims must be brought against a designated state sponsor of terrorism, 28 U.S.C. 1605A(a)(2)(A)(i), rather than allowing plaintiffs to bring suit against any sovereign they choose.

The absence of similar tailoring in the expropriation exception counsels against reading the exception to cover losses of property that occur in the context of a human-rights violation. It is unlikely that Congress would narrowly abrogate a sovereign’s immunity in U.S. courts for acts in the context of terrorism committed against U.S. nationals and U.S. government employees, while broadly depriving sovereigns of immunity any time they have allegedly seized property as part of a genocide or other human-rights violation. Indeed, such a reading might lead to evasion of the congressionally established limits in the terrorism exception itself because plaintiffs who do not come within those limits may nonetheless attempt to bring suit under the expropriation exception by alleging that a taking occurred as part of the terrorist act. 22

3. The FSIA’s statutory history reinforces that the expropriation exception applies only in cases involving a foreign state’s taking of the property of a foreign-national

The history of the FSIA counsels strongly against the broad reading of the expropriation exception that was endorsed by the court of appeals below. As this Court has previously observed, the FSIA was primarily intended to codify the “restrictive theory” of foreign sovereign immunity that the Executive Branch had adopted and applied for decades before the FSIA’s enactment. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co.*, 137 S. Ct. 1312, 1319-1321 (2017), *aff’d and remanded*, 743 Fed. Appx. 442 (D.C. Cir. 2018); *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983). Under the restrictive theory, a foreign state is generally immune for its “public acts,” *ibid.*, but not for those that are private or commercial. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 14 (1976) (House Report); see *Victory Transp. Inc. v. Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). The bulk of the FSIA’s immunity exceptions are therefore “narrow ones[,] covering waiver, commercial activity in the United States, * * * torts causing injury in the United States, and arbitration.” Pet. App. 104 (Katsas, J., dissenting from the denial of rehearing en banc) (citing 28 U.S.C. 1605(a)(1)-(6)).

The expropriation exception deviates from the restrictive theory by allowing courts to exercise jurisdiction over sovereigns for public acts that qualify as unlawful expropriations. But

there is no evidence that Congress intended for that deviation to work a “radical departure from the[] basic principles” of the “restrictive theory.” *Helmerich*, 137 S. Ct. at 1320. To the contrary, the House Report stated that the exception was intended to encompass “[e]xpropriation claims” involving “the nationalization or expropriation of property without payment” of “compensation required by international law,” as well as “takings which are arbitrary or discriminatory in nature,” as when a state targets the property of foreign nationals. House Report 19-20 (emphasis omitted); see also Restatement (Second) § 185 cmt a at 553 (explaining that a taking is wrongful under international law when it discriminates against an alien), § 166 (defining unlawful discrimination against an alien);

Accepting the court of appeals’ interpretation would effect a “radical departure” from the restrictive theory. *Helmerich*, 137 S. Ct. at 1320. As the *Helmerich* Court observed, “[a] sovereign’s taking or regulating of its own nationals’ property within its own territory is often just the kind of foreign sovereign’s public act (a ‘*jure imperi*’) that the restrictive theory of sovereign immunity ordinarily leaves immune from suit.” *Id.* at 1321. And while *Helmerich* also acknowledged that there were “fair arguments” that Congress intended for the expropriation exception to abrogate immunity with respect to certain takings of the property of a sovereign’s “own nationals[],” that statement is most naturally read to refer to the “fair arguments” to that effect advanced in *Helmerich* itself. *Ibid.* Those arguments were dramatically different from the ones advanced in this case. *Ibid.*

The plaintiffs in *Helmerich* had asserted that U.S. courts could exercise jurisdiction over their claims under the expropriation exception because Venezuela violated international expropriation law by targeting the property of a Venezuelan corporation based on the foreign nationality of the corporation’s shareholders. *Helmerich & Payne Int’l Drilling Co. v. Bolivarian Republic of Venezuela*, 784 F.3d 804, 812 (D.C. Cir. 2015). The parties agreed that the domestic takings rule would generally bar plaintiffs’ claims because the expropriation involved the property of Venezuela’s own national (a Venezuelan corporation), but the plaintiffs asserted that there is an exception to the domestic takings rule where a country targets a domestic corporation because it is owned by foreign nationals. *Ibid.* This Court observed that there were “fair arguments” for that proposition, but declined to decide the question, instead remanding on the basis that the court of appeals had applied too lenient a standard in assessing jurisdiction. *Helmerich*, 137 S. Ct. at 1321. But the Court’s tentative appraisal of the arguments for a targeted exception to the domestic takings rule in *Helmerich* do not help respondents, who seek an entirely distinct—and far greater—departure from the rule to allow U.S. courts to exercise jurisdiction in cases in which the property was not even *indirectly* owned by a foreign national at the time of the taking.

4. More recent statutes are unavailing

In an attempt to bolster their arguments, respondents and the court of appeals have relied on a pair of statutes from 1998 and 2016 in which Congress has denounced seizures of property that occurred during the Holocaust. ... Those statutes demonstrate Congress’s concern with Nazi art seizures, but they do not expand the expropriation exception or otherwise provide courts with jurisdiction to resolve related takings claims against sovereigns. ...

A 2016 amendment to the FSIA that references “Nazi-era claims” also fails to establish that the expropriation exception provides jurisdiction in this suit. 28 U.S.C. 1605(h)(2)(A). The recent FSIA amendment confers immunity with respect to “certain art exhibition activities” in the United States, making it possible for sovereigns to loan artworks for display without fear that the artworks’ presence in the United States will subject the sovereign to litigation. *Ibid.* The

provision exempts certain “Nazi-era claims” from its general grant of immunity, but it does nothing to broaden the existing statutory basis for jurisdiction over those claims. *Ibid.* Rather, the exemption from the conferral of “exhibition activities” immunity applies only to Nazi-era claims “in which rights in property taken in violation of international law are in issue within the meaning of” the expropriation exception. *Ibid.* The 2016 amendment thereby expressly preserves the existing scope of the expropriation exception ...

C. Any Ambiguity Should Be Resolved Against Jurisdiction

To the extent there is any remaining ambiguity in the expropriation exception, it should be resolved against jurisdiction. “When foreign relations are implicated,” it is particularly important for courts to “‘to look for legislative guidance before exercising innovative authority over substantive law.’” *Hernandez v. Mesa*, 140 S. Ct. 735, 747 (2020) (quoting *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) (opinion of Kennedy, J.)). That principle is grounded in large part on the Constitution, under which the “conduct of the foreign relations of our Government is committed * * * to the Executive and Legislative—‘the political’ Departments.” *Medellin v. Texas*, 552 U.S. 491, 511 (2008) (citation omitted). But the principle also stems from practical concerns regarding the serious “risks of adverse foreign policy consequences” that arise when U.S. courts attempt to set “limit[s] on the power of foreign governments over their own citizens,” *Sosa* 542 U.S. at 727-728.

Those constitutional and practical considerations counsel strongly against adopting the court of appeals’ interpretation of the expropriation exception, which requires courts to make declarations with respect to highly sensitive foreign-policy questions merely to determine jurisdiction. Moreover, adopting a broad understanding of a provision that abrogates the immunity of foreign sovereigns threatens to “‘affront’ other nations, producing friction in our relations” and the reciprocal revocation of immunity in foreign courts. ...

...In the context of this case, that determination may be largely straight-forward because the international community has long recognized that the Holocaust constituted a genocide. But plaintiffs may raise allegations of genocide in other contexts. See, e.g., *Bakalian v. Central Bank of the Re-public of Turkey*, 932 F.3d 1229 (9th Cir. 2019) (considering allegations that property was taken as part of a genocidal campaign by Turkey against ethnic Armenians); *Rukoro v. Federal Republic of Germany*, 363 F. Supp. 3d 436 (S.D.N.Y. 2019) (considering claim that Germany committed genocide in colonial Africa), appeal pending, No. 19-609 (2d Cir. filed Mar. 11, 2019). And it could have dramatic effects on foreign policy if a federal court were to declare that another country has committed genocide as part of the court’s jurisdictional analysis. Moreover, even with respect to settled instances of genocide like the Nazi Holocaust, questions may remain regarding the onset, scope, and nature of the genocide....

The court of appeals’ decision is also likely to give rise to other difficult questions in the sensitive human-rights arena, all of which a court would be required to address merely to determine whether it has jurisdiction....

These foreign policy concerns are exacerbated because international law disputes regarding expropriations may be highly sensitive even when they do not involve alleged human-rights violations.... Congress has determined that courts may nonetheless exercise jurisdiction over such disputes when they fall within the bounds of the expropriation exception, but courts should not broaden the bounds of the exception so that they are forced to address questions that implicate sensitive issues with respect to both a sovereign’s treatment of the property rights of its own citizens *and* human-rights norms.

2. Finally, rejecting the court of appeals' broad interpretation of the expropriation exception serves the "reciprocal self-interest" of the United States. *National City Bank v. Republic of China*, 348 U.S. 356, 362, (1955). As this Court has recognized, the United States is not infrequently sued in foreign courts. See *Helmerich*, 137 U.S. at 1322. Because "some foreign states base their sovereign immunity decisions on reciprocity," *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984), it is generally in the United States' interest to avoid adopting broad exceptions to foreign sovereign immunity that are inconsistent with the immunity protections that would be afforded under principles of international law generally accepted by other nations. *Helmerich*, 137 U.S. at 1322 (noting the Court's prior recognition that "our grant of immunity to foreign sovereigns dovetails with our own interest in receiving similar treatment").

The text of the expropriation exception already departs from typical international practice because it appears that no other country has adopted a comparable exception to sovereign immunity for expropriations. Restatement (Fourth) § 455, Reporter's Note 12. But the court of appeals interpretation goes further, suggesting that the already anomalous exception to immunity has broader application in the context of a human-rights violation. In 2012, the International Court of Justice rejected a similar proposition, holding that "a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law." *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. ¶ 91, at 44 (Feb. 3). Several European nations have submitted diplomatic notes to the United States endorsing that view and emphasizing that depriving Germany of immunity in this case might have negative consequences for foreign relations. See Pet. Br. 9 n.3; Letter from Jonathan M. Freiman to the Clerk of the Court (Sept. 4, 2020) (No. 19-351). Because it is an inappropriately expansive judicial interpretation that has exacerbated the tension between international and domestic immunity law, the court of appeals' position should be rejected.

* * * *

4. Nonapplicability in Criminal Cases

On May 18, 2020, the United States filed a brief on appeal in the Ninth Circuit in *United States v. Pangang Group Co. Ltd.*, No. 19-10306, a criminal prosecution of a Chinese company for corporate espionage. The U.S. brief asserts that the FSIA does not apply to criminal prosecutions against agencies and instrumentalities (and, in the alternative, that if the FSIA applies, its exceptions apply as well). The U.S. brief is excerpted below and available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

* * * *

III. THE FSIA DOES NOT CONFER ABSOLUTE IMMUNITY FROM CRIMINAL PROSECUTION ON THE PANGANG DEFENDANTS

* * * *

B. The district court had jurisdiction over this case alleging “offenses against the laws of the United States,” and the text, structure, and history of the FSIA do not provide otherwise

The district court correctly determined that it had jurisdiction over this criminal case. Under 18 U.S.C. § 3231, the “district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States.” *Id.* The Pangang Defendants are charged with “offenses against the laws of the United States”—specifically, the EEA [Economic Espionage Act of 1996], 18 U.S.C. § 1831(a)(1)–(5). ER 46–59. “It is hard to imagine a clearer textual grant of subject-matter jurisdiction” than Section 3231 as to criminal cases. *In re Grand Jury Subpoena*, 912 F.3d at 628. “And nothing” in the text of the FSIA “expressly displaces section 3231’s jurisdictional grant.” *Id.* Accordingly, the district court’s order that it had jurisdiction over this criminal case should be affirmed.

In arguing to the contrary, the Pangang Defendants contend that Congress stripped the district court of jurisdiction over this criminal case through enactment of the FSIA. But that statute (1) never mentions criminal jurisdiction or criminal cases at all in its text, (2) was designed to address uncertainty and entanglements caused by private litigants suing foreign countries, who then appealed to the State Department to recommend immunity, and (3) has never been construed by any court to bar a federal criminal prosecution through want of jurisdiction. Each of these issues cuts strongly against the Pangang Defendants’ suggested statutory construction.

1. The text of the FSIA does not mention criminal cases, in contrast to the very clear statutory text of Section 3231 and implications of the EEA

The FSIA “contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.” *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). The FSIA’s text, read “as a whole,” *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010), demonstrates that the FSIA is exclusively civil in its application.

The FSIA begins by conferring jurisdiction over “any nonjury civil action” in which a foreign state is not immune. 28 U.S.C. § 1330(a); *see Houston v. Murmansk Shipping Co.*, 667 F.2d 1151, 1154 (4th Cir. 1982) (“Congress apparently did not intend the phrase ‘nonjury civil action’ to define the district court’s jurisdiction. Rather, it appears that the phrase was intended to serve as a shorthand way of ensuring that actions against foreign states would be tried without a jury”). The FSIA’s procedures for asserting immunity or other jurisdictional limits likewise address civil actions. *See* 28 U.S.C. § 1441(d) (removal of “[a]ny civil action”); *id.* § 1608(d) (deadline for serving “an answer or other responsive pleading to the complaint”). The FSIA’s other procedural provisions have a uniform focus on civil actions. *See, e.g., id.* § 139(f) (venue); *id.* § 1608(a), (b) (service rules). And the statutory findings and declaration of purpose refer to the “rights of both foreign states and litigants,” without reference to governments or prosecutors that conduct criminal proceedings. *Id.* § 1602.

This civil focus and absence of reference to criminal proceedings is particularly instructive because the Supreme Court has advised that any “immunity defense made by a foreign sovereign in an American court must stand on the [FSIA’s] text. Or it must fall.” *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141 (2014). “The Act’s careful calibration of remedies among the listed types of defendants suggests that Congress did not mean to cover other types of defendants never mentioned in the text.” *Samantar*, 560 U.S. at 319. Indeed, the Court emphasized that it would not further Congress’s purpose to confer immunity in circumstances where FSIA contains not “so much as a word spelling out how and when” such immunity applies. *Samantar*, 560 U.S. at 322. So, too, here: despite detailed provisions covering how immunity applies in scenarios from admiralty to mortgage foreclosure actions to art exhibits—including a detailed special provision for Nazi-era claims—FSIA has not one word about “how and when” immunity applies to those charged with federal criminal offenses. 28 U.S.C. § 1605(b), (d), (h). “Reading the FSIA as a whole,” then, “there is nothing to suggest” that this Court “should read” FSIA to cover criminal cases. *Samantar*, 560 U.S. at 319. Under such circumstances, FSIA does not confer immunity on the Pangang Defendants or deprive the district court of jurisdiction.

That conclusion follows even more forcefully when considering the particular charges in this case—violations of the Economic Espionage Act of 1996, 18 U.S.C. §§ 1831–39. Congress passed that statute many years after enactment of the FSIA, and it contains criminal espionage provisions expressly requiring the involvement of a foreign government, instrumentality, or agent, at least as a beneficiary. *See* 18 U.S.C. § 1831(a) (“Whoever, intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent” knowingly engages in certain conduct related to economic espionage violates statute); ER 46 (Third Superseding Indictment charging violations of 18 U.S.C. § 1831(a)(1)–(5)). “The legislative history indicates that § 1831 is designed to apply only when there is evidence of foreign government sponsored or coordinated intelligence activity.” *United States v. Hsu*, 155 F.3d 189, 195 (3d Cir. 1998) (internal quotation marks and citation omitted) (quoting legislative history). That same legislative history explains that the EEA was designed to target activity ranging from a “foreign government that uses its classic espionage apparatus to spy on a company, to the two American companies that are attempting to uncover each other’s bid proposals, or to the disgruntled former employee who walks out of his former company with a computer diskette full of engineering schematics.” *Id.* at 201 (internal quotation marks and citation omitted). The Pangang Defendants do nothing to explain how this legislative intent to target the actions of, among others, foreign governments under the EEA accords with their claimed immunity. Indeed, the Pangang Defendants’ position—that they are entitled to absolute immunity simply because the government has alleged in the indictment that they are foreign instrumentalities under the EEA—underscores the dubious nature of their claim for dismissal under the FSIA. At a minimum, it seems particularly doubtful that Congress, while writing a statute that would often lead to the prosecution of foreign state actors engaged in economic espionage, nevertheless silently intended to provide those same foreign instrumentalities absolute immunity from prosecution. In the absence of textual support clearly indicating otherwise in the FSIA, this Court should not provide the Pangang Defendants with such relief.

2. *The history of the FSIA indicates application to civil, not criminal, cases*

Historically, the grant or denial of foreign state immunity was “the case-by-case prerogative of the Executive Branch.” *Republic of Iraq v. Beaty*, 556 U.S. 848, 857 (2009); see *Samantar*, 560 U.S. at 311–13, 320. That rule flowed from the Executive Branch’s constitutional primacy in foreign affairs. See *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34–36 (1945). Until 1952, if a foreign state sought immunity from a private civil action, the Executive generally requested a court to recognize immunity. *Samantar*, 560 U.S. at 311–312.

In 1952, this practice changed: the Executive Branch decided to grant immunity from suit to foreign states for “sovereign or public acts” but not “private acts.” *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711–15 (1976) (reprinting Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep’t of State, to Philip B. Perlman, Acting Att’y Gen. (May 19, 1952)). This policy led to “diplomatic pressure on the State Department” from foreign governments to grant immunity in private suits, and “political considerations led to suggestions of immunity in cases where immunity would not have been available” under the new policy. *Verlinden*, 461 U.S. at 487.

To address the “considerable uncertainty” faced by “private litigant[s]” due to inconsistent immunity determinations resulting from the Executive Branch having requests for immunity thrust upon it, Congress passed the FSIA in 1976. See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 9 (1976) (“1976 House Report”); see also *Verlinden*, 461 U.S. at 488. Passage of the FSIA was supported by the Departments of State and Justice. 1976 House Report 6. In passing the bill, the House of Representatives noted the need for “comprehensive provisions” to “inform parties when they can have recourse to the courts to assert a legal claim against a foreign state,” 1976 House Report 7, and repeatedly referred to “plaintiffs,” “suit[s],” “litigants,” and “liability,” *id.* at 6–8, 12—all terms consistent with civil actions. Moreover, the House introduced the need for the bill with the following observation and examples:

American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. . . . Instances of such contact occur when U.S. businessmen sell good to a foreign state trading company, and disputes may arise concerning the purchase price. Another is when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention. Still another example occurs when a citizen crossing the street may be struck by an automobile owned by a foreign embassy. At present, there are no comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state.

Id. at 6–7. The problems identified, language used, and examples cited by Congress in passing the FSIA all indicate an interest in providing civil litigants with more certainty—not displacing federal criminal proceedings. As the Supreme Court has stated, “[t]he FSIA was adopted . . . to address a modern world where foreign state enterprises are every day participants in commercial activities, and to assure litigants that decisions regarding claims against states and their enterprises are made on purely legal grounds.” *Samantar*, 560 U.S. at 323 (internal quotation marks omitted) (citing 1976 House Report).

This history and context do not suggest that the Executive Branch or Congress had any intention of passing a statute that provided foreign government-controlled entities free rein to violate criminal laws with impunity. The FSIA’s purposes do not support such a construction.

The federal government, not a private party, controls whether to initiate a federal criminal matter against a foreign-government-owned commercial enterprise. *Pasquantino v. United States*, 544 U.S. 349, 369 (2005); *see also United States v. Sinovel Wind Grp. Co.*, 794 F.3d 787, 792 (7th Cir. 2015). Accordingly, immunity in criminal matters “simply was not the particular problem to which Congress was responding.” *Samantar*, 560 U.S. at 323 (regarding officials’ civil immunity).

3. *No court has ever applied the FSIA to bar a federal criminal prosecution*

In addition to inconsistency with the FSIA’s history, purpose, and text, the Pangang Defendants’ argument suffers from a lack of decisional support. The Supreme Court has repeatedly described FSIA as addressed to civil actions and has never suggested that it applies to the criminal context. *See Verlinden*, 461 U.S. at 488 (FSIA provides “a comprehensive set of legal standards governing claims of immunity in every *civil* action against a foreign state or its political subdivisions, agencies, or instrumentalities”) (emphasis added); *accord NML Capital, Ltd.*, 573 U.S. at 141; *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004). The only courts to have addressed the question in criminal prosecutions or investigations have held that the FSIA does not apply. *See United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997); *In re Grand Jury Proceeding Related To M/V Deltuva*, 752 F. Supp. 2d 173, 176–180 (D.P.R. 2010); *United States v. Hendron*, 813 F. Supp. 973, 974–977 (E.D.N.Y. 1993).

The D.C. Circuit recently examined these issues at some length in a decision with instructive parsing of text, history, structure, and precedent. *See In re Grand Jury Subpoena*, 912 F.3d at 625–33. The court ultimately assumed without deciding that the FSIA did apply to criminal matters and nevertheless denied the defendants’ claimed immunity under the commercial activity exception. In so doing, however, the court rejected the defendant’s argument that the FSIA stripped district courts of jurisdiction over criminal cases. “[A] reading that embraces absolute immunity in criminal cases is much harder to reconcile with the Act’s context and purpose.” *Id.* at 629. The court observed that such a result would allow sweeping negative consequences: “[A] foreign-sovereign-owned, purely commercial enterprise operating within the United States could flagrantly violate criminal laws and the U.S. government would be powerless to respond save through diplomatic pressure. . . . We doubt very much that Congress so dramatically gutted the government’s crime-fighting toolkit. . . .” *Id.* at 629–30 (internal citations and quotation marks omitted). In particular, the court found no justification for such significant ramifications for criminal cases in the FSIA’s text or history. *Id.* at 630 (observing that “if Congress really intended [that result], . . . one would expect that answer to show up clearly in the Act’s text, or at least” in legislative history, yet “the Act and its legislative history do not say a single word about possible criminal proceedings” (internal quotation marks and citations omitted)). Instead, the court concluded, canvassing scholarship in support of its reading, that “the relevant reports and hearings suggest Congress was focused, laser-like, on the headaches born of private plaintiffs’ civil actions against foreign states.” *Id.* at 630 (citation omitted).

These principles apply with equal force in this case. The Pangang Defendants’ position would confer absolute immunity on foreign government-controlled businesses that committed substantial economic espionage in the United States—espionage that domestic or foreign-owned but not government-controlled competitors could not commit without criminal sanction. The government would be powerless to stop this activity except through diplomatic pressure. Inferring such Congressional intent from the FSIA, where no mention of criminal cases is made, is simply implausible and should not be adopted. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S.

564, 575 (1982) (“[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with legislative purpose are available.”); *accord Tovar v. Sessions*, 882 F.3d 895, 904 (9th Cir. 2018).

Such an interpretation would also conflict with the federal government’s traditional role in deciding whether to prosecute or subpoena a foreign-government-owned business—decisions the government has exercised for decades. *See, e.g., United States v. Ho*, 3:16-CR-46-TAV-HBG-1, 2016 WL 5875005 (E.D. Tenn. Oct. 7, 2016); *M/V Deltuva*, 752 F. Supp. 2d at 176–80; *United States v. Jasin*, No. CRIM. A. 91-00602-08, 1993 WL 259436 (E.D. Pa. July 7, 1993); *In re Sealed Case*, 825 F.2d 494, 495 (D.C. Cir. 1987) (per curiam); *see also, e.g., United States v. Statoil, ASA*, No. 06-CR-960 (S.D.N.Y. Oct. 13, 2006) (criminal information and deferred prosecution agreement against Norwegian state-owned oil company); *United States v. Aerlinite Eireann*, No. 89-CR-647, Dkt. No. 12 (S.D. Fla. Oct. 6, 1989) (guilty plea of airline then owned by Ireland). That is perhaps why “no reported court decision has dismissed an indictment or otherwise suppressed a criminal prosecution based on immunity conferred by the FSIA.” Restatement (Fourth) of Foreign Relations Law of the United States, § 451 rep. n.4 (2018). In arguing against the weight of this authority, the Pangang Defendants cite *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002), and the district court opinion upon which that decision rested. AOB 28. Such reliance is misplaced. As the D.C. Circuit explained, *Keller* was a civil case and never considered how FSIA interacted with Section 3231. *In re Grand Jury Subpoena*, 912 F.3d at 631. Moreover, *Keller* is no longer good law on its conclusion that the FSIA provided civil immunity to individual officials of a foreign state. *See Samantar*, 560 U.S. at 310 n.4 (listing *Keller* on the side of a circuit split that the Supreme Court proceeded to reject). And the manner in which *Keller* was abrogated is telling: the Supreme Court rejected the idea that, although the general text of the FSIA could be read consistently with *Keller*’s interpretation, when read “as a whole,” the FSIA’s history, purpose, structure, and text convinced the Court that extending coverage to scenarios “never mentioned in the text” was incorrect. *Samantar*, 560 U.S. at 319. Relying on *Keller* for interpretive guidance on which unmentioned scenarios the FSIA was meant to cover would be similarly unwise here. That is particularly true given that at least one other circuit has flatly rejected, in a civil case, the idea “that Congress intended the FSIA to govern district court jurisdiction in criminal cases.” *Southway v. Cent. Bank of Nigeria*, 198 F.3d 1210, 1214 (10th Cir. 1999).

Equally inapt is the Pangang Defendants’ reliance on *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). AOB 1, 5, 6, 13, 23, 25, 29. “[E]ven the briefest peek under the hood of *Amerada Hess* shows that the Supreme Court’s reasons for finding section 1330(a) to be the exclusive basis for jurisdiction in the civil context have no place in criminal matters.” *In re Grand Jury Subpoena*, 912 F.3d at 629. Nothing in *Amerada Hess* addresses, let alone forecloses, criminal jurisdiction. The general language cited by the Pangang Defendants does not support their claim. *See Illinois v. Lidster*, 540 U.S. 419, 424 (2004) (“[G]eneral language in judicial opinions” must be read “as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering”). Furthermore, the Pangang Defendants’ repeated citation to *Amerada Hess* for the proposition that the FSIA is “the sole basis for obtaining jurisdiction over a foreign state in our courts,” AOB 1, 5, 13, 25, 29, fails to grapple with the context of that statement: *Amerada Hess* explained only that the “comprehensiveness of the statutory scheme” meant that Congress did not need to amend “other grants of subject-matter jurisdiction in Title 28” such as “federal question jurisdiction,” admiralty, interpleader, commerce and antitrust, and

patents, copyrights, and trademarks. *Amerada Hess*, 488 U.S. at 437–39. This list has one thing in common: it refers to different civil jurisdictional provisions in Title 28. Jurisdiction in this case has nothing to do with Title 28. *See* 18 U.S.C. § 3231. *Amerada Hess* has no bearing here. *See In re Grand Jury Subpoena*, 912 F.3d at 629. The Pangang Defendants’ reliance upon it is meritless.

* * * *

5. Terrorism Exception to Immunity: *Opati v. Sudan*

The terrorism exception applies, *inter alia*, to cases in which money damages are sought for “personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act ... engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.” 28 U.S.C.

§ 1605A(a)(1). The provision further specifies that “[t]he court shall hear a claim under this section if” certain additional requirements are met, *id.* § 1605A(a)(2), including that “the foreign state was designated as a state sponsor of terrorism at the time the act [at issue] occurred, or was so designated as a result of such act, and ... either remains so designated when the claim is filed ... or was so designated within the 6-month period before the claim is filed” *Id.* § 1605A(a)(2)(A)(i). The provision provides a private right of action for U.S. nationals, members of the armed forces, and employees and contractors of the U.S. government to seek damages for personal injury or death resulting from the acts described above. *Id.* § 1605A(c). While the FSIA generally precludes foreign states from liability for punitive damages, 28 U.S.C. § 1606, the terrorism exception specifically permits punitive damages for actions brought under 1605A(c).

As discussed in *Digest 2019* at 327-33, the United States filed briefs in the U.S. Supreme Court in *Opati v. Sudan*, No. 17-1268 and *Sudan v. Opati*, 17-1406, and a related petition in *Sudan v. Owens*, 17-1236. The Court denied certiorari in *Sudan v. Opati*, and *Sudan v. Owens*, on May 26, 2020.

On May 18, 2020, the Court held in an 8-0 decision in *Opati v. Sudan* that plaintiffs in a federal cause of action under the terrorism exception may seek punitive damages for preenactment conduct. 590 U.S. ___, 140 S. Ct. 1601 (2020). The opinion is excerpted below. See Chapter 8 for discussion of the U.S.-Sudan claims agreement relating to the 1998 embassy bombings in Tanzania and Kenya.

* * * *

Two years after Congress amended the FSIA, al Qaeda attacked the U.S. Embassies in Kenya and Tanzania. In response, a group of victims and affected family members led by James Owens sued Sudan in federal district court, invoking the newly adopted terrorism exception and alleging

that Sudan had provided shelter and other material support to al Qaeda. As the suit progressed, however, a question emerged. In its recent amendments, had Congress merely withdrawn immunity for state-sponsored terrorism, allowing plaintiffs to proceed using whatever preexisting causes of action might be available to them? Or had Congress gone further and created a new federal cause of action to address terrorism? Eventually, the D. C. Circuit held that Congress had only withdrawn immunity without creating a new cause of action. See *Cicippio-Puelo v. Islamic Republic of Iran*, 353 F. 3d 1024, 1033 (2004).

In response to that and similar decisions, Congress amended the FSIA again in the National Defense Authorization Act for Fiscal Year 2008 (NDAA), 122 Stat. 338. Four changes, all found in a single section, bear mention here. First, in §1083(a) of the NDAA, Congress moved the state-sponsored terrorism exception from its original home in §1605(a)(7) to a new section of the U. S. Code, 28 U. S. C. §1605A. This had the effect of freeing claims brought under the terrorism exception from the FSIA's usual bar on punitive damages. See §1606 (denying punitive damages in suits proceeding under a sovereign immunity exception found in §1605 but not §1605A). Second, also in §1083(a), Congress created an express federal cause of action for acts of terror. This new cause of action, codified at 28 U. S. C. §1605A(c), is open to plaintiffs who are U. S. nationals, members of the Armed Forces, U. S. government employees or contractors, and their legal representatives, and it expressly authorizes punitive damages. Third, in §1083(c)(2) of the NDAA, a provision titled "Prior Actions," Congress addressed existing lawsuits that had been "adversely affected on the groun[d] that" prior law "fail[ed] to create a cause of action against the state." Actions like these, Congress instructed, were to be given effect "as if" they had been originally filed under §1605A(c)'s new federal cause of action. Finally, in §1083(c)(3) of the NDAA, a provision titled "Related Actions," Congress provided a time-limited opportunity for plaintiffs to file *new* actions "arising out of the same act or incident" as an earlier action and claim the benefits of 28 U. S. C. §1605A.

Following these amendments, the *Owens* plaintiffs amended their complaint to include the new federal cause of action, and hundreds of additional victims and family members filed new claims against Sudan similar to those in *Owens*. Some of these new plaintiffs were U. S. nationals or federal government employees or contractors who sought relief under the new §1605A(c) federal cause of action. But others were the foreign-national family members of U. S. government employees or contractors killed or injured in the attacks. Ineligible to invoke §1605A(c)'s new federal cause of action, these plaintiffs relied on §1605A(a)'s state-sponsored terrorism exception to overcome Sudan's sovereign immunity and then advance claims sounding in state law.

After a consolidated bench trial in which Sudan declined to participate, the district court entered judgment in favor of the plaintiffs. District Judge John Bates offered detailed factual findings explaining that Sudan had knowingly served as a safe haven near the two United States Embassies and allowed al Qaeda to plan and train for the attacks. The court also found that Sudan had provided hundreds of Sudanese passports to al Qaeda, allowed al Qaeda operatives to travel over the Sudan-Kenya border without restriction, and permitted the passage of weapons and money to supply al Qaeda's cell in Kenya. See *Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 139–146 (DC 2011).

The question then turned to damages. Given the extensive and varied nature of the plaintiffs' injuries, the court appointed seven Special Masters to aid its fact finding. Over more than two years, the Special Masters conducted individual damages assessments and submitted written reports. Based on these reports, and after adding a substantial amount of prejudgment

interest to account for the many years of delay, the district court awarded a total of approximately \$10.2 billion in damages, including roughly \$4.3 billion in punitive damages to plaintiffs who had brought suit in the wake of the 2008 amendments.

At that point, Sudan decided to appear and appeal. Among other things, Sudan sought to undo the district court’s punitive damages award. Generally, Sudan argued, Congress may create new forms of liability for past conduct only by clearly stating its intention to do so. And, Sudan continued, when Congress passed the NDAA in 2008, it nowhere clearly authorized punitive damages for anything countries like Sudan might have done in the 1990s.

The court of appeals agreed. It started by addressing the plaintiffs who had proceeded under the new federal cause of action in §1605A(c). The court noted that, in passing the NDAA, Congress clearly authorized individuals to use the Prior Actions and Related Actions provisions to bring new federal claims attacking past conduct. Likewise, the law clearly allowed these plaintiffs to collect compensatory damages for their claims. But, the court held, Congress included no statement clearly authorizing *punitive* damages for preenactment conduct. See *Owens v. Republic of Sudan*, 864 F. 3d 751, 814–817 (CA DC 2017). Separately but for essentially the same reasons, the court held that the foreign-national family member plaintiffs who had proceeded under state-law causes of action were also barred from seeking and obtaining punitive damages. *Id.*, at 817.

The petitioners responded by asking this Court to review the first of these rulings and decide whether the 2008 NDAA amendments permit plaintiffs proceeding under the federal cause of action in §1605A(c) to seek and win punitive damages for past conduct. We agreed to resolve that question. 588 U. S. ____ (2019).

*

The principle that legislation usually applies only prospectively “is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.” *Landgraf v. USI Film Products*, 511 U. S. 244, 265 (1994). This principle protects vital due process interests, ensuring that “individuals . . . have an opportunity to know what the law is” before they act, and may rest assured after they act that their lawful conduct cannot be second-guessed later. *Ibid.* The principle serves vital equal protection interests as well: If legislative majorities could too easily make new laws with retroactive application, disfavored groups could become easy targets for discrimination, with their past actions visible and unalterable. See *id.*, at 266–267. No doubt, reasons like these are exactly why the Constitution discourages retroactive lawmaking in so many ways, from its provisions prohibiting *ex post facto* laws, bills of attainder, and laws impairing the obligations of contracts, to its demand that any taking of property be accompanied by just compensation. See *id.*, at 266.

Still, Sudan doesn’t challenge the constitutionality of the 2008 NDAA amendments on these or any other grounds—the arguments we confront today are limited to the field of statutory interpretation. But, as both sides acknowledge, the principle of legislative prospectivity plays an important role here too. In fact, the parties devote much of their briefing to debating exactly how that principle should inform our interpretation of the NDAA.

For its part, Sudan points to *Landgraf*. There, the Court observed that, “in decisions spanning two centuries,” we have approached debates about statutory meaning with an assumption that Congress means its legislation to respect the principle of prospectivity and apply only to future conduct—and that, if and when Congress wishes to test its power to legislate retrospectively, it must say so “clear[ly].” *Id.*, at 272. All this is important, Sudan tells us,

because when we look to the NDAA we will find no *clear* statement allowing courts to award punitive damages for past conduct.

But if Sudan focuses on the rule, the petitioners highlight an exception suggested by *Altmann*. Because foreign sovereign immunity is a gesture of grace and comity, *Altmann* reasoned, it is also something that may be withdrawn retroactively without the same risk to due process and equal protection principles that other forms of backward-looking legislation can pose. Foreign sovereign immunity's "principal purpose," after all, "has never been to permit foreign states . . . to shape their conduct in reliance on the promise of future immunity from suit in United States courts." 541 U. S., at 696. Thus, *Altmann* held, "[i]n th[e] *sui generis* context [of foreign sovereign immunity], . . . it [is] more appropriate, absent contraindications, to defer to the most recent decision [of the political branches] than to presume that decision *inapplicable* merely because it postdates the conduct in question." *Ibid.* And, the petitioners stress, once the presumption of prospectivity is swept away, the NDAA is easily read to authorize punitive damages for completed conduct.

Really, this summary only begins to scratch the surface of the parties' debate. Sudan replies that it may be one thing to retract immunity retroactively consistent with *Altmann*, because all that does is open a forum to hear an otherwise available legal claim. But it is another thing entirely to create new rules regulating primary conduct and impose them retroactively. When Congress wishes to do *that*, Sudan says, it must speak just as clearly as *Landgraf* commanded. And, Sudan adds, the NDAA didn't simply open a new forum to hear a pre-existing claim; it also created a new cause of action governing completed conduct that the petitioners now seek to exploit. Cf. *Altmann*, 541 U. S., at 702–704 (Scalia, J., concurring). In turn, the petitioners retort that *Altmann* itself might have concerned whether a new forum could hear an otherwise available and pre-existing claim, but its reasoning went further. According to the petitioners, the decision also strongly suggested that the presumption of prospectivity does not apply at all when it comes to suits against foreign sovereigns, full stop. These points and more the parties develop through much of their briefing before us.

As we see it, however, there is no need to resolve the parties' debate over interpretive presumptions. Even if we assume (without granting) that Sudan may claim the benefit of *Landgraf*'s presumption of prospectivity, Congress was as clear as it could have been when it authorized plaintiffs to seek and win punitive damages for past conduct using §1065A(c)'s new federal cause of action. After all, in §1083(a), Congress created a federal cause of action that expressly allows suits for damages that "may include economic damages, solatium, pain and suffering, and *punitive damages*." (Emphasis added.) This new cause of action was housed in a new provision of the U. S. Code, 28 U. S. C. §1605A, to which the FSIA's usual prohibition on punitive damages does not apply. See §1606. Then, in §§1083(c)(2) and (c)(3) of the very same statute, Congress allowed certain plaintiffs in "Prior Actions" and "Related Actions" to invoke the new federal cause of action in §1605A. Both provisions specifically authorized new claims for preenactment conduct. Put another way, Congress proceeded in two equally evident steps: (1) It expressly authorized punitive damages under a new cause of action; and (2) it explicitly made that new cause of action available to remedy certain past acts of terrorism. Neither step presents any ambiguity, nor is the NDAA fairly susceptible to any competing interpretation.

Sudan's primary rejoinder only serves to underscore the conclusion. Like the court of appeals before it, Sudan stresses that §1083(c) *itself* contains no express authorization of punitive damages. But it's hard to see what difference that makes. Sudan admits that §1083(c) authorizes plaintiffs to bring claims under §1605A(c) for acts committed before the 2008 amendments.

Sudan concedes, too, that §1605A(c) authorizes plaintiffs to seek and win “economic damages, solatium, [and] pain and suffering,” for preenactment conduct. In fact, except for the two words “punitive damages,” Sudan accepts that *every other* jot and tittle of §1605A(c) applies to actions properly brought under §1083(c) for past conduct. And we can see no plausible account on which §1083(c) could be clear enough to authorize the retroactive application of all other features of §1605A(c), just not these two words.

Sudan next contends that §1605A(c) fails to authorize retroactive punitive damages with sufficient clarity because it sounds equivocal—the provision says only that awards “may” include punitive damages. But this language simply vests district courts with discretion to determine whether punitive damages are appropriate in view of the facts of a particular case. As we have repeatedly observed when discussing remedial provisions using similar language, “the ‘word “may” clearly connotes discretion.’” *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 579 U. S. ___, ___ (2016) (slip op., at 8) (quoting *Martin v. Franklin Capital Corp.*, 546 U. S. 132, 136 (2005), in turn quoting *Fogerty v. Fantasy, Inc.*, 510 U. S. 517, 533 (1994); emphasis added). What’s more, all of the categories of special damages mentioned in §1605A(c) are provided on equal terms: “[D]amages *may* include economic damages, solatium, pain and suffering, and punitive damages.” (Emphasis added.) Sudan admits that the statute vests the district court with discretion to award the first three kinds of damages for preenactment conduct—and the same can be no less true when it comes to the fourth.

That takes us to Sudan’s final argument. Maybe Congress did act clearly when it authorized a new cause of action and other forms of damages for past conduct. But because retroactive damages of the *punitive* variety raise special constitutional concerns, Sudan says, we should create and apply a new rule requiring Congress to provide a super-clear statement when it wishes to authorize their use.

We decline this invitation. It’s true that punitive damages aren’t merely a form a compensation but a form of punishment, and we don’t doubt that applying new punishments to completed conduct can raise serious constitutional questions. See *Landgraf*, 511 U. S., at 281. But if Congress *clearly* authorizes retroactive punitive damages in a manner a litigant thinks unconstitutional, the better course is for the litigant to challenge the law’s constitutionality, not ask a court to ignore the law’s manifest direction. Besides, when we fashion interpretive rules, we usually try to ensure that they are reasonably administrable, comport with linguistic usage and expectations, and supply a stable backdrop against which Congress, lower courts, and litigants may plan and act. See *id.*, at 272–273. And Sudan’s proposal promises more nearly the opposite: How much clearer-than-clear should we require Congress to be when authorizing the retroactive use of punitive damages? Sudan doesn’t even try to say, except to assure us it knows a super-clear statement when it sees it, and can’t seem to find one here. That sounds much less like an administrable rule of law than an appeal to the eye of the beholder.

*

With the question presented now resolved, both sides ask us to tackle other matters in this long-running litigation. Perhaps most significantly, the petitioners include a postscript asking us to decide whether Congress also clearly authorized retroactive punitive damages in claims brought by foreign-national family members under state law using §1605A(a)’s exception to sovereign immunity. Sudan insists that, if we take up that question, we must account for the fact that §1605A(a), unlike §1605A(c), does not expressly discuss punitive damages. And in fairness, Sudan contends, we should also resolve whether litigants may invoke state law at all, in light of the possibility that §1605A(c) now supplies the exclusive cause of action for claims involving

state-sponsored acts of terror. We decline to resolve these or other matters outside the question presented. The petitioners chose to limit their petition to the propriety of punitive damages under the federal cause of action in §1605A(c). See Pet. for Cert. i. The Solicitor General observed this limitation in the question presented at the petition stage. See Brief for United States as *Amicus Curiae* 19, n. 8. The parties’ briefing and argument on matters outside the question presented has been limited, too, and we think it best not to stray into new terrain on the basis of such a meager invitation and with such little assistance.

Still, we acknowledge one implication that necessarily follows from our holding today. The court of appeals refused to allow punitive damages awards for foreign-national family members proceeding under state law for “the same reason” it refused punitive damages for the plaintiffs proceeding under §1605A(c)’s federal cause of action. 864 F. 3d, at 818. The court stressed that it would be “puzzling” if punitive damages were permissible for state claims but not federal ones. *Id.*, at 817. Having now decided that punitive damages *are* permissible for federal claims, and that the reasons the court of appeals offered for its contrary decision were mistaken, it follows that the court of appeals must also reconsider its decision concerning the availability of punitive damages for claims proceeding under state law.

The judgment of the court of appeals with respect to punitive damages is vacated. The case is remanded for further proceedings consistent with this opinion.

* * * *

B. HEAD OF STATE AND OTHER FOREIGN OFFICIAL IMMUNITY

Mutond v. Lewis

On May 26, 2020, the United States filed an amicus brief in *Mutond v. Lewis*, No. 19-185, in the U.S. Supreme Court, urging the Court to grant the petition for certiorari in the case. The district court dismissed Lewis’s claims under the Torture Victims Protection Act (“TVPA”) against officials of the Democratic Republic of the Congo (“DRC”) (including Mutond) related to his detention and interrogation. The U.S. Court of Appeals for the D.C. Circuit reversed, concluding that the officials were not entitled to conduct-based foreign official immunity. On June 29, 2020, the Supreme Court denied the petition. The U.S. brief is excerpted below.

* * * *

A. This Court Should Grant Review To Clarify That No Categorical Exception To Conduct-Based Foreign-Official Immunity Exists For Personal-Capacity Suits

The court of appeals first erred by concluding that conduct-based immunity has no application to suits against foreign officials in their personal capacities. That holding contradicts the principles of foreign official immunity long advanced by the Executive Branch, and necessitates this Court’s review.

The D.C. Circuit’s principal holding is a broad one: “In cases like this one, in which the plaintiff pursues an individual-capacity claim seeking relief against an official in a personal capacity, exercising jurisdiction does not enforce a rule against the foreign state. [Petitioners] are thus not entitled to the conduct-based foreign official immunity.” Pet. App. 8a. Respondent attempts to characterize that holding as a “fact-intensive analysis” of this case. Br. in Opp. 1; see Pet. App. 6a-8a. But the only “facts” on which the court of appeals focused are features of this case that can be, and often are, easily replicated in nearly any action seeking damages from a foreign official: Respondent’s complaint does not “seek[] to draw on the [foreign state’s] treasury or force the state to take specific action.” Pet. App. 7a. Thus contrary to respondent’s claim, the decision below appears to reflect a “categorical rule” of non-immunity in personal-capacity suits against foreign officials. Br. in Opp. 2.

1. The decision below is contrary to the long-stated views and practice of the Executive Branch

a. The Executive Branch has repeatedly suggested immunity in suits filed against foreign officials in their personal capacities. See, e.g., 15-cv-813- *Doğan v. Barak*, D. Ct. Doc. 48 (C.D. Cal. June 10, 2016); 11-cv-1433 *Doe v. Zedillo Ponce de Leon*, D. Ct. Doc. 38 (D. Conn. Sept. 7, 2012); 05-cv-10270 *Matar v. Dichter*, D. Ct. Doc. 36 (S.D.N.Y. Nov. 17, 2006). None of those filings has hinted that conduct-based immunity might turn on a pleading distinction between personal- and official-capacity suits. Indeed, the question of official immunity logically arises when the defendant is not sued in his official capacity—i.e., when the foreign government is *not* the real party in interest.

Instead, conduct-based foreign-official immunity generally turns on whether the challenged *action* was taken in an official capacity. That common-sense rule has a long pedigree in the Executive Branch. See *Suits Against Foreigners*, 1 Op. Att’y Gen. 45, 46 (1794) (“[I]f the seizure of the vessel is admitted to have been an official act, done by the defendant * * *, [that] will of itself be a sufficient answer to the plaintiff’s action.”); *Actions Against Foreigners*, 1 Op. Att’y Gen. 81, 81 (1797) (“[A] person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States.”). And the official-capacity standard has remained consistent in the Executive Branch’s numerous filings in lawsuits against foreign officials. See, e.g., 15-cv-1265 *Miango v. Democratic Republic of the Congo*, D. Ct. Doc. 151-1, at 2 (D.D.C. May 1, 2019) (“As a general matter, acts of defendant foreign officials who are sued for exercising the powers of their office are treated as acts taken in an official capacity for which a determination of immunity is appropriate.”); U.S. Suggestion of Immunity at 5-6, *Ben-Haim v. Edri*, No. L-3502-15 (N.J. Super. Ct. Law Div. Dec. 3, 2015) (“As a general matter, under principles of customary international law accepted by the Executive Branch, a foreign official enjoys immunity from suit based upon acts taken in an official capacity.”); see also 11-cv-1433 *Doe v. Zedillo Ponce de Leon*, D. Ct. Doc. 38, at 5; Gov’t Amicus Br. at 21, *Matar v. Dichter*, No. 07-cv-2579 (2d Cir. Dec. 19, 2007). The State Department’s adherence to that principle is also reflected in its annual *Digest of United States Practice in International Law*. See, e.g., Office of the Legal Advisor, U.S. Dep’t of State, *Digest of United States Practice in International Law* (CarrieLyn D. Guymon, ed. 2015), Ch. 10, § B(3), at 426.

b. The contrast between the Executive Branch’s long-stated position and that in the decision below reflects a fundamental methodological flaw in the D.C. Circuit’s approach to foreign-official immunity in this case. Under this Court’s decisions, the principles recognized by the Executive Branch governing foreign-official immunity are to be followed by the courts. That

is true not only in cases in which the Executive files a suggestion of immunity, but also in cases in which courts must decide for themselves whether a foreign official is immune from suit.

1. In *Samantar v. Yousuf*, 560 U.S. 305 (2010), this Court held that the FSIA left undisturbed the Executive Branch's historical authority to determine the immunity of foreign officials. See *id.* at 321-325. Under that tradition more generally, the Executive's articulation of foreign immunity principles historically has been adhered to in judicial proceedings, including in cases in which the Executive Branch expresses no view about a particular defendant's immunity. See, e.g., *Jam v. International Fin. Corp.*, 139 S. Ct. 759, 765-766 (2019) ("If the Department submitted a recommendation on immunity, courts deferred to the recommendation. If the Department did not make a recommendation, courts decided for themselves whether to grant immunity, although they did so by reference to State Department policy."); *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943); *Compania Espagnola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938). In *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945), for example, the Executive took no position on the immunity of a particular ship owned by the Mexican government, but it identified precedent under which a state-owned vessel is not immune if it is used by a private party for commercial purposes. *Id.* at 31-32. The Court recognized that the Executive had applied that principle in other immunity determinations, deemed that practice "controlling," and applied the same principle to the specific vessel at issue. *Id.* at 38. As the Court explained, affording immunity on principles not accepted by the Executive "may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations" as would be denying immunity in the face of the Executive's suggestion to the contrary. *Id.* at 36.

2. The courts' deference to the Executive Branch's position on foreign-official immunity under that frame-work rests on the separation of powers under the Constitution. Before Congress enacted the FSIA, this Court had long recognized that the Executive's authority to make foreign sovereign immunity determinations, and the requirement of judicial deference to such determinations, followed from the Executive's constitutional responsibility for conducting the Nation's foreign relations. See, e.g., *Ex parte Peru*, 318 U.S. at 589 (suggestion of immunity "must be accepted by the courts as a conclusive determination by the political arm of the Government" that "continued retention of the vessel interferes with the proper conduct of our foreign relations"); see also *Hoffman*, 324 U.S. at 34; *United States v. Lee*, 106 U.S. 196, 209 (1882); *National City Bank v. Republic of China*, 348 U.S. 356, 360-361 (1955); see generally *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948) (under the Constitution, the Executive is "the guiding organ in the conduct of our foreign affairs"); 22 U.S.C. 2656.

The Executive's authority to make foreign-official immunity determinations has the same constitutional foundation. As this Court has recognized, suits against foreign officials implicate many of the same foreign-affairs concerns as do suits against foreign states. Although foreign-state and foreign-official immunity are not invariably coextensive in scope, see *Samantar*, 560 U.S. at 321, the historical basis for recognizing the immunity of current and former foreign officials is that "the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers," *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895), *aff'd*, 168 U.S. 250 (1897); see *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). As a result, suits against foreign officials implicate much the same considerations of comity and respect for other nations' sovereignty as suits against foreign states. See *Underhill*, 65 F. at 579; cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (The "strong sense of the Judicial Branch" is "that its engagement in the task of passing on the validity of

foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." In the absence of a governing statute such as the FSIA, it continues to be the Executive Branch's role to assess those considerations in determining whether foreign officials are entitled to immunity. *Samantar*, 560 U.S. at 321-325.

2. The decision below erred in relying on the Second Restatement

Instead of considering whether petitioners took the acts at issue in an official capacity and whether they would be immune from suit under the principles accepted by the Executive Branch, the court of appeals assumed without actually deciding that the Second Restatement identified the relevant standard. Pet. App. 6a. That was error.

a. Reliance on the Second Restatement's provisions on foreign-official immunity as a conclusive statement of current law is misplaced. Cf. *Samantar*, 560 U.S. at 321 n.15 (expressing "no view" on whether the Second Restatement "correctly" articulates common-law immunity principles). The Second Restatement was published in 1965. Its drafters acknowledged the "paucity of adjudicated decisions in the international field" at the time and admitted their reliance on less conventional sources to divine the principles of foreign-relations law. Second Restatement § 1 cmt. c. The Restatement has twice been revised since that time, with each revision noting that foreign-relations law had undergone "significant change since publication of the previous Restatement." Restatement (Third) of Foreign Relations Law of the United States Intro. (1987) (Third Restatement); see also Restatement (Fourth) of Foreign Relations Law of the United States Intro. & Part IV Intro. Note (2018) (Fourth Restatement) (similar). Neither the Third Restatement (which was a complete revision) nor the Fourth (which is thus far only a partial revision but includes a provision on sovereign immunity) repeats the Second Restatement's test for foreign-official immunity.

b. Even taken at face value, it is far from clear that the Second Restatement provision at issue here addresses the question presented by this case. Section 66 of the Second Restatement is entitled "applicability of immunity of foreign state." Second Restatement § 66 (emphasis added; capitalization omitted; font altered). The relevant Subsection, 66(f), purports to explain that the "immunity of a foreign state * * * extends to" any "public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state." *Id.* § 66(f) (emphasis added; font altered). That section is written in terms that appear to consider only when a suit against a foreign official would effectively trigger the foreign nation's (pre-FSIA) *sovereign* immunity. Indeed, the test mirrors the standard articulated by this Court—just two years earlier—for determining when a suit against a federal official is, in reality, a suit against the United States without its consent. See *Dugan v. Rank*, 372 U.S. 609, 620 (1963) ("The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'") (citations omitted).

As this Court explained in *Samantar*, the common law doctrine of foreign-official immunity is distinct from the now-statutory doctrine of foreign-sovereign immunity. See 560 U.S. at 321-322. Practice confirms that distinction, as the Executive has "sometimes suggested immunity under the common law for individual officials even when the foreign state did not qualify." *Id.* at 321-322; see, e.g., *Greenspan v. Crosbie*, No. 74-cv-4734, 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976) (suggestion that Canadian officials enjoyed immunity from securities fraud conspiracy claims, while the province of Newfoundland could be held liable). That

distinction makes sense, as personal damages actions against foreign officials could unduly chill the performance of their duties, trigger concerns about the treatment of United States officials abroad, and interfere with the Executive's conduct of foreign affairs—even when a foreign state itself could be sued.

Because the Second Restatement's Section 66(f) is not written in terms that address the circumstances in which foreign officials may enjoy common law conduct-based immunity independently of their sovereigns, it does not answer the immunity question here. But even if Section 66(f) were instructive, the court of appeals should have interpreted it in a manner consistent with the principles of foreign-official immunity recognized by the Executive Branch. See *Smith v. Ghana Commercial Bank, Ltd.*, No. 10-cv-4655, 2012 WL 2930462, at *10 (D. Minn. June 18, 2012), report and recommendation adopted, 2012 WL 2923543 (D. Minn. July 18, 2012), *aff'd* (8th Cir. Dec. 7, 2012) (exercising jurisdiction over Ghanaian Attorney General “would be ‘to enforce a rule of law against’ the Republic of Ghana” when the plaintiff's claims challenged the Attorney General's “decisions about how to pursue those accused of wrongdoing within Ghana's territory”).

The court of appeals thus fundamentally erred in assessing conduct-based immunity for foreign officials. Rather than determining whether petitioners' challenged actions were taken in an official capacity, for which it is the policy of the Executive to recognize immunity, the court relied on the Second Restatement to effectively establish a categorical exception to conduct-based immunity for personal-capacity suits. Such a rule has been endorsed by no other court of appeals, and this Court's review is warranted.

B. This Court Should Grant Review To Resolve The Circuit Conflict About Whether The TVPA Implicitly Abrogates All Conduct-Based Foreign-Official Immunity

The court of appeals also erred in holding that Congress *sub silentio* abrogated conduct-based foreign-official immunity for claims arising under the TVPA. That holding is incorrect and conflicts with the decisions of other courts of appeals, necessitating this Court's review.

1. The decision below is incorrect

The pedigree of foreign-official immunity stretches back centuries. See p. 13, *supra*; see, e.g., *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 138-139 (1812); *Actions Against Foreigners*, 1 Op. Att'y Gen. at 81; *Suits Against Foreigners*, 1 Op. Att'y Gen. at 46. “Just as longstanding is the principle that ‘[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long- established and familiar principles.’” *United States v. Texas*, 507 U.S. 529, 534 (1993) (brackets in original); see, e.g., *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1813). As a result, a “statute must ‘speak directly’ to the question addressed by the common law” if it is to “abrogate a common-law principle.” *Texas*, 507 U.S. at 534 (citation omitted). That rule is particularly clear for common-law immunities, as this Court has explained: “[W]e ‘proceed[] on the assumption that common-law principles of . . . immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so.’” *Filarsky v. Delia*, 566 U.S. 377, 389 (2012) (citation omitted; second set of brackets in original).

The TVPA created a cause of action for damages against “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation,” “subjects an individual” to “torture” or “extrajudicial killing.” § 2(a), 106 Stat. 73. The statute creates a cause of action only; it says nothing about immunities. Because the TVPA does not “speak directly to the question addressed by the common law” concerning conduct-based immunity for foreign officials, the

statute does not abrogate that doctrine. *Texas*, 507 U.S. at 534 (citation and internal quotation marks omitted).

Nor does the TVPA's legislative history evince an intention to discard the common law on foreign-official immunity. That legislative history is somewhat muddled by Congress's erroneous assumption, at the time of passing the TVPA, that the FSIA would govern foreign-official immunity. But the legislative history nonetheless reflects Congress's understanding that some TVPA suits could be barred by pre-existing immunity doctrines that were unchanged by the TVPA. See H.R. Rep. No. 367, 102d Cong., 1st Sess. Pt. 1, at 5 (1991) ("The TVPA is subject to restrictions in the [FSIA]" regarding immunities.); S. Rep. No. 249, 102d Cong., 1st Sess. 7 (1991) (Senate Report) (similar). Consistent with that understanding, the Senate Report explained that for an official to be immune from a TVPA suit, the official must have "an agency relationship to [the] state," which could require the state to " 'admit some knowledge or authorization of the relevant acts.' " Senate Report 8 (citation omitted). The Senate Report expressed the view that, in practice, foreign states would rarely do so for the heinous acts covered by the TVPA. *Ibid.* But that practical observation is only relevant if the TVPA did not abrogate conduct-based immunity for foreign officials as a legal matter.

Contrary to Judge Randolph's opinion, the fact that the TVPA creates a cause of action does not pose a "clear conflict" with the doctrine of conduct-based immunity for foreign officials. Pet. App. 14a. That statutory causes of action may coexist with common-law immunities is well-established in American law. The best example is Section 1983, which—much like the TVPA—creates a right of action against "[e]very person who, under color of [law]," deprives another of his or her legal rights. 42 U.S.C. 1983. Like the TVPA, Section 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). But because common-law immunity principles are "an entrenched feature" of American law, " 'well grounded in history and reason,' " this Court has repeatedly held that they "were not somehow eliminated 'by covert inclusion in the general language' of § 1983." *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012) (citation omitted); see *id.* at 361-362 (collecting cases). Instead, the Court has construed the statute "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Malley v. Briggs*, 475 U.S. 335, 339 (1986) (citation omitted); see, e.g., *Pierson v. Ray*, 386 U.S. 547, 554-555 (1967) (even though the word "person" in Section 1983 includes legislators and judges, the statute does not abrogate the common law doctrine of absolute legislative and judicial immunity).

There is no reason to interpret the TVPA differently. If anything, the fact that TVPA litigation necessarily involves foreign officials and interests should counsel additional hesitation before concluding that Congress silently dispensed with a long-established immunity doctrine. Cf. *Schooner Exchange*, 11 U.S. (7 Cranch) at 146 (stating that the Court would understand the government to have rescinded a foreign sovereign's immunity only if it so indicates "in a manner not to be misunderstood").

2. The court of appeals' decision conflicts with the decisions of other courts of appeals

In holding that the TVPA abrogates the common law doctrine of conduct-based immunity for foreign officials, the court of appeals created a conflict with the Second and Ninth Circuits, which this Court should resolve.

In *Doğan v. Barak*, 932 F.3d 888 (2019), the Ninth Circuit rejected the argument that because "the TVPA's plain language unambiguously imposes liability on any foreign official who engages in extrajudicial killings," the statute abrogated common-law foreign-official immunity. *Id.* at 894. Because the TVPA does not expressly address immunity, the Ninth Circuit explained, principles of immunity " 'were incorporated' into the TVPA." *Id.* at 895 (quoting

Filarsky, 566 U.S. at 389). And in *Matar v. Dichter*, 563 F.3d 9 (2009), the Second Circuit similarly rejected the argument that “any immunity [the foreign official defendant] might enjoy is overridden by his alleged violations of the TVPA.” *Id.* at 15. The decision below cannot be squared with those rulings.

Respondent attempts to distinguish *Doğan* and *Matar* on the ground that the Executive Branch filed a suggestion of immunity on behalf of the foreign officials in those cases. See Br. in Opp. 18-19. According to respondent, the D.C. Circuit’s decision in this case holds only that the TVPA “displaces” the second step of the common-law foreign-official immunity procedure. *Id.* at 18. But Judge Randolph’s brief opinion contains no such limitation. And, as explained above, the same legal principles should govern the foreign-official immunity inquiry at the first and second steps, as the federal courts make immunity determinations by applying “the established policy” of the State Department. *Samantar*, 560 U.S. at 312 (citation omitted). While the D.C. Circuit recognized that courts are “divested of * * * jurisdiction” when the Executive suggests a foreign official’s immunity, Pet. App. 5a, the court did not explain how the Executive’s suggestion of foreign-official immunity in a TVPA case would coexist with Judge Randolph’s determination that the TVPA abrogates conduct-based immunity for foreign officials. The resulting confusion only heightens the need for this Court’s intervention.

* * * *

C. DIPLOMATIC, CONSULAR, AND OTHER PRIVILEGES AND IMMUNITIES

1. Protection of Diplomatic and Consular Missions

On November 10, 2020, Attorney-Adviser Elizabeth Grosso of the U.S. Mission to the UN delivered the U.S. statement at a Sixth Committee meeting on the protection, security and safety of diplomatic and consular missions. Ms. Grosso’s statement follows.

* * * *

It is essential for the normal conduct of relations among states that the rules protecting the sanctity of ambassadors, other diplomats, and the premises of consular and diplomatic missions, are respected. These rules are the foundation on which diplomacy functions.

The host government’s special duty to protect diplomatic missions includes protection against violence and attacks from non-state actors. Over recent years, U.S. missions overseas have endured significant attacks, in some notable instances without the benefit of robust state protection.

The most recent serious incident occurred in Iraq, on December 31, 2019, when several Iranian-backed militias attacked the U.S. Embassy in Baghdad. The mob entered unhindered into the International Zone past barricades manned by Iraqi security forces. The attack on the Embassy was joined by at least one cabinet member of the Government of Iraq, one former cabinet member, and several leaders of Iran-backed armed groups who have been designated terrorists by the United States. Once the mob assembled in front of our embassy, the Iraqi

government made little effort to prevent individuals from breaking into, damaging, and setting fire to our diplomatic facilities.

Over the months following, attacks against diplomatic facilities have continued to escalate in Iraq, including with rocket fire and improvised explosive devices. These attacks have killed and injured many, and included many nationalities among their victims, from European diplomats to innocent Iraqi civilians. The assaults on our embassies abroad are attacks on the inviolability of the premises of a U.S. diplomatic mission. Under the Vienna Convention on Diplomatic Relations, governments have a special duty to take all appropriate steps to protect the premises of foreign missions against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity. We call on all governments to fulfill this duty under international law to take all appropriate steps to protect our diplomatic facilities.

Not everything is within a host state's control. What matters is that states respond promptly and robustly to incidents that occur. For example, in April of this year, municipal and federal authorities responded promptly to a shooting that occurred outside the Cuban embassy in Washington, DC, and took the suspect into custody. There were no injuries. The suspect in the attack has now been formally charged in U.S. federal court and faces trial. This is but one example of how the United States has faithfully executed its duty to protect diplomatic facilities from intrusion, damage or disturbances, and to bring any offenders to justice.

Mr. Chairman, we appreciate the opportunity that this discussion affords to reemphasize the importance of these issues. We stand with partner nations in underscoring the urgency of taking steps to enhance security for diplomatic missions. The international community has a vital stake in the protection of diplomats and diplomatic missions, 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.

* * * *

2. Determinations under the Foreign Missions Act

a. Designation of Chinese media entities as foreign missions

On February 18, 2020, the State Department's Office of Foreign Missions designated the following Chinese media entities as foreign missions under the Foreign Missions Act: Xinhua News Agency, China Global Television Network, China Radio International, China Daily Distribution Corporation, and Hai Tian Development USA. 85 Fed. Reg. 10,506 (Feb. 24, 2020). Senior State Department officials provided a special briefing on February 18, 2020 regarding the designations. The briefing is available at <https://2017-2021.state.gov/senior-state-department-officials-on-the-office-of-foreign-missions-designation-of-chinese-media-entities-as-foreign-missions/>, and excerpted below.

* * * *

...we're making this designation based on the very indisputable fact that all five of these are subject to the control of the Chinese Government. Obviously, the Chinese Communist Party has always had a pretty tight rein on media in general and state-run media in particular, but that has only further tightened since Xi Jinping took over. Since he became general secretary, China's Communist Party has reorganized China's state news agencies and asserted even more direct control over them, both in terms of content, editorial, et cetera, et cetera.

* * * *

For Xinhua, this is an institution directly reporting to China's State Council, which is the chief administrative authority of the PR Government. China Global Television Network is part of the China Media Group, which is a media company run by the PRC Government. The same goes for China Radio International; that's also part of the China Media Group. China Daily Distribution Corporation acts on behalf of the *China Daily*, which is an English-language daily newspaper owned by the Publicity Department of the CCP. And then fifth, Hai Tian Development USA acts on behalf of the *People's Daily*, which is the official newspaper of the Central Committee of the Chinese Communist Party.

* * * *

... What we are doing is imposing two requirements on these entities.

The first is that they ... are required to notify the Office of Foreign Missions within the State Department of their current personnel in the United States, basic information about those individuals, and then ... if there's any changes to those employment situations. So if anyone departs or new people come on, they would notify us, just like the standard requirement for an embassy or consulate.

The second is that they would need to notify us of their current real property holdings, whether they are owned or leased; and in connection with that, prior to acquiring, whether by purchase or lease any new real property, they would need to obtain prior approval from my office. Those are the only two requirements that are in place, and all of that was notified to each of these entities earlier today.

* * * *

On March 2, 2020, the State Department announced the institution of a personnel cap on the PRC-controlled state media entities which were designated under the Foreign Missions Act on February 18, 2020. The press statement, available at <https://2017-2021.state.gov/institution-of-a-personnel-cap-on-designated-prc-state-media-entities/>, is excerpted below.

* * * *

The U.S. government is today instituting a personnel cap on certain PRC-controlled state media entities in the United States – specifically, the five entities that were designated by the U.S. State Department on February 18, 2020, as foreign missions of the People’s Republic of China. This cap limits the number of Chinese citizens permitted to work for these organizations in the United States at any given time.

The cap applies to the five Chinese state media entities operating in the United States that have been designated as foreign missions, which recognizes that they are effectively controlled by the PRC government. Unlike foreign media organizations in China, these entities are not independent news organizations.

The decision to implement this personnel cap is not based on any content produced by these entities, nor does it place any restrictions on what the designated entities may publish in the United States.

Our goal is reciprocity. As we have done in other areas of the U.S.-China relationship, we seek to establish a long-overdue level playing field. It is our hope that this action will spur Beijing to adopt a more fair and reciprocal approach to U.S. and other foreign press in China.

* * * *

In a June 22, 2020 press statement, available at <https://www.state.gov/designation-of-additional-chinese-media-entities-as-foreign-missions/>, the State Department announced the designation of additional Chinese media entities as foreign missions under the Foreign Missions Act. As identified in the press statement, the June 22 determination designates “...the U.S. operations of China Central Television, China News Service, the People’s Daily, and the Global Times as *foreign missions*.” The designations were published in the Federal Register on July 6, 2020. 85 Fed. Reg. 40,379 (July 6, 2020). Referring to the total of nine media entities designated in February and June, the June 22 press statement further explains the basis for, and meaning of, the foreign mission designation, as follows:

These nine entities all meet the definition of a *foreign mission* under the Foreign Missions Act, which is to say that they are “substantially owned or effectively controlled” by a foreign government. In this case, they are effectively controlled by the government of the People’s Republic of China.

The decision to designate these entities is not based on any content produced by these entities, nor does it place any restrictions on what the designated entities may publish in the United States. It simply recognizes them for what they are.

Entities designated as foreign missions must adhere to certain administrative requirements that also apply to foreign embassies and consulates in the United States.

This designation recognizes PRC propaganda outlets as foreign missions and increases transparency relating to the CCP and PRC government’s media activities in the United States.

On October 21, 2020, the State Department announced the designation of the U.S. operations of Yicai Global, Jiefang Daily, Xinmin Evening News, Social Sciences in China Press, Beijing Review, and Economic Daily as foreign missions. The press statement announcing the designations, available at <https://www.state.gov/designation-of-additional-prc-propaganda-outlets-as-foreign-missions/>, notes that the additional six entities, like those previously designated, meet the definition of a foreign mission under the Foreign Missions Act in that they are “substantially owned or effectively controlled” by a foreign government, specifically, the government of the People’s Republic of China. The designations were published in the Federal Register on October 30, 2020. 85 Fed. Reg. 68, 941; 68,942; 68,951 (Oct. 30, 2020).

b. Other Foreign Mission Act designations and determinations

On July 6, 2020, the Department of State published notice of the designation of engagements between Chinese members of PRC foreign missions and personnel of sub-national government, educational institutions, and research institutions, as well as any visits by Chinese members of PRC foreign missions to any of the three above entities, to be a benefit under the Foreign Missions Act. 85 Fed. Reg. 40,380 (July 6, 2020). The determination requires that PRC personnel on foreign mission submit advanced notification s of such engagements or visits to the Office of Foreign Missions.

On August 13, 2020, the State Department announced that the Office of Foreign Missions had designated the Confucius Institute United States Center (“CIUS”), and any successor entity, including their real property and personnel, as a foreign mission within the meaning of 22 U.S.C. 4302(a)(3). 85 Fed. Reg. 52,187 (Aug. 24, 2020).

On September 21, 2020, the Department of State published notice of the Office of Foreign Missions determination under the Foreign Missions Act that events outside of a foreign mission premises are a benefit under the Act. 85 Fed. Reg. 59,371 (Sept. 21, 2020). Also on September 21, 2020, the Department published notice of the determination under the Foreign Missions Act that PRC missions must obtain advance approval from the Department of State’s Office of Foreign Missions to host a cultural event with more than 50 people in attendance in the United States and its territories held outside the physical boundaries of the PRC bilateral foreign mission. 85 Fed. Reg. 59,371 (Sept. 21, 2020). The State Department announced new requirements on PRC mission personnel in a September 2, 2020 press statement, available at <https://2017-2021.state.gov/advancing-reciprocity-in-u-s-china-diplomatic-relations/>.

On November 13, 2020, the Department published notice of the determination under the Foreign Missions Act that the representative offices and operations in the United States of the National Association for China’s Peaceful Unification, including its real property and personnel, are a foreign mission within the meaning of 22 U.S.C. 4302(a)(3). 85 Fed. Reg. 72,747 (Nov. 13, 2020).

3. Closure of the Consulate of the PRC in Houston

After the United States withdrew consent for the operation of the consulate of the People's Republic of China in Houston, the State Department's Office of Foreign Missions implemented that decision utilizing the Foreign Missions Act, determining that three PRC consular properties in Houston would be closed for PRC's use, effective July 24, 2020. 85 Fed. Reg. 47,463 (Aug. 5, 2020). Shortly after the announcement regarding the Houston consular properties, the PRC announced closure of the U.S. consulate at Chengdu.

4. Enhanced Consular Immunities

As discussed in *Digest 2016* at 463, Section 501 of the Department of State Authorities Act, Fiscal Year 2017, Pub. L. No. 114-323 (codified at 22 U.S.C. § 254(c)), amended the Diplomatic Relations Act to include permanent authority for the Secretary of State to extend enhanced privileges and immunities to consular posts and their personnel on the basis of reciprocity. See also *Digest 2015* at 436-37.

The Agreement between the Government of the United States of America and the Government of the Kingdom of Saudi Arabia regarding Consular Privileges and Immunities was signed on January 21, 2020. The agreement entered into force on September 11, 2020 and is available at <https://www.state.gov/saudi-arabia-20-911>.

The Agreement Regarding Consular Privileges and Immunities with Kazakhstan, signed in 2019, entered into force May 4, 2020 and is available at <https://www.state.gov/kazakhstan-20-504>.

On September 1, 2020, Secretary Pompeo and Foreign Minister Nasser Bourita, of Morocco, offered remarks at the signing of the agreement on enhanced immunities between the two countries. The remarks at the signing ceremony are available at <https://2017-2021.state.gov/secretary-michael-r-pompeo-and-moroccan-foreign-minister-nasser-bourita-at-the-signing-of-enhanced-immunities-agreement-with-morocco/>. The State Department also issued a statement regarding the meeting (by video teleconference) between Secretary Pompeo and Foreign Minister Bourita in connection with the signing ceremony, which is available at <https://2017-2021.state.gov/secretary-pompeos-meeting-with-moroccan-foreign-minister-nasser-bourita-3/>. The enhanced immunity agreement with Morocco is provisionally applied from the date of signature. In addition to extending enhanced protections to personnel at consular posts, their family members, and consular posts, this agreement includes an Article to protect Embassy administrative and technical staff members. The article was included because upon its accession to the VCDR in 1968, Morocco took reservation to paragraph (2) of Article 37, indicating that it considers the paragraph "not applicable." The United States formally objected to the reservation in 1974 and stated that "the Government of the United States ... considers the Convention as continuing in force between it and Morocco except for the provision[] to which the reservation [is] addressed." While the United States considers the protections specified under VCDR

Article 37(2) part of customary international law, and thus applicable, it is uncertain whether the Moroccan government and Moroccan courts would have accorded administrative and technical (“A&T”) staff accredited personnel privileges and immunities commensurate with their status. To address this issue, the agreement concluded on September 1, 2020 provides a separate legal basis for ensuring that the privileges and immunities specified under Article 37(2) apply.

On September 12, 2020, the United States and the United Arab Emirates signed an enhanced consular privileges and immunities agreement. See State Department press statement, available at <https://2017-2021.state.gov/signing-of-an-enhanced-consular-privileges-and-immunities-agreement-with-the-united-arab-emirates/>.

5. Embassy Baghdad

On January 6, 2020, the U.S. Mission to the UN issued a statement regarding the December 31, 2019 attack by Iran on the U.S. embassy in Baghdad. The statement expresses the U.S. view of the host country’s obligations under the 1961 Vienna Convention to protect diplomatic and consular premises. The statement is available at <https://usun.usmission.gov/media-note-attack-on-u-s-embassy-in-baghdad-iraq/>, and excerpted below.

We appreciate the 27 United Nations Member States that spoke out against the December 31 Iran-orchestrated attack on the U.S. embassy in Baghdad. They clearly recognize the importance of a host country’s obligations under the 1961 Vienna Convention to protect diplomatic and consular premises.

Their comments stand in stark contrast to the United Nations Security Council’s silence due to two permanent members—Russia and China—not allowing a statement to proceed. Indeed, not allowing the United Nations Security Council to issue the most basic of statements underscoring the inviolability of diplomatic and consular premises once again calls the Council’s credibility into question. Such expressions of support should not be controversial or warrant courage.

6. Vienna Convention on Diplomatic Relations (“VCDR”)

Due to the COVID-19 pandemic, many governments around the world instituted quarantine and testing requirements for everyone arriving into their country’s territory, asserting that there would be no exceptions to these measures even for diplomatic personnel, who enjoy personal inviolability. By contrast, the United States government asked official travelers to simply self-quarantine for 14 days upon arrival from overseas travel. The U.S. government requested that other governments forgo mandatory testing on arrival for U.S. diplomats and their families in light of their privileges and immunities under the Vienna Convention on Diplomatic Relations (“VCDR”) and likewise forgo such testing of official U.S. government travelers on the basis of reciprocity. One example of a

diplomatic note from May 2020, asserting inviolability and reciprocity, is excerpted below, with identifying information redacted.

* * * *

The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs of [redacted] and has the honor to renew its collaboration ... to address challenges posed by the COVID-19 crisis, as countries worldwide begin to prepare to reopen economies and other essential services in a phased approach.

The Embassy wishes to express its appreciation to the Ministry for its continued support in informing us about local developments in combatting the spread of COVID-19. As noted by the Ministry in March, arriving and returning U.S. diplomats and their families who otherwise enjoy personal inviolability, must nevertheless submit to invasive medical testing upon arrival at [redacted] International Airport. The U.S. Department of State has instructed the Embassy to register its concern with this measure and to seek assurances that it will not be applied to U.S. Government personnel under the supervision of the U.S. Ambassador at the U.S. Embassy

The U.S. Embassy assures the Ministry that it shares the same goals ... in controlling the spread of COVID-19. At the same time, the Embassy believes it is essential for all countries to respect the privileges and immunities accorded to diplomats under the Vienna Convention on Diplomatic Relations (VCDR), to which the [redacted] and United States are parties, while also taking into consideration the treatment accorded to its official travelers on a reciprocal basis. The Embassy believes both goals can be accomplished at the same time.

In order for the U.S. Embassy to continue to fully staff its Mission and carry out the conduct of bilateral relations and other diplomatic and consular functions ... during this critical period, the Embassy needs to be assured that the privileges and immunities to which the U.S. Embassy and its personnel are entitled are fully respected Furthermore, the Embassy needs to be assured that with respect to official U.S. Government travelers ..., [redacted] consider the treatment accorded to its official travelers to the United States where [redacted] official travelers are currently not subjected to testing upon arrival, but rather, are asked to self-quarantine for 14 days upon arrival from overseas travel.

The U.S. Embassy respectfully requests that [redacted] forgo mandatory testing on arrival for U.S. Diplomats and their families in light of their privileges and immunities under the VCDR, and likewise forgo such testing for other U.S. Government official travelers on the basis of reciprocity. In light of the extraordinary circumstances created by the COVID-19 challenge, the U.S. Embassy will voluntarily comply with the host government request for all arriving diplomatic staff and their families to strictly self-quarantine in their residences for 14 days after arrival. During that period, the U.S. Embassy Health Unit, staffed by a U.S. diplomat medical professional, will monitor the health of the newly arrived person via daily telephonic check-in and the individuals will be required to take their temperature daily. The U.S. Embassy is prepared to continue to provide advance notice to the Protocol Office of the Foreign Ministry of the return or arrival into [redacted] of U.S. mission personnel to facilitate their transportation directly from the airport to residence while minimizing contacts.

* * * *

Some governments declined the U.S. request for reciprocal self-quarantine instead of generally-applicable measures such as testing upon arrival; insisting that diplomats be subjected to the same testing and quarantine regime as any other arriving passengers. In order to allow U.S. diplomatic personnel to return to posts around the world, the U.S. government sent diplomatic notes to dozens of foreign governments, waiving personal inviolability for designated individuals for the limited purpose of having nasal swab testing performed upon arrival after receiving certain assurances regarding the nature of the tests and being guaranteed that those diplomats who test positive would not be required to institutionalize. One example of such a diplomatic note, identifying arriving diplomatic personnel and waiving personal inviolability for the limited purpose of testing upon arrival, is excerpted below (with identifying information redacted). Several governments urged ancillary measures, such as allowing local government health officials into diplomatic residences to perform temperature checks, or permitting inspections of diplomatic properties for implementation of COVID-19 protocols, or incentivizing diplomatic personnel to use tracking applications on their mobile devices. The U.S. government did not extend waivers to cover any of these ancillary requests.

* * * *

It is the position of the United States that pre-departure testing of such individuals in the United States combined with residential quarantine would be sufficient to meet the public health goals of the Government of [redacted].

Under Article 29 and/or Article 37 of the Vienna Convention on Diplomatic Relations, diplomatic agents, members of the administrative and technical staff of the Embassy and their family members enjoy full personal inviolability. Such individuals enjoy personal inviolability from the moment of their arrival in [redacted]. Accordingly, Article 29 and/or 37 preclude any COVID-19 testing of the above-named individuals.

Given the extraordinary circumstances brought on by the COVID-19 pandemic, and in a spirit of cooperation, the United States government waives the personal inviolability which is enjoyed by the individuals listed above for the sole and limited purpose of allowing these individuals to have a nasal swab done for COVID-19 testing upon arrival. The United States understands that tests will not be anonymized, but the negative samples collected for the purpose of COVID-19 testing will be destroyed after the conclusion of the test. The United States understands that test will be administered by Ministry of Health personnel and analyzed by the designated institution.

The United States further understands that U.S. direct hires and their family members will arrive at [redacted] airport and be immediately tested upon arrival. U.S. government personnel and their family members will go immediately into residential quarantine for 14 days.

Anyone who tests negative upon arrival will be allowed to leave residential quarantine after 14 days. Anyone who tests positive and is asymptomatic will be closely monitored by the U.S. medical staff and continue to be tested until they have two negative test results.

Individuals who test positive and are symptomatic will be medically evacuated as soon as possible. The Mission medical staff will coordinate closely with the [redacted] Ministry of Health.

Finally, the United States notes that it does not waive the personal inviolability, or any other privilege or immunity enjoyed by the above individuals.

* * * *

Beginning in the summer of 2020, the United States sent diplomatic notes to multiple governments asserting the right of diplomatic personnel under the VCDR to depart their foreign posts without any impediment, to include the imposition of COVID-19 testing requirements. One example of such a diplomatic note is excerpted below. In some instances, the United States requested an exemption for accredited U.S. Embassy personnel and their family members from foreign government requirements for them to submit to a COVID-19 test as a condition of their departure. Personnel who submitted to testing did so voluntarily.

* * * *

The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs of [redacted] and has the honor to inform the Ministry of the impending departure of the Embassy's Deputy Chief of Mission, [redacted] and her spouse

The Embassy wishes to note that in order to comply with the [redacted] conditions of boarding, [redacted] and her spouse intend to take a COVID-19 test at [redacted] prior to their departure. [redacted] and her spouse are taking the test voluntarily and without any prejudice to any privileges and immunities which they enjoy. Should either [redacted] or her spouse test positive, they will not board the ... flight on July 10, 2020, but will isolate at home until both are deemed healthy enough to fly by Embassy medical personnel or until medically evacuated by the United States government. The Embassy wishes to reiterate that the United States does not waive the privileges and immunities enjoyed by [redacted] or her spouse for the purpose of hospitalization or institutionalization should either of them test positive for COVID-19. Specifically, the United States does not waive the personal inviolability enjoyed by [redacted] and her spouse under Articles 29 and 37 of the Vienna Convention on Diplomatic Relations (VCDR) to which [redacted] is a party.

The Embassy of the United States would also like to take this opportunity to remind the Ministry of [redacted] obligations not to impede the departure of U.S. diplomats from [redacted] in any fashion. Article 44 of the VCDR, states that even at times of "armed conflict," the receiving state must "grant facilities in order to enable persons enjoying privileges and immunities" and "members of their families . . ." to leave at the earliest possible moment. Any requirement imposed by the Government of [redacted] on departing diplomats, which is inconsistent with the privileges and immunities they enjoy, would thus also run afoul of Article 44 of the VCDR.

* * * *

D. INTERNATIONAL ORGANIZATIONS

1. *Drepina v. Tikhomirov*

The United States filed a statement of interest in New Jersey state court on December 21, 2020 in *Drepina v. Tikhomirov*, No. L-000310-20. The statement of interest explains that the United Nations is absolutely immune from legal process and suit, absent an express waiver, and, accordingly, the court lacks jurisdiction and should dismiss all claims against the UN. The case involves plaintiff Drepina's allegations of sexual harassment and assault by former UN staff member Tikhomirov. The statement of interest is excerpted below and available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>. Also included in the statement of interest is the September 2, 2020 letter from UN Under-Secretary-General for Legal Affairs and United Nations Legal Counsel Miguel de Serpa Soares, asserting immunity for the UN and pointing out that the alleged incidents occurred in 2017 and that Mr. Tikhomirov retired from the UN in 2015.

* * * *

Absent an express waiver, the UN is absolutely immune from suit and all legal process. The UN Charter provides that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes." The Charter of the United Nations, June 26, 1945, 59 Stat. 1031, art. 105.1. The General Convention, adopted Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16, defines the UN's privileges and immunities by providing 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." General Convention, art. II, sec. 2. The United States is a party to both the UN Charter and the General Convention. Absent an express waiver, the UN is absolutely immune from suit and all legal process.

The United States understands the General Convention 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 expressly waives this immunity in a "particular case." Furthermore, under the Headquarters Agreement between the United Nations and the United States, the "headquarters district shall be inviolable . . .," and "service of legal process . . . may take place within the headquarters district only with the consent of and under conditions approved by the [UN] Secretary-General." Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 3416, 11 U.N.T.S. 11 (entered into force Oct. 21, 1947), art. III, § 9(a). Here, the United Nations has not waived its immunity, but on the contrary, has expressly requested that the United States take steps to protect its immunity in this proceeding. See Exhibit A; see also Letter dated October 20,

2020, from Miguel de Serpa Soares, Under Secretary General for Legal Affairs and United Nations Legal Counsel, to Kelly Craft, Permanent Representative of the United States to the United Nations (attached hereto as Exhibit B).

Courts routinely recognize the UN's absolute immunity from suit absent an express waiver on the part of the UN. "Under the [General] Convention the United Nations' immunity is absolute, subject only to the organization's express waiver thereof in particular cases." *Boimah v. United Nations General Assembly*, 664 F. Supp. 69, 71 (E.D.N.Y. 1987). "[W]here, as here, the United Nations has not waived its immunity, the General Convention mandates dismissal of Plaintiffs' claims against the United Nations for lack of subject matter jurisdiction." *Brzak v. United Nations*, 551 F. Supp. 2d 313, 318 (S.D.N.Y. 2008), *aff'd*, 597 F.3d 107, 112 (2d Cir. 2010); see also *LaVenture v. United Nations*, 746 F. App'x 80, 81 (2d Cir. 2018) (mem.) ("It is well established that the UN [has] absolute immunity from suit in domestic courts pursuant to the Convention on Privileges and Immunities of the United Nations."); *Georges*, 834 F.3d at 91 ("To reiterate, Section 2 provides that the UN 'shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.'"); *United States v. Bahel*, 662 F.3d 610, 623 (2d Cir. 2011) ("[T]he plain language of Article II leaves no doubt that the U.N. can only waive immunity for itself, as an organization, expressly."); *Emmanuel v. United States*, 253 F.3d 755, 757 (1st Cir. 2001) ("[T]he absolute immunity enjoyed by the United Nations . . . covers all suits brought by any party, including private individuals . . .").

Here, Plaintiff has not alleged *any* waiver of immunity by the UN, much less an express one. The UN itself affirms that it has not and does not intend to waive its immunity, but rather "expressly assert[s]" its immunity in this matter. See Exhibit A at 2. Because the UN has not waived its immunity in this case, it is entitled to immunity from legal process and suit, and the claims against it must be dismissed for want of jurisdiction. See *LaVenture*, 746 F. App'x at 82 ("[T]he United Nations enjoys absolute immunity from the instant suit and . . . [a]ccordingly, the District Court did not err in dismissing all claims against all defendants for lack of subject matter jurisdiction based on immunity."); *Georges*, 834 F.3d at 98 (affirming lower court dismissal for lack of subject matter jurisdiction on the basis of immunity).

* * * *

2. *Jam v. IFC*

As discussed in *Digest 2019* at 379-383, the Supreme Court held in *Jam v. Int'l Finance Corp.*, that international organizations enjoy the same immunity from suit as foreign governments under the FSIA. 586 U.S. ___, 139 S. Ct. 759 (2019). The United States filed a Statement of Interest on remand of the case in the district court for the District of Columbia in 2019, conveying its view that the lawsuit did not fall within the FSIA's commercial activity exception as plaintiffs claimed. No. 15-cv-00612. The district court dismissed the case on February 14, 2020. 442 F. Supp. 3d 162 (D.D.C.). After the plaintiffs sought leave to file an amended complaint, and following a request from the court for its views on the matter, the United States filed a second statement of interest in the district court on June 30, 2020, which is excerpted below and available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

* * * *

I. If Leave To Amend Were Granted, The “Gravamen” Of This Action Would Still Be CGPL’s Construction And Operation Of The Power Plant In India.

The Government continues to believe that the “gravamen” of this action is CGPL’s construction and operation of the power plant in India. That conclusion follows from the Supreme Court’s guidance in *Sachs* and *Nelson*, which instructed that the “gravamen” inquiry should focus on what “actually injured” the plaintiff—here, CGPL’s alleged deficient construction and operation of the power plant. *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

The plaintiffs’ additional allegations do not lead to a different result. Those allegations primarily relate to IFC’s organizational structure, internal processes, and knowledge about potential harms from the project. *See* Proposed Am. Compl. ¶¶ 197–269. They do not change the critical facts of this case: that an Indian company built and operated a power plant in India that allegedly caused Indian plaintiffs environmental and social harms in India. Thus, even if the Court were to grant plaintiffs leave to amend, the lawsuit still would be based upon CGPL’s actions in India. The FSIA’s commercial activity exception still would not apply.

II. Even Accepting The Court’s Analysis, Plaintiffs’ Additional Allegations Do Not Satisfy The Commercial Activity Exception.

The Court previously held that this action is based upon IFC’s “alleged failure to ensure that the design, construction, and operation of the plant complied with all environmental and social sustainability standards laid out in the loan agreement,” as well as its “alleged failure to take sufficient steps to prevent and mitigate harms to the property, health, and way of life of people who live near the Tata Mundra plant.” *Jam*, 2020 WL 759199, at *8. Accepting this articulation of the gravamen, the proposed amended complaint does not satisfy the commercial activity exception for two independent reasons: (1) the additional allegations do not shift the gravamen from India to the United States; and (2) IFC’s failure to prevent or mitigate environmental and social harms and ensure compliance with sustainability standards is not “commercial activity” under the FSIA.

a. The Plaintiffs’ Additional Allegations Do Not Shift The Location Of The “Gravamen” From India To The United States.

The allegations added to the amended complaint principally fall into two categories. First, the plaintiffs submit additional allegations that IFC knew or should have known at the time it approved funding for the project that its sustainability measures were insufficient to address the project’s risks. *See* Proposed Am. Compl. ¶¶ 163, 216–25, ECF No. 63-1. Second, the plaintiffs provide additional claims that IFC management in charge of monitoring the project’s environmental and social performance and approving loan disbursements were located in Washington, D.C. *Id.* ¶¶ 198–215, 226–69. Neither of these categories is sufficient to shift the gravamen of the action from India to the United States.

At the outset, the first category of allegations does not relate to the gravamen at all. The Court has already ruled that this lawsuit is not “based upon” IFC’s approval of the loan, “but rather the subsequent failure ‘to take sufficient steps or exercise due care to prevent and mitigate

harms to the property, health, [and] livelihoods’ of those who live near the plant.” *Jam*, 2020 WL 759199 at *9 (alteration in original) (quoting Compl. ¶ 3, ECF No. 1). Accordingly, the added allegations about what IFC knew or should have known when it approved the loan are irrelevant to the location of the gravamen. The fact that in advance of the loan IFC might have lacked a “meaningful” Environmental and Social Action Plan, Proposed Am. Comp. ¶ 219, or have performed only “poor” due diligence, *id.* ¶ 220, simply does not concern whether the identified gravamen—IFC’s failure to prevent or mitigate harm “*after approving the loan*,” *Jam*, 2020 WL 759199 at *9 (emphasis added)—had “substantial contact” with the United States, 28 U.S.C. § 1603(e).

This Court previously reached the same conclusion as to similar allegations. Addressing claims that “critical decisions relevant to whether to finance the Tata Mundra Project, and under what conditions, were made in Washington, D.C.,” and that IFC’s disbursement of funds “was made in U.S. dollars and came from funds held within the United States,” the Court concluded that the allegations “d[id] not pertain to the gravamen of plaintiffs’ suit, as identified by this Court.” *Jam*, 2020 WL 759199 at *10. Instead, “they relate[d] only to the loan transaction.” *Id.* Moreover, this Court has recognized that such allegations are “in direct tension with the thrust of plaintiffs’ complaint.” *Id.* at *9. The original complaint was based on the claim that “IFC had the power to protect plaintiffs by enforcing provisions in the loan agreement but failed to do so.” *Id.* Yet parts of the amended complaint now contend that IFC *lacked* such power and should not have entered the loan in the first place. *See* Proposed Am. Compl. ¶¶ 163, 216–25. The Court has already ruled that the action is “based upon” IFC’s failure to prevent or mitigate harm *after* the loan was approved, and the plaintiffs’ handful of additional allegations concerning the initial lending decision cannot change that conclusion.

The second category of added allegations similarly does not shift the location of the gravamen from India to the United States. These allegations consist of claims that ultimate authority for IFC’s social and environmental oversight of the project rested with officials in the United States. The plaintiffs allege, for example, that managers “responsible for approving key project decisions about environmental and social (E&S) performance throughout the project” were “located at the IFC’s headquarters in Washington, D.C.” Proposed Am. Compl. ¶¶ 200–01. They allege that “[d]eterminations about whether any of the environmental and social (or other) conditions of the Loan Agreement have been breached, and whether the IFC should enforce the E&S commitments in the Loan Agreement, were made by the IFC’s legal department, which is based in Washington, D.C.” *Id.* ¶ 236. They claim that “the decision whether to disburse each tranche of the loan was made by the IFC in Washington, D.C.” *Id.* ¶ 235. And they allege that all communications regarding the project were required to be sent to IFC’s Washington, D.C. headquarters (in addition to being sent to IFC’s New Delhi office). *Id.* ¶ 229.

But even taking these additional allegations into account, the lawsuit is still centered in India. As the Court explained, this action is “based upon” IFC’s “failure to ensure the plant project was designed, constructed, and operated with due care.” *Jam*, 2020 WL 759199 at *8. That gravamen “focuses on IFC’s failure to act *at the Tata Mundra Power Plant* and in the surrounding community in India—which is the point of contact, or ‘place of injury,’ for the torts alleged in plaintiffs’ complaint.” *Id.* (emphasis added). In other words, this lawsuit is not “based upon” which IFC officials oversaw the project or where they were located, disbursed IFC funds, or received communications. Under the Court’s “holistic approach,” *id.*, where IFC made internal decisions and administered the loan is not determinative; instead, the inquiry focuses on the particular basis for the lawsuit—its gravamen. The Court has already explained that the

“plaintiffs’ complaint against IFC is—at least in large part—based upon [] conduct (whether acts or omissions) *in India*.” *Id.* at *7 (emphasis added). The added allegations do not change that conclusion.

The Plaintiffs are alleging a failure to act and asserting that such failure should be attributed to decisions at IFC’s headquarters. But even if IFC management in the United States possessed the necessary authority to require changes to the plant’s design, construction, or operation, any new design or method of operation proposed by IFC still would have had to be accepted and executed by CGPL in India. Similarly, even if IFC management could have withheld loan disbursements in the United States in response to a failure to meet conditions in the loan agreement, the intended effect of that action would be merely to incentivize behavior in India. What the plaintiffs still have not alleged is anything that IFC did (or did not do) in the United States that directly led to injuries in India. *Contra id.* at *6 n.3 (suggesting that “if CGPL contracted with IFC to actively monitor and adjust the power plant’s cooling levels from a computer system in the United States, but IFC’s technicians negligently misadjusted the cooling levels, causing a fire at the plant,” an action by injured plant workers might be “based upon” IFC’s U.S. conduct). Instead, the plaintiffs’ additional allegations against IFC merely elaborate on the organizational structure and internal processes behind failures occurring in India. They do not demonstrate that the amended complaint would result in this lawsuit being based on conduct in the United States.

The conclusion that the gravamen identified by the Court is still situated in India is reinforced by the fact that, even with the plaintiffs’ new allegations, their tort claims still focus primarily in India. A tort claim typically is not complete until the plaintiff suffers an injury. *Nnaka v. Fed. Rep. of Nigeria*, 238 F. Supp. 3d 17, 29 (D.D.C. 2017). Thus, the “locus” of a tort—the place where the last event necessary to make an actor liable takes place—usually will be “the place where the injury occurred.” *Id.* (citations omitted). Here, even taking into account the plaintiffs’ additional allegations, the locus of their tort claims is Gujarat, India—where they were injured by the power plant. Moreover, to the extent IFC owed any duty not to allow the plant to harm the plaintiffs, that duty also existed in India—the location where reasonably foreseeable harms might occur. *See Caldwell v. Bechtel, Inc.*, 631 F.2d 989, 998 (D.C. Cir. 1980) (explaining that tort duties traditionally are owed to those “who might foreseeably be injured by defendant’s conduct”). If the plaintiffs are correct that IFC breached their duty to the plaintiffs, IFC did so only by “fail[ing] to take steps to mitigate the foreseeable risks in India.” *Jam*, 2020 WL 759199 at *9. And, to the extent IFC proximately “caused” the plaintiffs injuries, they undisputedly did so in India. Thus, notwithstanding assertions concerning IFC’s organizational structure, internal processes, and knowledge, the plaintiffs’ claims against IFC are still chiefly focused in India, not the United States. Similar to the Supreme Court’s assessment in *Sachs*, however the plaintiffs frame their suit, “the incident [abroad] remains at its foundation.” 136 S. Ct. at 396.

In short, per the Court’s analysis, this action is based upon a failure to prevent harm in India, and the amended complaint does not shift the location of the gravamen to the United States.

b. IFC's Alleged Failure To Ensure Compliance With Its Standards And Prevent Or Mitigate Harms In India Is Not "Commercial Activity" Under The FSIA.

As set forth below, the commercial activity exception has not been satisfied for a second, independent reason: any failure by IFC to ensure adherence to its own sustainability standards and prevent social and environmental harms is not a "commercial activity" under the FSIA.

The FSIA codified the "restrictive theory" of foreign sovereign immunity, under which a foreign state is immune for its sovereign or public acts (*jure imperii*), but not its private or commercial acts (*jure gestionis*). *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612–23 (1992). In drawing this distinction, the FSIA explains that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). Accordingly, the question whether particular activity is "commercial" turns not on "whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives," but on "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in trade and traffic or commerce." *Weltover*, 504 U.S. at 614 (citations omitted). "Put differently, a foreign state engages in commercial activity . . . only where it acts 'in the manner of a private player within' the market." *Nelson*, 507 U.S. at 360 (quoting *Weltover*, 504 U.S. at 614).

Courts have not yet had occasion to address this distinction with respect to international organizations like IFC. However, should the Court reach the issue here, it need not resolve broader questions such as whether IFC's lending activities writ large are "commercial," or even whether the particular loan to CGPL in this case was a "commercial activity." Instead, the Court need only determine whether the particular gravamen it already has identified—IFC's alleged failure to prevent environmental and social harm and ensure compliance with its own sustainability standards—is a "commercial activity" under the FSIA.

In the Government's view, it is not. In making any internal decisions about how to monitor the environmental and social aspects of an ongoing project, IFC would not be acting in the manner of a private player in the market, but rather would be acting in a public, quasi-regulatory capacity.

Although IFC does not hold the same regulatory responsibilities as a sovereign state, its discretionary implementation (or non-implementation) of its environmental and social policies is an act more akin to that of a sovereign in which private market participants do not ordinarily engage. After all, IFC's environmental and social standards were created with active and direct input from member governments and by decision of the IFC's member states, acting through the IFC Board of Directors. Consequently, governments view these standards as extensions of the regulatory policies of those member states. Here, IFC's enforcement or non-enforcement of its sustainability standards with respect to the Tata Mundra project is qualitatively different than the types of activities that commonly have been understood to be "commercial" under the FSIA, such as issuing common debt instruments, *see Weltover*, 504 U.S. at 617, or contracting for services, *see Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 580 (7th Cir. 1989). Instead, IFC's discretionary administration of its own environmental and social policies is more akin to the regulatory acts of foreign sovereigns that commonly are held to be non-commercial. *See, e.g., Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1030 (D.C. Cir. 1997) (finding that administration of a government program to provide health and welfare benefits was not "commercial activity" under the FSIA).

This is especially the case because the policies at issue here relate to the regulation of the environment and natural resources. Courts routinely recognize that actions in this area are distinctly sovereign in nature. *See, e.g., Turan Petroleum, Inc. v. Ministry of Oil & Gas of Kazakhstan*, 406 F. Supp. 3d 1, 15 (D.D.C. 2019) (holding that breaches of agreements “pertain[ing] to the exploration and development of Kazakhstan’s oil and gas resources” are sovereign, not commercial, acts); *Rush-Presbyterian*, 877 F.2d at 578 (finding that “a contract whereby a foreign state grants a private party a license to exploit the state’s natural resources is *not* a commercial activity, since natural resources, to the extent they are ‘affected with the public interest,’ are goods in which only the sovereign may deal”).

The fact that the plaintiffs frame IFC’s alleged conduct as a failure to ensure compliance with provisions in a loan agreement, *e.g.* Compl. ¶ 140, does not transform IFC’s conduct into commercial activity. When evaluating whether activity is commercial, courts look to the nature of the conduct that is directly at issue, not to whether that conduct is connected in some way to a contract or other commercial act. *See, e.g., UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210, 216 (5th Cir. 2009) (dispute over contract to provide training and support services to Royal Saudi Air Force not “commercial”); *cf. In re Aluminum Warehousing Antitrust Litig.*, 2014 WL 4211353, at *15 (S.D.N.Y. Aug. 25, 2014) (“[N]ot all contractual arrangements are commercial in nature. There are numerous instances in which a public organ might use a contractual arrangement to fulfill its public function.”). Here, the plaintiffs challenge IFC’s internal decisions concerning how to promote environmental and social sustainability and conduct oversight in the countries in which it invests. Such conduct is not of the type associated with private players in a market, even if it has a connection to a loan agreement.

Finally, it makes no difference that private parties “can” address environmental and social harms in their own transactions. *See* Pls.’ Notice of Supp. Evidence, ECF No. 57. Even uniquely sovereign activities can sometimes be emulated by private market participants. For example, while a private company “can” hire security for its CEO, “[p]roviding security for the [Saudi] royal family . . . is not a commercial act in which the state is acting in the manner of a private player within the market.” *Butters v. Vance Int’l, Inc.*, 225 F.3d 462, 465 (4th Cir. 2000) (citations omitted). Here, the manner in which the IFC engages in the monitoring and discretionary enforcement of its environmental and social standards is fundamentally different than the manner in which private players might attempt to pursue environmental or social goals. IFC develops sustainability standards that are formulated based on active and direct input from sovereign member states in light of member states’ own policies on environmental and social matters. IFC’s discretionary implementation and enforcement of such policies is not a commercial activity, but rather a public, quasi-regulatory function immune from suit under the FSIA.

* * *

In considering the above issues, the Court should keep sight of the novel context in which this case arises. Unlike foreign sovereigns, which have capitals within their own territory, IFC is an international organization headquartered in the United States. As a result, ultimate decision-making authority for functions of the organization frequently will reside in the United States, rather than in foreign jurisdictions. Nonetheless, it is critical not to afford less protection to organizations headquartered in the United States than foreign sovereigns with capitals elsewhere. The thrust of the International Organizations Immunities Act and the Supreme Court’s ruling interpreting it in this case is that the immunity of international organizations and foreign sovereigns should be “equivalent.” *Jam v. IFC*, 139 S. Ct. 759, 768 (2019). Courts therefore

should be skeptical of claims of commercial activity based on internal oversight decisions where the only U.S. nexus is an attribution of responsibility to officials working at an international organization's U.S. headquarters. Here, such allegations fail to satisfy the FSIA's commercial activity exception.

* * * *

On August 24, 2020, the district court issued its decision, denying as futile the plaintiffs' motion for leave to amend the complaint. Excerpts follow from the district court's opinion.

* * * *

As the Court explained in its prior opinion, the commercial activity exception, "as applied to international organizations, withholds immunity when an action is based upon (1) 'a commercial activity carried on in the United States' by an international organization or (2) 'an act performed in the United States in connection with a commercial activity' of the international organization 'elsewhere.'" *Jam*, 442 F. Supp. 3d at 170–71 (quoting 28 U.S.C. § 1605(a)(2)). The first step in determining whether the exception applies, therefore, is to "consider whether the action is 'based upon' activity 'carried on' or 'performed' in the United States." *Id.* To make that determination, courts must look to "the basis or foundation of a claim, those elements that, if proven, would entitle a plaintiff to relief, and the gravamen of the complaint." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 395 (2015) (internal quotation marks, citations, and alterations omitted).

At the motion-to-dismiss stage, the parties had each proposed competing bright-line rules for how to identify the gravamen of the complaint. Plaintiffs argued for a narrow approach focused only on IFC's affirmative lending activity. See *Jam*, 442 F. Supp. 3d at 173–74. IFC, in contrast, advocated for an equally narrow approach focused exclusively on the last act that "actually injured" plaintiffs. See *id.* at 172–73. The Court rejected both of these approaches. As to plaintiffs' approach, the Court emphasized that it is not only "IFC's direct, affirmative conduct" that is relevant to the gravamen analysis—instead, the "design, construction, and operation of the power plant in India" must also be considered when identifying the gravamen, since that conduct is equally critical to the success of plaintiffs' claims. *Id.* at 173–74. The Court continues to reject plaintiffs' approach.

The Court does, however, wish to clarify its view of IFC's approach. IFC's bright-line rule that the conduct that "actually injured" plaintiffs is always the gravamen remains incorrect. But the Court's February 14 opinion perhaps understated the importance of that conduct to the gravamen analysis as a whole. It is worth emphasizing that the Supreme Court's two main decisions expounding on the gravamen analysis, and subsequent caselaw interpreting those decisions, make clear that in the typical case—though not in every case—the conduct that "actually injured" a plaintiff will constitute the gravamen of a complaint.

The Supreme Court's first foray into the gravamen analysis was in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). ...

The Supreme Court ... concluded that the suit was instead based on "the tortious conduct itself": the detention, torture, and beating in Saudi Arabia. *Id.* Because such tortious conduct is

not itself commercial activity, the Court determined that the suit did not fall within the commercial activity exception. *Id.* at 361. ...

The Supreme Court's analysis in the more recent *Sachs* decision closely tracks that in *Nelson*. In *Sachs*, "a U.S. citizen [Sachs] sued an Austrian state-owned railway operator after she fell in Austria from a train station platform onto the tracks where a moving train crushed her legs." *Jam*, 442 F. Supp. 3d at 172. ...

The Supreme Court [stated,] "there [was] nothing wrongful about the sale of the Eurail pass standing alone." *Id.* at 396. After all, "without the existence of the unsafe boarding conditions [in Austria], there would have been nothing to warn [plaintiff] about when she bought the Eurail pass." *Id.* Whichever way the Court sliced it, "all of [plaintiff's] claims turn[ed] on the same tragic episode in Austria," so the "conduct constituting the gravamen of [her] suit plainly occurred abroad." *Id.* ...

In short, *Sachs* and *Nelson* both focused on "'the core of [the plaintiffs'] suit[s],' i.e., 'the ... acts that actually injured them.'" *Petersen Energía Inversora S.A.U. v. Argentine Republic & YPF S.A.*, 895 F.3d 194, 206 (2d Cir. 2018) (quoting *Sachs*, 136 S. Ct. at 396). Importantly, this was not a single-element test focused on the injury element of the plaintiffs' tort claims. In rejecting a one-element approach, the *Sachs* Court noted that application of such a test would "necessarily require[] a court to identify all the elements of each claim in a complaint before that court may reject those claims for falling outside" the commercial activity exception. *Sachs*, 136 S. Ct. at 396; but see *Jam*, 442 F. Supp. 3d at 173 (characterizing an "actual injury" test as "effectively a one-element approach to identifying the gravamen of a suit" (internal quotation marks omitted)). Neither *Sachs* nor *Nelson* did any such thing, declining to undertake a "claim-by-claim, element-by-element analysis" of the asserted causes of action. *Sachs*, 136 S. Ct. at 396. Instead, "[r]ather than individually analyzing each of the [plaintiffs'] causes of action," the Court "zeroed in on the core of their suit"—the "acts that actually injured them." *Id.*

To be sure, *Sachs* emphasized that it was not imposing a strict rule that the gravamen is always the conduct that "actually injured" a plaintiff, adding in a brief footnote that "[d]omestic conduct with respect to different types of commercial activity may play a more significant role in other suits." *Id.* at 397 n.2. But the clear thrust of both *Sachs* and *Nelson* is that in the usual case, the conduct that "actually injured" the plaintiff—that pinched the boy's fingers—will be the gravamen, and in any event will always be an important factor to consider when identifying the gravamen. Federal courts around the country have interpreted *Sachs* accordingly. ...

b. The Gravamen of the Proposed Amended Complaint

With that refined understanding of how to identify the gravamen in mind, the Court is nearly ready to undertake an assessment of the gravamen of the proposed amended complaint here. That analysis, however, is intertwined with what is essentially a question of first impression that the Court touched on only briefly in its February 14 opinion: what is a court to do under the FSIA where the conduct that "actually injured" the plaintiffs was not primarily that of a named defendant, but rather that of a third party?

IFC and the United States have argued that this is such a case, and that *Sachs* and *Nelson* compel the conclusion that a suit can be "based upon" the conduct of a third party, if that conduct is what "actually injured" the plaintiffs within their theory of the case. See, e.g., Statement of Interest of the United States ("First U.S. Statement") [ECF No. 47] at 6, 8–9. As support, they point to the language in *Nelson* that the suit there was not based upon Saudi Arabia's recruitment activity within the United States, which "alone entitle[d] [plaintiffs] to nothing under their theory of the case," *Nelson*, 507 U.S. at 358, and the language in *Sachs* that

there was “nothing wrongful about the sale of the Eurail pass standing alone,” *Sachs*, 136 S. Ct. at 396. Using that same logic, IFC and the United States contend that there was nothing wrongful about either IFC’s funding of the Tata Mundra Plant or IFC’s alleged failure to enforce certain provisions of the loan agreement standing alone—recovery on any claims for that conduct is derivative of, and depends on, subsequent tortious activity in India by Coastal Gujarat Power Limited (“CGPL”), the Indian power company that constructed and operated the plant. See First U.S. Statement at 6–7. The United States points out that while IFC’s conduct may have “led to the conduct that eventually injured” plaintiffs, merely being a distant link in the causal chain is insufficient to invoke the commercial activity exception. See First U.S. Statement at 7; *Nelson*, 507 U.S. at 358. According to IFC and the United States, the conduct that actually injured plaintiffs here was the construction and operation of the plant in India, done mainly by CGPL. See First U.S. Statement at 7–9; Def. IFC’s Reply Mem. of Law in Further Supp. of its Renewed Mot. to Dismiss [ECF No. 48] at 2–6.

The Court agrees with IFC and the United States that, for purposes of the FSIA, a suit can be based primarily upon the conduct of a third party, although that determination will depend heavily on the facts and circumstances of each case. This does not mean that courts should employ a freeform approach to identifying the gravamen where they look outside the four corners of the pleadings and independently determine who the “real” defendant is in some theoretical or metaphysical sense. Plaintiffs are, of course, the “master[s] of the[ir] complaint,” and can choose to assert whatever claims against whichever defendants they wish. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987). But the Supreme Court’s guidance in both *Sachs* and *Nelson* is that courts should, in the usual FSIA case, look to the conduct that “actually injured” plaintiffs. And this Court can find nothing in either of those cases suggesting that courts should restrict the gravamen analysis to just the named defendants’ conduct where it is clear from the face of a plaintiff’s complaint that the conduct that actually injured her was in large part that of a third party.

Indeed, while neither case addressed the issue explicitly, both the reasoning of the Supreme Court’s opinions and the warnings against giving jurisdictional significance to feints of language support considering the conduct of a third party, at least in a case like the present one. Nothing in *Sachs*, for example, suggests that the result would have been any different if all relevant facts were the same, except that the Austrian railway and the ticket-seller had been two different state-owned entities, and *Sachs* had sued the ticket-seller instead of the railway for failure to warn. Under that hypothetical, the Court’s reasoning in its gravamen analysis would continue to hold true. It would remain the case that “[w]ithout the existence of the unsafe boarding conditions in [Austria], there would have been nothing to warn *Sachs* about when she bought the[railway]pass.” *Sachs*, 136 S. Ct. at 396. The core of the suit would likewise remain the “wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria.” *Id.*

This Court is mindful of the Supreme Court’s repeated admonitions that courts should not give “jurisdictional significance” to “feint[s] of language,” nor should they “allow plaintiffs to evade the [FSIA’s] restrictions through artful pleading.” *Id.* at 396–97. The point of the gravamen analysis is to look past the technicalities of plaintiffs’ claims and the precise details of how they framed their pleading and “zero[] in on the core of their suit.” *Id.* at 396; see *Glob. Tech., Inc. v. Yubei (XinXiang) Power Steering System Co.*, 807 F.3d 806, 814 (6th Cir. 2015) (“Courts must look past artful pleading to determine the underlying reality of the core activities being challenged, to determine if the gravamen of the complaint truly falls within one of the exceptions

Congress wrote into the FSIA.”). In general, permitting a plaintiff in an FSIA action to switch jurisdiction off and on, merely by adding or removing named defendants, would give rise to exactly the sort of evasion of the FSIA’s restrictions about which *Sachs* and *Nelson* warned.

Here, the Court has no real doubt that, had plaintiffs named CGPL as a second defendant and asserted claims against CGPL, the gravamen of that action would have been in India. All of CGPL’s conduct—as alleged in plaintiffs’ complaint and proposed amended complaint—was in India, and it clearly had a much larger and more direct role in the plant’s construction and operation, and hence in the alleged harms to plaintiffs, than did IFC, which played only a small part in the whole affair. The claims against IFC are, by necessity, more attenuated than any claims against CGPL would be, just as the failure-to-warn claims in *Sachs* and *Nelson* were quite attenuated relative to the other claims plaintiffs asserted. Indeed, the Seventh Circuit has noted that *Sachs* relied—if only implicitly—on the rationale that claims for conduct extending far back on the “chain of causation” leading to an ultimate injury cannot be the basis for jurisdiction—particularly where those claims are asserted against an entity that did not actually injure the plaintiff. See *Noboa v. Barceló Corporación Empresarial, SA*, 812 F.3d 571, 572–73 (7th Cir. 2016); see also *Nelson*, 507 U.S. at 358 (deeming it insufficient for gravamen purposes that activities “led to the conduct that eventually injured the Nelsons”). Accordingly, whether the concern is framed as one of feints of language or too much attenuation, this Court is extremely wary of permitting plaintiffs to manufacture jurisdiction under the FSIA by choosing not to name a defendant. And the Court does not think that this is one of those unusual cases where something other than the conduct that actually injured the plaintiffs constitutes the gravamen of the complaint, as may have been contemplated by *Sachs*’s enigmatic statement that “[d]omestic conduct with respect to different types of commercial activity may play a more significant role in other suits.” *Sachs*, 136 S. Ct. at 397 n.2. This Court can perhaps envision circumstances where that statement would come into play—where a sovereign’s or international organization’s conduct, while not actually injuring the plaintiff, was nonetheless so significant and closely tied to the eventual injury that it constitutes the gravamen of the complaint. Although the Court is loath to speculate on scenarios not presented in this case, the *Sachs* footnote could potentially apply in, for instance, an action asserting products-liability claims, where a sovereign entity (or international organization) manufactures a fatally defective drug inside the United States and sells it to another sovereign entity, who then sells it to a consumer abroad. In that scenario, it would be difficult to discern which conduct “actually injured” the consumer and was the basis for the suit under the standard *Sachs* and *Nelson* test, given that both domestic conduct (the manufacturing of the deadly drug) and foreign conduct (the sale of the drug) might bear similar levels of responsibility for the injury. To determine what the gravamen would be in a case where it is not clear which conduct actually injured the plaintiff, a court may well have to forego the actual injury analysis and instead conduct a fact-specific analysis of the relative importance of the domestic and foreign conduct to the eventual injury, as the *Sachs* footnote might suggest.

But this Court has no need to analyze any further how that hypothetical would payout, because the present case just isn’t one where the *Sachs* footnote is applicable. Here, it is clear what conduct actually injured plaintiffs: construction and operation of the Tata Mundra Power Plant in India. Many of plaintiffs’ claims, on their face, allege that IFC failed to do certain things inside the United States. See, e.g., Compl. ¶ 299 (alleging that IFC “fail[ed] to take reasonable steps to prevent harms to Plaintiffs”); ¶ 306 (alleging that IFC “has failed and continues to fail to exercise due care and monitor, supervise[, and control CGPL]”). But as the Supreme Court concluded with respect to the failure-to-warn claims in *Sachs* and *Nelson*, and as the Court has

emphasized in a related context, claims for failures or omissions in the United States resulting in an injury abroad are particularly suspect when used as the basis for jurisdiction and should “flash[]the yellow caution light,” because “it will virtually always be possible to assert that the ... activity that injured the plaintiff [abroad] was the consequence of faulty training, selection or supervision—or even less than that, lack of careful training, selection or supervision—in the United States.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 702 (2004) (quoting *Beattie v. United States*, 756 F.2d 91, 119 (D.C. Cir. 1984) (Scalia, J., dissenting)). Indeed, this case is factually analogous to *Sachs*: even though plaintiffs have asserted claims alleging omissions in the United States, ultimately, “[a]ll of [their] claims turn on the same tragic episode in [India], allegedly caused by wrongful conduct and dangerous conditions in [India], which led to injuries suffered in [India].” *Sachs*, 136 S. Ct. at 396. For these reasons, the Court refines its definition of the gravamen of plaintiffs’ original complaint. The February 14 opinion defined the gravamen as “IFC’s failure to ensure the Tata Mundra Power Plant was designed, constructed, and operated with due care so as not to harm plaintiffs’ property, health, and way of life.” *Jam*, 442 F. Supp. 3d at 177. The Court now revises that gravamen to focus on what actually injured plaintiffs: the construction and operation of the Tata Mundra Power Plant in India.

* * * *

3. **Nkrumah v. Pompeo**

As discussed in Chapter 1, on October 26, 2020, a federal district court for the District of Columbia found that a State Department determination, pursuant to IOIA Sec. 288e(b), that an international organization employee’s presence in the United States was “not desirable” was not subject to judicial scrutiny. *Nkrumah v. Pompeo*, No. 20-cv-01892 (D.D.C. Oct. 26, 2020). As such, the court denied plaintiff Nkrumah’s motion for a temporary restraining order and preliminary injunction. Ms. Nkrumah is a citizen of Ghana who had been entitled to the benefits of the IOIA as a World Bank employee. The State Department made the “undesirability” determination after an investigation revealed that Ms. Nkrumah had engaged in fraud related to the G-5 visa application for a domestic worker and participated in a scheme to underpay and overwork the G-5 visa holder. As a result of the “undesirability” finding, following a certain date, Ms. Nkrumah was no longer entitled to the benefits accorded employees of designated international organizations under U.S. law, including the immigration benefit of “G” nonimmigrant visa status. See Chapter 1.B.1.b for excerpts from the opinion.

Cross References

Hungary v. Simon, **Ch. 5.C.1**

Germany v. Philipp, **Ch. 5.C.2**

Nkrumah v. Pompeo, **Ch. 1.B.1.b**

Responsibility of International Organizations, **Ch. 7.A.4**

Holocaust claims, **Ch. 8.B**

Sudan claims, **Ch. 8.D**

Sudan, **Ch. 9.A.2**

Investor-State dispute resolution (including expropriation), **Ch. 11.B**

Israel-Lebanon maritime boundary, **Ch. 12.A.3**

CHAPTER 11

Trade, Commercial Relations, Investment, and Transportation

A. TRANSPORTATION BY AIR

1. Air Transport Agreements

An air transport agreement (“ATA”) is a bilateral, or occasionally multilateral, agreement allowing, and setting the terms for, international commercial air transportation services between or among signing States. Under the longstanding U.S. Open Skies policy, the United States generally seeks to conclude ATAs that allow airlines to make commercial decisions based on market demand, without intervention from government regulators. Air carriers can provide more affordable, convenient, and efficient air services to consumers and shippers, thereby promoting travel and trade. Information on U.S. ATAs is available at <https://www.state.gov/subjects/air-transport-agreements/>. In 2020, U.S. air transport agreements with The Bahamas, Qatar, and Bangladesh entered into force. In 2020, the United States negotiated new air transport agreements with Kazakhstan and the United Kingdom and negotiated and signed or initialed amendments to the agreements with Kenya and Japan.

a. *Kazakhstan*

On January 6, 2020, the State Department announced in a media note, available at <https://2017-2021.state.gov/the-united-states-and-kazakhstan-sign-open-skies-agreement/>, the signing of an ATA with Kazakhstan on December 30, 2019, at Nur-Sultan. The media note states:

The Agreement establishes a modern civil aviation relationship with Kazakhstan, consistent with U.S. Open Skies international aviation policy. It includes unrestricted capacity and frequency of services, open route rights, a liberal charter regime, and open code-sharing opportunities. The Agreement will enter into force upon an exchange of diplomatic notes between the two governments.

b. *The Bahamas*

On January 27, 2020, the Air Transport Agreement between the Government of the United States of America and the Government of the Commonwealth of The Bahamas was signed in Nassau. The State Department media note on the signing of the ATA, available at <https://2017-2021.state.gov/the-united-states-and-the-bahamas-sign-air-transport-agreement/>, notes that it is the first ATA negotiated by the two countries. The Agreement entered into force upon signature. The Bahamas-U.S. ATA is available at <https://www.state.gov/u-s-the-bahamas-air-transport-agreement-of-january-27-2020/>.

c. *Kenya*

On February 5, 2020, representatives of the U.S. and Kenyan governments signed an amendment to the U.S.-Kenya Air Transport Agreement at the Department of State in Washington, DC. The State Department media note on the amendment, available at <https://2017-2021.state.gov/the-united-states-and-kenya-add-all-cargo-rights-to-air-transport-agreement/>, explains that:

The Amendment adds seventh-freedom traffic rights for all-cargo operations to the bilateral Air Transport Agreement and will enter into force following an exchange of diplomatic notes. It has been applied on the basis of comity and reciprocity since it was negotiated on December 4, 2019.

The rights in the Amendment facilitate the movement of goods throughout the world by providing air carriers greater flexibility to meet their cargo and express delivery customers' needs more efficiently. Specifically, the Amendment allows U.S. all-cargo airlines to fly between Kenya and a third nation without needing to stop in the United States, an important right if operating a cargo hub. Kenyan all-cargo carriers have reciprocal rights to serve the United States. ...

d. *Japan*

On March 23, 2020, the United States and Japan exchanged diplomatic notes to amend their ATA to increase access by U.S. and Japanese carriers to operate between the United States and Haneda Airport in Tokyo. The March 24, 2020 State Department media note announcing the amendment, available at <https://2017-2021.state.gov/united-states-and-japan-expand-airlines-access-to-tokyos-haneda-airport/>, states that it “provides for 12 new daytime slot pairs each for U.S. and Japanese air carriers to operate between the United States and Tokyo International Airport (Haneda), the busiest in Japan.” The media note further explains:

These flights are expected to begin as early as the 2020 International Air Transport Association spring season, starting March 29. This change increases the number of slot pairs available to U.S. airlines for service to and from Haneda

from the current total of six to 18. Several U.S. carriers have expressed strong interest in offering additional daytime service to Haneda, in part due to its central location near downtown Tokyo.

e. Qatar

On August 27, 2020, the Department of State delivered a responsive diplomatic note to the Embassy of the State of Qatar, acknowledging Qatar's prior note indicating it had completed all internal procedures for entry into force of the U.S.-Qatar ATA, and confirming that the United States had also completed all such internal procedures. As a result, consistent with the terms of the ATA, it entered into force on the date of the U.S. note, August 27, 2020.

f. Bangladesh

On September 30, 2020, the U.S. Ambassador to Bangladesh and the Bangladeshi Senior Secretary for the Ministry of Aviation and Tourism signed a U.S.-Bangladesh Air Transport Agreement in Dhaka. The ATA had been applied on the basis of comity and reciprocity since 2013, but with its signing, immediately entered into force. The agreement is available at <https://www.state.gov/air-transport-agreements/u-s-bangladesh-air-transport-agreement-of-september-30-2020/>.

g. United Kingdom

On November 17, 2020, the Governments of the United States and the United Kingdom of Great Britain and Northern Ireland completed the process for signing a civil air transport agreement. The November 17, 2020 State Department media note on the signing, available at <https://2017-2021.state.gov/united-states-and-united-kingdom-sign-civil-air-transport-agreement/>, explains that the U.S. government representatives signed the agreement on November 10 in Washington and the UK government representative signed on November 17. The media note further states:

The Agreement includes all of the essential elements of Open Skies, such as unrestricted capacity and frequency, open routes, open code-sharing opportunities, a liberal charter regime, and market-determined pricing. The Agreement also provides expanded "seventh-freedom" traffic rights for all-cargo carriers and full market access to the UK's overseas territories and crown dependencies. Pending the Agreement's entry into force via an exchange of diplomatic notes, both sides are prepared to apply its terms on the basis of comity and reciprocity as soon as the U.S.-EU Air Transport Agreement no longer applies to the United Kingdom.

On December 3, 2020, at the 23rd Meeting of the U.S.-EU Joint Committee, the United States issued a statement on Brexit and U.S.-EU ATAs. The statement follows and is available at <https://2017-2021.state.gov/u-s-statement-on-brexit-and-u-s-eu-atas/>.

* * * *

The U.S. delegation would like to make a statement for the record on the legal implications of Brexit with respect to the 2007 U.S.-EU Air Transport Agreement, as amended and the 2011 Four-Part ATA (“U.S.-EU ATAs”).

- The U.S. delegation takes note of the position of the European Union that EU law continues to apply in and to the UK during the transition period, and that such law includes, *inter alia*, the U.S.-EU ATAs.
- Although the United States does not share this view as a legal matter, during the transition period the United States has endeavored, and will continue to endeavor, wherever possible, to afford the UK the same treatment it would receive, in this case, if the U.S.-EU ATAs applied to it, subject to relevant legal and policy considerations.
- Once the transition period ends, the United States shares the view that the U.S.-EU ATAs will have no application or relevance to U.S.-UK civil aviation relations.
- We expect that, for all practical purposes and to maintain the current transatlantic market, the status quo for the UK will remain until the transition period ends. Preparations are under way to ensure that, after that date, the air transport agreement that the United States and the UK have negotiated bilaterally and signed will govern U.S.-UK civil aviation relations.
- We look forward to hearing what the future UK-EU relationship will be, and how it may affect the transatlantic and global aviation market.

* * * *

On December 18, 2020, the U.S. Department of State conveyed a letter to the UK Department of Transportation on the application of the U.S.-UK ATA on the basis of comity and reciprocity. The letter is excerpted below

* * * *

I acknowledge the receipt of your letter of November 30, 2020, which reads as follows:

I refer you to the Memorandum of Consultations signed on November 28, 2018, by delegations representing the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America in conjunction with the initialling of the ad referendum text of a new Air Transport Agreement (“Agreement”) between our two countries. In paragraph 5 of the Memorandum, both

delegations expressed their expectation that, pending the entry into force of the Agreement, their respective aeronautical authorities will permit operations consistent with the Agreement on the basis of comity and reciprocity from a date specified by both governments.

Consistent with the intent of the Memorandum of Consultations, on behalf of the UK Government I can now confirm that UK aeronautical authorities are prepared to permit operations consistent with the Agreement on the basis of comity and reciprocity as of January 1, 2021, as the sole basis of U.S.-UK air service relations. If the U.S. Government can provide the same confirmation with respect to U.S. aeronautical authorities, I suggest this letter and your reply to that effect will place on record the joint understanding of our two Governments that our respective aeronautical authorities will permit operations consistent with the Agreement on the basis of comity and reciprocity from January 1, 2021, as the sole basis of U.S.-UK air service relations, until the Agreement enters into force.

The U.S. Department of Transportation, i.e., the U.S. aeronautical authority, has reviewed its contents and expressed its favorable views in response thereto. I am therefore able to confirm on behalf of the U.S. Government that the U.S. aeronautical authority is prepared to permit operations consistent with the Agreement on the basis of comity and reciprocity as of January 1, 2021, as the sole basis of U.S.-UK air services relations. Therefore, we confirm that your letter and this reply place on the record the joint understanding of our two Governments that our respective aeronautical authorities will permit operations consistent with the Agreement on the basis of comity and reciprocity from January 1, 2021, as the sole basis of U.S.-UK air services relations, until the Agreement enters into force.

* * * *

2. The Downing of Malaysia Airlines Flight MH17 in Ukraine

As discussed in *Digest 2019* at 390, *Digest 2018* at 439-40, and *Digest 2017* at 486, the State Department expressed support for, and confidence in, the Joint Investigative Team ("JIT") investigating the downing of Malaysian Airlines flight MH17 in Ukraine.

On March 8, 2020, in a press statement from Secretary Pompeo, available at <https://2017-2021.state.gov/trial-of-four-suspects-in-mh17-case/>, the United States welcomed the beginning of the criminal trial in the Netherlands of four suspects in the downing of Malaysia Airlines Flight MH17. The press statement continues:

As the trial begins, 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." All of those indicted are members of Russia-led forces in eastern Ukraine. We call upon all States to cooperate in efforts to establish accountability, in accordance with UN Security Council Resolution 2166.

This trial is a critical moment in the search for justice for the families and friends of the 298 individuals who lost their lives on July 17, 2014.

We have the utmost confidence in the Dutch legal system to establish the truth and to do justice in this case. We support the ongoing investigatory work of the Joint Investigation Team comprised of the Netherlands, Australia, Belgium, Malaysia, and Ukraine. We again urge Russia to cease its continuing aggressive and destabilizing activities in Ukraine.

3. Restrictions on Air Service to Cuba

As discussed in *Digest 2019* at 391, the United States suspended scheduled commercial air service between the United States and Cuban international airports, other than Havana's José Martí International Airport, in 2019. In a January 10, 2020 press statement from Secretary Pompeo, available at <https://2017-2021.state.gov/united-states-further-restricts-air-travel-to-cuba/>, the State Department announced further restrictions, suspending all public charter flights between the United States and Cuban destinations other than José Martí. The press statement explains:

Nine Cuban airports currently receiving U.S. public charter flights will be affected. Public charter flight operators will have a 60-day wind-down period to discontinue all affected flights. Also, at my request, DOT will impose an appropriate cap on the number of permitted public charter flights to José Martí International Airport. DOT will issue an order in the near future proposing procedures for implementing the cap.

... In suspending public charter flights to these nine Cuban airports, the United States further impedes the Cuban regime from gaining access to hard currency from U.S. travelers.

On August 13, 2020, Secretary Pompeo requested that DOT suspend all private charter flights to Cuba, including to Havana, excerpt for flights "for emergency medical purposes, search and rescue, and other travel deemed in the interest of the United States." The press statement, available at <https://2017-2021.state.gov/suspension-of-private-charter-flights-between-the-united-states-and-cuba/>, is excerpted below.

The Cuban military and intelligence services own and operate the great majority of hotels and tourism infrastructure in Cuba. We urge travelers of all nationalities to consider this and to make responsible decisions regarding travel to Cuba. The suspension of private charter flights will deny economic resources to the Castro regime and inhibit its capacity to carry out abuses.

B. INVESTMENT DISPUTE RESOLUTION UNDER FREE TRADE AGREEMENTS**1. Non-Disputing Party Submissions under Chapter 11 of the North American Free Trade Agreement**

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. The Permanent Court of Arbitration (“PCA”) and the International Centre for Settlement of Investment Disputes (“ICSID”) frequently administer the settlement of investor state disputes.

a. B-Mex v. Mexico

On January 10, 2020, the United States filed a statement as an intervener in a set-aside action brought by the Mexican government in Ontario Superior Court after a NAFTA Chapter 11 arbitral tribunal rejected Mexico’s preliminary jurisdictional objections. *United Mexican States v Burr*, case no. CV-19-625689-00CL. Excerpts follow from the U.S. intervention, which is available in full at <https://www.state.gov/factum-of-the-united-states-of-america/>.

* * * *

I. Pursuant to NAFTA Article 1122, the NAFTA Parties Consented to Arbitrate Only Claims Submitted in Accordance with the Procedures Set out in the NAFTA

8. A State’s consent to arbitrate 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.

9. NAFTA 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 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.” In addition, an agreement to arbitrate is only formed upon the investor’s corresponding consent to arbitrate *in accordance with those procedures*.

10. The NAFTA Parties have therefore explicitly conditioned their consent upon satisfaction of the relevant procedural requirements. All three NAFTA Parties agree on this point, as reflected in their submissions in the *B-Mex* arbitration, as well as in their submissions in previous arbitrations. Pursuant to Article 31 (3)(a)-(b) of the *Vienna Convention on the Law of Treaties*, this subsequent agreement or subsequent practice of the NAFTA Parties “shall be taken into account” in interpreting the NAFTA.

11. The phrase “in accordance with the procedures set out in this Agreement” refers to all procedures relevant to arbitrating a Section B claim and necessarily includes procedures relevant to submitting a claim, *i.e.*, the procedures in Article 1119 (Notice of Intent to Submit a Claim to

Arbitration) and Article 1121 (Conditions Precedent to Submission of a Claim to Arbitration). 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.

12. Moreover, by conditioning their consent in Article 1122(1) upon satisfaction of the “procedures set out in this Agreement,” the NAFTA Parties explicitly made satisfaction of these procedures jurisdictional (not admissibility) requirements.

II. A Claimant Must Satisfy the Requirements of NAFTA Article 1119 in Order to Engage a NAFTA Party’s Consent to Arbitrate

13. The requirement under NAFTA Article 1119 for a disputing investor to deliver a Notice of Intent to Submit a Claim to Arbitration is one of the procedural conditions that must be satisfied before a NAFTA Party’s consent to arbitrate under Article 1122(1) is engaged. The NAFTA Parties demonstrated agreement on this point in their submissions to the Tribunal.

14. In accordance with NAFTA Article 1119, a disputing investor who does not deliver a Notice of Intent 90 days before submitting a Notice of Arbitration or Request for Arbitration fails to satisfy this procedural requirement, and therefore fails to engage the respondent NAFTA Party’s consent to arbitrate. Under such circumstances, a tribunal lacks jurisdiction *ab initio*. A respondent’s consent cannot be created retroactively; consent must exist at the time a claim is submitted to arbitration.

15. The procedural requirements in Article 1119 are explicit and mandatory, as reflected in the way the requirements are phrased (*i.e.*, “shall deliver;” “shall specify”). These requirements serve important functions, including: to allow a NAFTA Party time to identify and assess potential disputes; to 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 preparation of a defence. 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 [.]”

16. For the foregoing reasons, the procedural requirements of Article 1119 are mandatory preconditions to Chapter 11 arbitrations. 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. A tribunal cannot simply overlook this failure to comply with these requirements.

III. A Claimant Must Also Satisfy the Requirements of NAFTA Article 1121 in Order to Engage a NAFTA Party's Consent to Arbitrate

17. NAFTA Article 1121 also contains procedural requirements upon which the NAFTA Parties have conditioned their consent to arbitrate. The NAFTA Parties also demonstrated agreement on this point in their submissions to the Tribunal.

18. 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.

19. 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—including both the fact of consent and the manner in which consent is communicated—the NAFTA Party’s consent is not engaged, and the tribunal lacks jurisdiction *ab initio*. As will be discussed in more detail in Section IV.B below, there is no basis in the text of Article 1121 for the Tribunal’s conclusion that, while a failure to provide consent in the specified manner may affect a claim’s admissibility, it does not deprive the Tribunal of jurisdiction over the claim. A claimant does not have the option to comply with some of Article 1121’s requirements and ignore others, as the Tribunal concluded.

20. A tribunal is required to determine whether a disputing investor has consented in accordance with the requirements of Article 1121 and must look to the disputing investor’s submissions to make that determination. However, a tribunal itself has no authority to remedy an invalid consent under Article 1121. The discretion to permit a claimant either to proceed under or remedy an invalid consent lies with the respondent NAFTA Party as a function of the respondent’s general discretion to consent to arbitration, not with a tribunal.

IV. The Tribunal’s Interpretation of The Requirements of Articles 1119 and 1121

A. The Requirements in Article 1119 Are Jurisdictional

21. The Tribunal majority stated that “[a]rbitration being a creature of consent, lack of consent equates lack of jurisdiction.” The Tribunal then concluded, however, that “the Respondent’s consent in Article 1122 is not conditioned upon the satisfaction of the requirement of Article 1119(a)”

22. The Tribunal majority’s conclusion rested primarily on three reasons: (1) the requirements of Article 1119 are, at most, procedures “to be followed *prior to* an arbitration” and not procedures, by contrast to those specified in Articles 1123 to 1136, “with which the subsequent *arbitration* itself, if any, must accord”; (2) unlike Article 1121, Article 1119 is not expressly identified as a condition precedent to submission of a claim to arbitration nor, unlike Articles 1116 and 1120, does it expressly bar the submission of a claim that does not comply with its requirements; and (3) the NAFTA’s objectives would not be “furthered” by a strict application of Article 1119. The conclusion of the Tribunal on each of these points is flawed.

23. *First*, the Tribunal's purported distinction between procedures prior to arbitration and procedures for arbitration has no textual support in the NAFTA. The language of Article 1122 is framed broadly to encompass "the procedures set out in this Agreement," *i.e.*, the NAFTA, and there is no distinction, express or implied, between procedures relevant to the submission of a claim and procedures relevant to the conduct of an arbitration once a claim has been submitted. If, by contrast, the NAFTA Party's standing offer of consent were understood to refer only to the subset of procedures set forth in Articles 1123 to 1136, as the Tribunal majority stated, the NAFTA Party would be consenting in advance to arbitrate claims with investors *regardless* of their compliance even with the waiver requirement in Article 1121. Such an interpretation is untenable and contrary to the decisions of multiple NAFTA tribunals finding that compliance with the waiver requirement is a prerequisite to engage the NAFTA Party's consent. Other tribunals interpreting nearly identical provisions in other treaties are in accord.

24. *Second*, whether Article 1119 is expressly labeled a condition precedent to submission of a claim to arbitration is irrelevant. As explained above, Article 1121 requires that an investor consent to arbitrate "in accordance with the procedures set out in this Agreement." This condition means that the investor must accept all procedures in the NAFTA that may pertain to arbitration under Chapter Eleven, Section B, including but not limited to, the procedures in Article 1119. An investor that has not accepted the NAFTA procedures has not consented to arbitration under Chapter Eleven. Because the acceptance of these procedures forms part of the investor's consent as a "condition precedent" to arbitrate, there is no need to insert the phrase "conditions precedent" in the header of each and every relevant NAFTA article containing a procedure that could be relevant to an arbitration under Chapter Eleven, Section B. The status of the NAFTA procedures as conditions precedent is thus clear from the header of Article 1121, combined with that Article's incorporation through the investor's consent of all "the procedures set out in this Agreement."

25. Likewise, nothing can be inferred from Article 1119 not explicitly stating the consequences for a failure to comply with its terms. As noted, Article 1119 frames, in mandatory terms, both the requirement to deliver the Notice and the required content of the Notice: "[t]he disputing investor *shall* deliver to the disputing Party written notice of its intention to submit a claim to arbitration" and the "notice *shall* specify ..." (emphasis added). Thus, there is no question that the disputing investor *must* deliver the Notice and that the Notice *must* contain the specified information. In addition, Article 1119 provides a timeframe for delivering a valid Notice that establishes the Notice as a prerequisite for filing a claim: the disputing investor must deliver the Notice "at least 90 days before the claim is submitted." In other words, the disputing investor cannot submit a claim unless:

(1) it has delivered a valid Notice to the disputing NAFTA Party; and (2) 90 days have passed since delivery of the Notice. A failure by the disputing investor to comply with Article 1119 will bar such investor from submitting a claim.

26. *Third*, the Tribunal majority substituted its own judgment about what constitutes a fair and effective dispute resolution mechanism for the judgment of the NAFTA Parties with respect to whether the requirements of Article 1119 are jurisdictional. The NAFTA Parties made the submission of a valid Notice under Article 1119 mandatory to the dispute resolution process, and the Tribunal is not empowered to waive or disregard this requirement. Furthermore, as explained above, the Notice serves a number of important purposes which would be undermined

by permitting disputing investors to proceed with a claim without meeting the requirements of Article 1119.

27. Finally, the Tribunal majority failed to address the non-disputing NAFTA Parties' submissions under Article 1128. As the United States explained in its Article 1128 submissions, it has long maintained that the "procedures set out in this Agreement" that are required to engage the NAFTA Parties' consent and form the agreement to arbitrate necessarily include Articles 1116 to 1121. As noted above, all three NAFTA Parties agree that their consent to the submission of any claim to arbitration is conditioned upon the satisfaction of the relevant procedural requirements. In accordance with Article 31(3)(a)-(b) of the *Vienna Convention on the Law of Treaties*, the NAFTA Parties' common, concordant, and consistent views form a subsequent practice that "shall be taken into account" by the Tribunal in interpreting the NAFTA. As the recent decision of the *Mobil II* tribunal correctly noted after examining the views (many contained in nondisputing Party submissions) of "all three NAFTA Parties in their practice subsequent to the adoption of NAFTA," subsequent practice establishing agreement of the parties regarding the interpretation of the treaty is "entitled to be accorded considerable weight." Other tribunals have reached the same conclusion.

28. The Tribunal majority, however, gave no weight to the NAFTA Parties' agreement on the proper role of Article 1119; indeed, the Tribunal did not even mention the nondisputing NAFTA Parties' Article 1128 submissions. This is inconsistent with customary international law principles of treaty interpretation, as reflected in Article 31(3)(a)-(b) of the *Vienna Convention on the Law of Treaties*.

B. The Requirements in Article 1121 Are Jurisdictional

29. The Tribunal concluded that Article 1121(1) "sets out two substantive conditions precedent that an investor must satisfy before it can pursue a claim in arbitration: consent and waiver," and that "a NAFTA Party cannot be compelled to arbitrate where those conditions are not met." The Tribunal then determined, however, that "the requirements of Article 1121(3) as to the manner in which that consent is to be conveyed to the Respondent do not bear on the Tribunal's jurisdiction."

30. Having acknowledged the jurisdictional requirements of the first paragraph of Article 1121, the Tribunal's conclusions with respect to the requirements imposed by the third paragraph of Article 1121 are unsupported by treaty analysis or customary international law principles of treaty interpretation reflected in the *Vienna Convention on the Law of Treaties*.

31. Article 1121 does not distinguish between requirements that are jurisdictional and requirements that potentially could be relevant only to the admissibility of a claim. All requirements in the Article should be treated as "conditions precedent to submission of a claim to arbitration." Again, the Tribunal cannot substitute its judgment for the judgment of the NAFTA Parties, as memorialized in the text of the treaty itself, on the issue of what should be a "condition precedent to submission of a claim to arbitration."

* * * *

b. Tennant Energy v. Canada

On January 15, 2020, the United States made an oral submission at a hearing in the NAFTA Chapter 11 arbitration filed by Tennant Energy against Canada. *Tennant Energy v. Canada*, PCA Case No. 2018-54. The U.S. previously made a written submission on

November 27, 2019. See *Digest 2019* at 391-93. Excerpts follow from the U.S. oral submission.

* * * *

In our Written Submission, we set out the U.S. position on the proper interpretation of Article 1134, and I do not intend to reiterate or expand on that issue now. Instead, I will briefly address the proper role of the NAFTA Party's Submissions in the interpretation of the NAFTA, particularly where, as here, all parties are in agreement as to how the treaty provision at issue should be read.

States are well-placed to provide authentic interpretation of their treaties, including in proceedings before investor-State Tribunals like this one. NAFTA Article 1128 ensures the Non-Disputing NAFTA Parties have an opportunity to provide their views on the correct interpretation of the NAFTA. The NAFTA Parties consider Non-Disputing Party Submissions to be an important tool in this respect, and the United States consistently includes provision for such submissions in its Investment Agreements.

Article 31 of the Vienna Convention on the Law of Treaties recognizes the important role that the States Parties play in the interpretation of their Agreements. In particular, Paragraph 3 states that: "In interpreting a treaty, there shall be taken into account, together with the context, any subsequent agreement between the parties regarding the interpretation of the Treaty or the application of its provisions and any subsequent practice in the application of the Treaty which establishes the agreement of the Parties regarding its interpretation."

Article 31 of the Vienna Convention, which reflects customary international law, is framed in mandatory terms. Subsequent agreements between the parties and subsequent practice of the parties *shall* be taken into account. Thus, if the Tribunal concludes that there is either a subsequent agreement between the NAFTA Parties or subsequent practice that establishes such an agreement, it must take that into account in its interpretation of Article 1134.

In addition, there is no hierarchy of importance amongst the elements of interpretation listed in Article 31. Accordingly, the Tribunal must consider any subsequent agreement of the Parties and any subsequent practice of the Parties alongside the Treaty's text, context, and object and purpose. Where the submissions by the three NAFTA Parties demonstrate that they agree on the proper interpretation of a given provision, the Tribunal must, in accordance with Article 31(3)(a) take this agreement into account.

In addition to reflecting an agreement under Article 31(3)(a), the NAFTA Parties' concordant interpretations may also constitute subsequent practice under Article 31(3)(b). The International Law Commission has commented that subsequent practice may include "statements in the course of a legal dispute." Accordingly where the NAFTA Parties' submissions in an arbitration evidence a common understanding of a given provision, this constitutes subsequent practice that must be taken into account by the Tribunal under Article 31(3)(b). Several Tribunals have agreed that submissions by the NAFTA Parties in arbitrations under Chapter 11, including non-disputing party submissions may serve to form subsequent practice. For example, the *Mobil v. Canada* Tribunal recently found that arbitral submissions by the NAFTA Parties constituted subsequent practice and observed that: "The subsequent practice of the parties to a

treaty, if it establishes the Agreement of the parties regarding the interpretation of the Treaty, is entitled to be accorded considerable weight.”

I will point you to Paragraphs 103, 104, and 158-160 of the *Mobil v. Canada* Decision on Jurisdiction and Admissibility dated July 13, 2018.

The Tribunal in *Bilcon v. Canada* reached a similar conclusion at Paragraphs 376-379 of its January 10, 2019 Award on Damages, as did the Tribunal in *Canadian Cattlemen for Fair Trade v. The United States* at Paragraphs 188-189 of its January 28, 2008, Award 1 on Jurisdiction.

Whether the Tribunal considers the interpretations the NAFTA Parties have presented in Chapter Eleven Cases as a subsequent agreement under 31(3)(a) or subsequent practice under 31(3)(b) or both, the outcome is the same. Here each of the NAFTA Parties has, through its respective submissions, expressed a concordant interpretation of Article 1134, namely that it permits a Tribunal to order Security for Costs subject to the applicable Arbitration Rules.

Canada expressed this view in its initial request for Security for Costs, and México and the United States expressed consistent views in their Article 1128 Submissions.

Finally, in Paragraph 2 of its response to the Non-Disputing Parties Submissions, Canada correctly noted all three NAFTA Parties agree that NAFTA Chapter Eleven Tribunals may order Security for Costs under NAFTA Article 1134, subject to the applicable Arbitration Rules.

In accordance with the treaty interpretation principles that I have outlined, the Tribunal must take the NAFTA Parties’ common understanding of Article 1134 as evidenced by their submissions in this arbitration into account.

* * * *

c. Resolute v. Canada

On April 20, 2020, the U.S. made its second non-disputing Party submission in *Resolute Forest Products, Inc. v. Canada*, PCA Case No. 2016-13. The submission is available in full at <https://www.state.gov/wp-content/uploads/2020/04/Resolute-Article-1128-Submission-FINAL-508.pdf>. The statement in the submission on “Proportionality” follows.

23. The United States has long observed that State practice and *opinio juris* do not establish that the minimum standard of treatment of aliens imposes a general obligation of proportionality on States. To the contrary, and as noted below, the minimum standard of treatment affords every State “wide discretion with respect to how it carries out [its] policies by regulation and administrative conduct” and tribunals do “not have an open-ended mandate to second-guess government decision-making.”

2. Non-Disputing Party Submissions under other Trade Agreements

a. *U.S.-Korea FTA: Elliott v. ROK*

Chapter Eleven of the United States-Korea Free Trade Agreement (“KORUS”) contains provisions designed to protect foreign investors and their investments and to facilitate the settlement of investment disputes. Article 11.20.4 of the KORUS, like Article 1128 of NAFTA, allows for non-disputing Party submissions. On February 7, 2020, the United States made a non-disputing Party submission in *Elliott v. ROK*, PCA Case No. 2018-51. Excerpts follow from the discussion of “attribution,” in the U.S. submission. The submission is available at <https://www.state.gov/wp-content/uploads/2020/02/US-Article-II204-Submission-Elliott-v-ROK-020720-508.pdf>.

* * * *

2. KORUS Article 11.1.3 provides that:

measures adopted or maintained by a Party means measures adopted or maintained by:

- (a) central, regional, or local governments and authorities; and
- (b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.

3. Article 11.1.3(a) confirms that measures adopted or maintained by any government or authority of a Party are attributable to that Party. The term “governments and authorities” means the organs of a Party, consistent with the principles of attribution under customary international law. As the text of Article 11.1.3(a) makes clear, this rule of attribution applies to any State organ at the central, regional, or local level of government. The text of Article 11.1.3(a) does not draw distinctions based on the type of conduct at issue.

4. Pursuant to Article 11.1.3(b), attribution of conduct of a non-governmental body to a Party requires that both (i) the conduct is governmental in nature and (ii) the measures adopted or maintained by the non-governmental body are undertaken “in the exercise of powers *delegated* by” the government or an authority of a Party. (Emphasis added.) Article 16.9 of the Korus defines “delegation,” for purposes of the chapter on competition-related matters, as including, *inter alia*, “a legislative grant, and a government order, directive, or other act, transferring to the . . . state enterprise, or authorizing the exercise by the . . . state enterprise of, governmental authority.” If the conduct of a non-governmental body falls outside the scope of the relevant delegation of authority, such conduct is not a “measure[] adopted or maintained by a Party” under Article 11.1.

5. A non-governmental body such as a state enterprise may exercise regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges. These examples illustrate circumstances in which a non-governmental body such

as a state enterprise is exercising governmental authority delegated by a Party in its sovereign capacity.

* * * *

b. U.S.-Panama TPA: Omega 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 February 3, 2020, the United States made a non-disputing Party submission in *Omega Eng’g and Rivera v. Panama*, ICSID Case No. ARB/16/42, pursuant to Article 10.20.2 of the U.S.-Panama TPA and the Treaty between the United States of America and the Republic of Panama concerning the Treatment and Protection of Investment, with Agreed Minutes, as amended (“U.S.-Panama BIT”) (or jointly, “the Agreements”). This is the first non-disputing party submission by the United States made pursuant to an older BIT. The U.S. submission is available at <https://www.state.gov/wp-content/uploads/2020/03/US-Submission-in-Omega-Mr.-Rivera-v.-Panama-508.pdf>. The submission addresses topics including the minimum standard of treatment (including fair and equitable treatment and full protection and security) in bilateral investment treaties (“BITs”) having the same meaning as in customary international law; and expropriation likewise having the same meaning in BITs as it does in customary international law. Excerpts below relate to most-favored nation (“MFN”) treatment, the obligations to accord treatment to investments or investors, and to moral damages.

* * * *

Most-Favored-Nation-Treatment (Article 10.4 of the U.S.-Panama TPA)

2. Article 10.4 of the U.S.-Panama TPA provides:

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. (Emphases added.)

3. To establish a breach of most-favored-nation treatment (“MFN”) under Article 10.4, a claimant has the burden of proving that it or its investments: (1) were accorded “treatment”; (2) were

in “like circumstances” with investors or investments (“comparators”) of a third State (*i.e.*, of a State which is not a Party to the U.S.-Panama TPA); and (3) received treatment “less favorable” than that accorded to such investors or investments. As the *UPS v. Canada* tribunal noted with respect to the national treatment obligation of NAFTA Article 1102, “[t]his is a legal burden that rests squarely with the Claimant. That burden never shifts. . . .”

4. Article 10.4 is intended to prevent discrimination on the basis of nationality by the Party that is hosting the investment between investors (or investments) of the other Party and investors (or investments) of a third State. It is not intended to prohibit all differential treatment among investors or investments. Rather, it is designed only to ensure that the Parties do not treat entities that are “in like circumstances” differently based on nationality. A claimant is not required to establish discriminatory intent.

5. As indicated above, the appropriate comparison is between the treatment accorded to a claimant or its investment, on one hand, and the treatment accorded to a third-State investor or investment in like circumstances, on the other. It is therefore incumbent upon the claimant to identify third-State investors or investments as comparators. If the claimant does not identify any third-State investor or investment as allegedly being in like circumstances, no violation of Article 10.4 can be established.

6. Determining whether a domestic investor or investment identified by a claimant is in “like circumstances” to the claimant or its investment is a fact-specific inquiry. As one tribunal observed, “[i]t goes without saying that the meaning of the term 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 “like circumstances” analysis requires consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other relevant characteristics. When determining whether a claimant was in like circumstances with comparators, it or its 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 10.4 depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare objectives.

7. Nothing in Article 10.4 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 third-State investor or any investment of a national. The appropriate comparison is between the treatment accorded a foreign investment or investor in like circumstances. This is an important distinction intended by the Parties. Thus, the Parties may adopt measures that draw distinctions among entities without necessarily violating Article 10.4.

8. With respect to the third component of an MFN claim noted in paragraph 3, a claimant must also establish that the alleged non-conforming measure(s) that constituted “less favorable” treatment are not subject to the reservations contained in Annex II of the U.S.-Panama TPA, as set forth in Article 10.13.2. In particular, both Parties reserved “the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement(s) in force or signed prior to the date of entry into force of this Agreement.”

9. A claimant must meet the basic requirement of Article 10.4 to identify a comparator “in like circumstances.” The MFN clause of the U.S.-Panama TPA expressly requires a claimant to demonstrate that investors of another Party or a non-Party “in like circumstances” were afforded more favorable treatment. Ignoring the “in like circumstances” requirement would serve impermissibly to excise key words from the Agreement.

10. Nor can Article 10.4 be used to alter the substantive content of the fair and equitable treatment or full protection and security obligations under Article 10.5. As noted in the submissions on Article 10.5 below, Article 10.5.2 clarifies that the concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. Article 10.5.3 further clarifies that 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.”

* * * *

Requirement to Accord Treatment to Investments and/or Investors

46. Some obligations in the Agreements require a Party to accord treatment to both investors and investments, whereas other obligations in the Agreements only require a Party to accord treatment to an investment. For example, the Agreements require the Parties to accord “fair and equitable treatment” only to investments, not to investors. In contrast, the Agreements require the Parties to accord “national treatment” to both investors and investments. In accordance with this distinction, for the Agreements’ obligations which only extend to investments, a claimant (*i.e.*, an investor) must establish that a Party’s treatment was accorded to an investment and violated the relevant obligation.

Damages

47. Both of the Agreements authorize claimants to seek damages for alleged breaches of specified obligations in the Agreements. However, in accordance with the discussion above in paragraph 46, for TPA or BIT obligations that only extend to investments, a tribunal may only award damages for violations where the investment incurred damages. A tribunal has no authority to award damages that a claimant allegedly incurred in their capacity as an investor for violations of obligations that only extend to investments.

* * * *

c. U.S.-Peru TPA: *Renco v. Peru*

Chapter Ten of the U.S.-Peru Trade Promotion Agreement (“TPA”) contains provisions similar to those in other trade agreements, to protect investors and facilitate dispute settlement. Article 10.20.2 of the U.S.-Peru TPA, like Article 1128 of NAFTA, allows for non-disputing Party submissions. On March 6, 2020, the United States made a non-disputing Party submission in *Renco v. Peru*, PCA Case No. 2019-46. The U.S. submission is available at <https://www.state.gov/wp-content/uploads/2020/05/U.S.-Submission-Renco-II-508.pdf>. Excerpts below discuss the relationship of a denial of justice claim to the time bar and non-retroactivity.

* * * *

Article 10.18.1 (Limitations Period)

2. Article 10.18.1 of the U.S.-Peru TPA provides:

No claim may be submitted to arbitration under this Section 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 alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.

3. Article 10.18.1 imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute. As is made explicit by Article 10.18.1, the 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.” Accordingly, a tribunal must find that a claim satisfies the requirements of, *inter alia*, Article 10.18.1 in order to establish a Party’s consent to (and therefore the tribunal’s jurisdiction over) an arbitration claim. Because the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction under Chapter Ten, including with respect to Article 10.18.1, the claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.

4. This limitations period is a “clear and rigid” requirement that is not subject to any “suspension,” “prolongation,” or “other qualification.” An investor or enterprise first acquires knowledge of an alleged breach and loss under Article 10.18.1 as of a particular “date.” Such knowledge cannot *first* be acquired on multiple dates or on a recurring basis. As the *Grand River* tribunal recognized in interpreting the nearly identical limitations provisions under Articles 1116(2) and 1117(2) of the NAFTA, subsequent transgressions by a Party arising from a continuing course of conduct do not renew the limitations period once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred thereby. To allow otherwise would permit an investor to evade the limitations period by basing its claim on the most recent transgression in that series, rendering the limitations provisions ineffective.

5. With regard to knowledge of “incurred loss or damage” under Article 10.18.1, a claimant may have knowledge of loss or damage even if the amount or extent of that loss or damage cannot be precisely quantified until some future date. Moreover, 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.

6. With regard to “knowledge of the breach alleged” 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.” It is well-established that the international responsibility of States may not be invoked with respect to non-final judicial acts, unless recourse to further domestic remedies is obviously futile or manifestly ineffective. Thus, non-final judicial acts have not ripened into the type of final act that is sufficiently definite to implicate state responsibility, unless further recourse is obviously futile or manifestly ineffective.

7. In the context of a claim of denial of justice, therefore, the three-year limitations period set out in Article 10.18.1 will not begin to run until the date on which the investor or enterprise first acquired, or should have acquired, knowledge that either the breach has occurred—*i.e.*,

when all available domestic remedies have been exhausted, unless obviously futile or manifestly ineffective—or the claimant or enterprise has incurred loss or damage, whichever is later.

Article 10.1.3 (Non-Retroactivity)

8. Article 10.1.3 states: “[f]or greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.” The phrase “for greater certainty” signals that the sentence it introduces reflects what the agreement would mean even if that sentence were absent.

9. A host State’s conduct prior to the entry into force of an obligation may be relevant in determining whether the State subsequently breached that obligation. Given the rule against retroactivity, however, there must exist “conduct of the State after that date which is itself a breach.” As the *Berkowitz* tribunal observed, “pre-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right. Pre-entry into force acts and facts cannot . . . constitute a cause of action.” Further, “[t]he mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct.”

* * * *

d. U.S.-Colombia TPA: Carrizosa v. Colombia

Article 10.20.2 of the United States-Colombia Trade Promotion Agreement (“U.S.-Colombia TPA” or “Agreement”) authorizes a non-disputing Party to make oral and written submissions to a Tribunal regarding the interpretation of the Agreement.

On May 1, 2020, the United States made a non-disputing Party submission in *Astrid Carrizosa v. Colombia*, ICSID Case No. ARB/18/05, a proceeding under Chapter Twelve (Financial Services) of the U.S.-Colombia TPA. Article 10.20 is part of Section B of Chapter Ten, and thus incorporated into Chapter Twelve by Article 12.1.2(b). The May 1, 2020 submission is available at <https://www.state.gov/wp-content/uploads/2020/06/U.S.-Submission-in-Carrizosa-v.-Colombia-ICSID-Case-No.-ARB-18-05-508.pdf>. Also on May 1, 2020, the United States made similar points in its submission in *Alberto Carrizosa Gelzis et al v. Colombia*, PCA Case No. 2018-56, involving similar claims brought under Chapter Twelve by different members of the Carrizosa family, pursuant to different rules. The ICSID and PCA cases proceeded concurrently. The U.S. submission in the PCA case is available at <https://www.state.gov/wp-content/uploads/2020/06/U.S.-Submission-in-Carrizosa-v.-Colombia-Case-No.-2018-56-508.pdf>, and excerpted below.

* * * *

ARTICLE 12.1: SCOPE OF COVERAGE AND INVESTOR-STATE ARBITRATION

7. Article 12.1.1 (Scope of Coverage), provides *inter alia* that Chapter Twelve “applies to measures adopted or maintained by a Party relating to; (a) financial institutions of another Party; [and] (b) investors of another Party, and investments of such investors, in financial institutions in

the Party's territory[.]” If a claim falls within the scope of Chapter Twelve, it may not be arbitrated under any other Chapter of the U.S.-Colombia TPA.

8. The chapeau of Article 12.1.2 further provides in relevant part that Chapter Ten applies to “measures described in paragraph 1 *only to the extent that*” Chapter Ten or Articles thereof “are incorporated into this Chapter.” (Emphasis added.) Article 12.1.2.(b) then goes on to incorporate into Chapter Twelve the dispute resolution provisions of Chapter Ten, Section B, “solely” with respect to claims brought under the specific Chapter Ten Articles incorporated into Chapter Twelve. Thus, Article 12.1.2(b) provides that:

Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter solely for claims that a Party has breached Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), or 10.14 (Special Formalities and Information Requirements), as incorporated into this Chapter. (Emphasis added.)

9. By using the word “solely,” the Parties expressly identified the only obligations found in Chapter Ten that they were willing to arbitrate under Chapter Twelve. The Parties did not consent to arbitrate any investor claims based on other substantive obligations found in Chapter Ten. Nor did the Parties consent to arbitrate investors’ claims based on any of the substantive obligations contained in Chapter Twelve, which remain subject only to State-to-State dispute resolution in Chapter Twenty-One.

10. The NAFTA was the first international trade and investment agreement of the United States to provide for investor-State arbitration of financial services matters in a separate chapter. Financial Services matters, including investor-State arbitration, are contained in Chapter Fourteen of the NAFTA. The *Fireman’s Fund* tribunal considered the scope of NAFTA Chapter Fourteen and explained how the NAFTA Parties arrived at the more limited scope of investor-State arbitration for claims falling within the scope of that chapter than for NAFTA’s Investment Chapter:

The regulations concerning financial services were not the same in all three countries, but each of the State Parties was clear that challenges to such regulations or interpretations of the regulations and the relevant authorities should not be committed to investor-State arbitration under the NAFTA. On the other hand, investment in financial institutions across borders was to be encouraged, and investors were to be protected through the NAFTA from expropriation and measures tantamount to expropriation.

The solution arrived at in the NAFTA was to include a separate Chapter Fourteen on Financial Services. The expropriation provisions of the NAFTA as set out in Chapter Eleven, including the provisions for investor-State arbitration, were made applicable to claims under Chapter Fourteen, but claims based on other provisions designed to protect cross-border investors and investments, including provisions for National Treatment and Most-Favored-Nation Treatment, are excluded from the competence of an arbitral tribunal in a case involving investment in financial institutions. Chapter Fourteen contains no counterpart to Article 1105 concerning Minimum Standard of Treatment.

11. Further, the *Fireman’s Fund* tribunal correctly noted that the NAFTA Parties did not consent to arbitrate National Treatment claims or Minimum Standard of Treatment claims for

financial services matters. Rather, such claims were subject to State-to-State dispute resolution, not investor-State dispute resolution. The *Fireman's Fund* tribunal explained:

Several provisions of Chapter Eleven [the Investment Chapter] are incorporated into Chapter Fourteen, including, as here relevant, Article 1110 concerning Expropriation and Compensation, and Articles 1115-1138 concerning the procedural aspects of dispute resolution by a tribunal such as the present one. Article 1102 on National Treatment and Article 1105 on Minimum Standard of Treatment are not incorporated into Chapter Fourteen. Accordingly, if the measures alleged to have been taken on behalf of the Government of Mexico are covered by Chapter Fourteen, this Tribunal lacks jurisdiction of the claims under Articles 1102 and 1105. Chapter Fourteen contains no counterpart to the Minimum Standard of Treatment provision of Chapter Eleven; it does contain, in Article 1405, a counterpart to the national treatment provision in Chapter Eleven, and indeed a claim for breach of Article 1405 is made in the present arbitration. However, Article 1405 is not included among the provisions to which the procedural provisions of Chapter Eleven apply (Articles 1115-1138), and Article 1414 makes clear that claims under Article 1405 are subject to state-to-state dispute settlement pursuant to Chapter Twenty, not to investor-state dispute settlement under Chapter Eleven.

In sum, if the measures challenged in this arbitration are covered by Chapter Fourteen, the claims brought under Articles 1102, 1105, and 1405 must be dismissed, and only the claim for expropriation pursuant to Article 1110 remains to be decided by this Tribunal.

12. Likewise here, the Parties to the U.S.-Colombia TPA did not consent to investor-State arbitration of any claims other than those explicitly incorporated into Chapter Twelve via Article 12.1.2(b). Therefore, an investor-State tribunal has no jurisdiction to consider claims not explicitly set out in 12.1.2(b).

13. The U.S.-Colombia TPA Parties did agree, however, to subject such claims to State-to-State dispute resolution, just as the NAFTA Parties did. Pursuant to Article 21.2.1, the U.S.-Colombia TPA Parties subjected disagreements regarding “all disputes between the Parties regarding the interpretation or application of” the TPA to State-to-State dispute resolution procedures. Chapter Twenty-One of the TPA sets forth the procedures for State-to-State dispute resolution, although the procedures are modified with respect to disputes arising under Chapter Twelve pursuant to Article 12.18.

MOST-FAVORED-NATION (MFN) TREATMENT

14. Article 12.3.1 provides:

Each Party shall accord to investors of another Party, financial institutions of another Party, investments of investors in financial institutions, and cross-border financial service suppliers of another Party treatment no less favorable than that it accords to the investors, financial institutions, investments of investors in financial institutions, and cross-border financial service suppliers of any other Party or of a non-Party, in like circumstances.

15. As a threshold matter, as discussed above in paragraphs 8, 9 and 12, no claim brought via Article 12.3.1 may be brought by an investor against a State Party to the TPA. Thus, an MFN claim brought via Article 12.3.1 alleging that a Party extended more favorable treatment to a

third-Party investor or investment than was accorded to the investor or investment of the other Party cannot be the subject of investor-State arbitration. As a result an investor-State Tribunal has no jurisdiction to consider any procedural or substantive treatment extended by a TPA Party to a third-State investor or investment through a multilateral or bilateral agreement that a TPA Party has with a third State. Any other conclusion would eviscerate the carefully crafted decision the TPA Parties made to make only certain obligations in the financial services sector subject to investor-State arbitration. Rather, the TPA Parties agreed that any MFN claims may only be subject to State-to-State dispute resolution.

16. In the context of a State-to-State claim, the requirements to establish a breach of Article 12.3.1 with respect to an investor or investment are summarized as follows: a complaining State has the burden of proving that an investor of that State or that investor's investment (1) was accorded "treatment"; (2) was in "like circumstances" with the identified non-Party investors or investments; and (3) received treatment "less favorable" than that accorded to the identified non-Party investors or investment.

17. With respect to the third component of an MFN claim noted in the preceding paragraph, pursuant to Article 12.9.3, a complaining State must also establish that the alleged nonconforming measures (NCM) that constituted "less favorable" treatment are not subject to the reservations contained in Annex II of the TPA. In particular, in Annex II both Parties "reserve[d] the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement." Thus, a tribunal has no jurisdiction to consider any more favorable treatment extended pursuant to such agreements.

DEFINITION OF "INVESTMENT"

18. Footnote 15 to Article 10.28(g) (Definitions) explains that "[t]he term "investment" "does not include an order or judgment entered in a judicial or administrative action.

19. Footnote 15 applies to investor-State arbitration conducted pursuant to Chapter Twelve of the U.S.-Colombia TPA by virtue of Article 12.20, which defines "investment" to mean the same as that in Article 10.28, with certain exceptions not relevant here.

* * * *

The United States made oral submissions in both *Carrizosa* cases, in November in the ICSID case, and on December 15, 2020 in the PCA case. The transcript in the PCA case is available at <https://www.state.gov/wp-content/uploads/2021/04/Carrizosa-PCA-oral-NDP-508.pdf>. Excerpts follow from the transcript of the U.S. oral submission in the PCA case. (The U.S. oral submission in the ICSID case also includes these arguments.)

* * * *

The first issue concerns Footnote 2 to Article 10.4 and the significance of the words "for greater certainty" at the beginning of that footnote. As a general practice, the United States uses the words "for greater certainty" in its International Trade Investment Agreements to introduce confirmation regarding the meaning of "agreement." In U.S. practice, the phrase "for greater certainty" signals that the sentence it introduces reflects the understanding of the United States

and the other agreement party or parties of what the provisions of the Agreement would mean even if that sentence were absent.

As a consequence, “for greater certainty” sentences also serve to spell out more explicitly the proper interpretation of similar provisions *mutatis mutandis* and other agreements or in the same agreement .

* * * *

The third issue we would like to address concerns the shared interpretations of the State Parties to the TPA as to its provisions and Article 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties. Although the United States is not a party to the Vienna Convention, we consider that Article 31 reflects customary international law on treaty interpretation .

Dates are well placed to provide authentic interpretation of their treaties, including in proceedings before investor-State tribunals like this one. TPA Article 1022 ensures the non-disputing TPA Party has an opportunity to provide its views on the correct interpretation of the TPA. And the United States consistently includes provision for such submissions in its Investment Agreements .

Article 31 of the Vienna Convention on the Law of Treaties recognizes the important role that the States Parties play in the interpretation of their agreements. In particular, Paragraph 3 states that, “in interpreting a treaty, there shall be taken into account, together with the context, any subsequent agreement between the Parties regarding the interpretation of the Treaty or application of its provisions and any subsequent practice in the application of the Treaty which establishes the agreement of the Parties regarding its interpretation.”

Article 31 of the Vienna Convention is framed in mandatory terms. Subsequent agreements between the Parties and subsequent practice of the Parties shall be taken into account. Notably, several Investment Tribunals constituted under the NAFTA have agreed that submissions by the NAFTA Parties in arbitrations under Chapter 11, including non-disputing party submissions may serve to form subsequent practice.

For example , the *Mobil v. Canada* Tribunal found that arbitral submissions by the NAFTA Parties constituted subsequent practice and observed that: “The subsequent practice of the Parties to a treaty, if it establishes the agreement of the Parties regarding the interpretation of the Treaty, is entitled to be accorded considerable weight.” And I would point you to Paragraphs 103, 104 , and 158-160 of the *Mobil v. Canada* Decision on Jurisdiction and Admissibility of 2018 .

The Tribunal in *Bilcon v. Canada* reached a similar conclusion ...

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e. U.S.-Morocco FTA: Carlyle Group v. Morocco

Article 10.19.2 of the United States-Morocco Free Trade Agreement (“U.S.-Morocco FTA” or “Treaty”) allows submissions by non-disputing Parties on questions of interpretation of the Treaty. On December 4, 2020, the United States made such a submission in the case, *Carlyle Group v. Morocco*, ICSID Case No. ARB/18/29. The U.S. submission is available at <https://2017-2021.state.gov/wp->

[content/uploads/2020/12/U.S.-Article-10.19.2-Submission_The-Carlyle-Group-LP-and-others-v.-Kingdom-of-Morocco-508.pdf](https://www.usip.org/content/uploads/2020/12/U.S.-Article-10.19.2-Submission_The-Carlyle-Group-LP-and-others-v.-Kingdom-of-Morocco-508.pdf) and excerpted below.

* * * *

Article 10.15.1 (Submission of a Claim to Arbitration)

2. The U.S.-Morocco FTA provides two separate jurisdictional bases for investors to bring claims against a Treaty Party: Articles 10.15.1(a) and 10.15.1(b). Articles 10.15.1(a) and 10.15.1(b) serve to address discrete and non-overlapping types of injury. Where the investor seeks to recover loss or damage that it incurred directly, it may bring a claim under Article 10.15.1(a). However, where the alleged loss or damage is to “an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly,” the investor’s injury is only indirect. Such derivative claims must be brought, if at all, under Article 10.15.1(b).

* * * *

Article 10.27 (Definition of “Investment”)

“Characteristics of an investment”

12. Article 10.27 defines “investment” ... This definition encompasses “every asset” that an investor owns or controls, directly or indirectly, that has the characteristics of an investment. The “[f]orms that an investment may take include” the categories listed, which are illustrative and non-exhaustive. The enumeration of a type of an asset in Article 1, however, is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; it must still always possess the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

13. Article 10.27’s use of the word “including” in relation to “characteristics of an investment” indicates that the list of identified characteristics, i.e., “the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk,” is not an exhaustive list; additional characteristics may be relevant.

14. With respect to debt instruments and loans, for example, Article 10.27 provides that the “[f]orms that an investment may take include: ... bonds, debentures, other debt instruments, and loans “However, footnote 9, which is appended to subparagraph (c), clarifies that:

Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

15. Consistent with the distinction drawn in footnote 9, certain shorter-term forms of debt, in contrast to, *e.g.*, long-term notes, are less likely to have the characteristics of an investment.

Meaning of “control”

16. Article 10.27 of the FTA defines “investment” to mean “every asset that an investor owns *or controls*, directly or indirectly, that has the characteristics of an investment.” The term “control” is not defined in the Treaty. 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.

* * * *

C. WORLD TRADE ORGANIZATION

The following discussion of developments in 2020 in select WTO dispute settlement proceedings involving the United States is drawn from Chapter II.D, “WTO Dispute Settlement,” of the Annual Report of the President of the United States on the Trade Agreements Program (“Annual Report”), released in March 2021 and available at <https://ustr.gov/sites/default/files/files/reports/2021/2021%20Trade%20Agenda/Online%20PDF%202021%20Trade%20Policy%20Agenda%20and%202020%20Annual%20Report.pdf>. WTO legal texts referred to below are available at https://www.wto.org/english/docs_e/legal_e/legal_e.htm.

1. Disputes brought by the United States

China – Domestic Supports for Agricultural Producers (DS511)

The United States pursued action in one WTO proceeding in 2020. June 30, 2020 marked the end of the “reasonable period of time” for China to comply with WTO rules with regard to its provision of domestic support for producers of wheat, Indica rice, Japonica rice, and corn. (Originally, the reasonable period of time was to expire on March 31, 2020, as discussed in *Digest 2019* at 408, but China and the United States agreed to extend it.) As explained in the Annual Report at 57:

In July 2020, the United States requested authorization to suspend the application to China of tariff concessions and other obligations at an estimated level of \$1.3 billion for 2020. China objected to the U.S. request, automatically referring the matter to arbitration.

2. Disputes brought against the United States

a. Measures Affecting Trade in Large Civil Aircraft (Second Complaint) (EU) (DS353)

See the Annual Report at 75-79 for the history of this dispute. On October 13, 2020, the arbitration regarding the level of suspension of concessions requested by the EU,

pursuant to Article 22.6 of the Dispute Settlement Understanding (“DSU”), concluded that the adverse effects caused by the Washington State tax rate reduction during an historical 2012 reference period is commensurate with \$3.99 billion annually in countermeasures. On October 26, 2020, the WTO authorized the EU to take countermeasures accordingly. However, as explained in the Annual Report at 79, “the Washington State tax rate reduction was repealed effective April 1, 2020,” leaving the EU with “no legal basis to maintain countermeasures on U.S. goods.”

b. *Anti-Dumping Measures on Oil Country Tubular Goods from Korea (DS488)*

As discussed in the Annual Report at 86-87, the United States and the Republic of Korea disagree on whether the United States has fully complied with the Dispute Settlement Body’s (“DSB’s”) recommendations and rulings in the case, resulting in the matter being referred to arbitration in 2019. The Annual Report relates that:

On February 6, 2020, Korea and the United States reached an understanding regarding procedures under Articles 21 and 22 of the DSU, under which each party agreed it would accept a report by the compliance panel without appeal.

c. *Countervailing Measures on Supercalendered Paper from Canada (DS505)*

As discussed in the Annual Report at 87-88, the United States appealed certain of the Panel’s findings in the case. The appellate document, issued on February 6, 2020, maintains the findings of the Panel. The United States objected to adoption of the document as an Appellate Body report because there was a Chinese national affiliated with the Government of China serving on the appeal, contrary to Article 17.3 of the DSU. As explained in the Annual Report:

The United States explained that because there was no valid Appellate Body report in this dispute, the document and report could only be adopted by positive consensus. Because there was no consensus on adoption, the DSB did not validly adopt any document and report in this dispute, and therefore there was no valid recommendation of the DSB with which to bring a measure into conformity with a covered agreement.

On June 18, 2020, Canada requested authorization to suspend concessions and other obligations pursuant to Article 22.2 of the DSU. On June 26, 2020, the United States objected to Canada’s request, referring the matter to arbitration pursuant to Article 22.6 of the DSU. On August 6, 2020, the WTO notified the parties that the arbitration would be carried out by the panelists who served during the panel proceeding: Mr. Paul O’Connor, Chair; and Mr. David Evans and Mr. Colin McCarthy. The arbitration proceedings are ongoing.

d. *Countervailing Measures on Softwood Lumber from Canada (DS533)*

As discussed in the Annual Report at 91, the panel circulated its report in this dispute on August 24, 2020.

The panel found that Commerce's determinations regarding benchmarks for stumpage, log export permitting processes, and non-stumpage programs were inconsistent with the SCM [Subsidies and Countervailing Measures] Agreement. The panel effectively applied the WTO Appellate Body's flawed test for using out-of-country benchmarks in its analysis of benchmarks from within Canada that Commerce used to measure the benefit of subsidies. The panel also applied a heightened level of scrutiny in its review of Commerce's determination, in essence putting itself in the place of the investigating authority, contrary to the terms of the SCM Agreement.

On September 28, 2020, the United States notified the DSB of its decision to appeal certain issues of law covered in the panel report.

e. *Tariff Measures on Certain Goods from China (DS543)*

As discussed in the Annual Report at 93, the panel circulated its report on September 15, 2020.

The panel concluded that the tariff measures at issue are inconsistent with Article I:1 of the GATT 1994 (MFN), because they fail to provide treatment for Chinese products that is no less favorable than that granted to like products originating from other WTO Members, and with Articles II:1(a) and (b) of the GATT 1994, because the additional duties are in excess of the bound rates found in the U.S. Schedule.

On October 27, 2020, the United States notified the DSB of its decision to appeal certain issues of law covered in the panel report.

D. INVESTMENT TREATIES, TRADE AGREEMENTS AND TRADE-RELATED ISSUES

1. *Africa Growth and Opportunity Act*

The U.S. Trade Representative ("USTR") determined that imports of eligible products from Mali qualify for the textile and apparel benefits provided under the African Growth and Opportunity Act ("AGOA") based on Mali's effective procedures for preventing unlawful transshipment and the use of counterfeit documents in connection with the shipment of such articles, and progress in complying with the custom procedures required by AGOA. 85 Fed. Reg. 44140 (July 21, 2020).

In a December 22, 2020 proclamation, President Trump determined that the Democratic Republic of the Congo ("DRC") meets the eligibility requirements set forth in

section 104 of the AGOA and the eligibility criteria set forth in section 502 of the Trade Act, and designated the DRC as a beneficiary sub-Saharan African country. 85 Fed. Reg. 85,491 (Dec. 29, 2020). The President also designated the DRC as a “lesser developed beneficiary sub-Saharan African country” under section 112(c) of the AGOA. *Id.*

2. United States-Mexico-Canada Agreement (“USMCA”)

As discussed in *Digest 2019* at 413-14, *Digest 2018* at 460-61 and *Digest 2017* at 516, the Trump Administration renegotiated the North American Free Trade Agreement (“NAFTA”), replacing it with the United States-Mexico-Canada Agreement (“USMCA”). The U.S. Senate approved the United States-Mexico-Canada Agreement Implementation Act on January 16, 2020. See January 16, 2020 State Department press statement, available at <https://2017-2021.state.gov/u-s-senate-passage-of-the-united-states-mexico-canada-agreement/> (noting that Mexico had previously ratified the USMCA, and that the Canadian Parliament was considering the agreement). On January 29, 2020, President Trump signed the United States-Mexico-Canada Agreement Implementation Act into law. Pub. L. No. 116-113, 134 Stat. 11. See State Department press statement, available at <https://2017-2021.state.gov/president-trump-initiates-a-new-chapter-in-trade-policy-by-signing-into-law-the-united-states-mexico-canada-agreement/>. The USMCA entered into force on July 1, 2020. See State Department press statement, available at <https://2017-2021.state.gov/entry-into-force-of-the-united-states-mexico-canada-agreement/>. The text of the USMCA is available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

3. U.S.-Kenya Trade Agreement

On March 17, 2020, USTR notified Congress of the Administration’s intent to enter into negotiations with the Republic of Kenya (“Kenya”) for a U.S.-Kenya trade agreement. 85 Fed. Reg. 16,451 (Mar. 23, 2020). On March 23, 2020, the Office of the U.S. Trade Representative (USTR) solicited comments and announced that the Trade Policy Staff Committee would hold a public hearing on a proposed U.S.-Republic of Kenya trade agreement. 85 Fed. Reg. 16,450 (Mar. 23, 2020). The hearing was canceled due to the COVID-19 pandemic and the period for the submission of written comments was extended.

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 when he took actions to adjust the imports of aluminum and steel articles in 2018, and

automobiles and automobile parts in 2019. Further adjustments were made to the steel and aluminum measures in 2019 and 2020.

As discussed in *Digest 2018* at 462-64, and *Digest 2019* at 414-15, the United States took measures in 2018 to adjust aluminum imports and subsequently modified the measures so they no longer applied to Canada, Mexico, Argentina and Australia. In 2020, however, the United States temporarily re-imposed measures on certain aluminum imports from Canada. Likewise, as discussed in *Digest 2018* at 464-67 and *Digest 2019* at 415-16, the United States took actions to adjust imports of steel, and subsequently modified those measures so they no longer applied to Canada, Mexico, Argentina, Australia, Brazil, and Korea.

On January 24, 2020, the President determined in Proclamation 9980 that it was necessary and appropriate, in light of U.S. national security interests, to impose tariffs on certain derivatives of aluminum articles and steel articles under Section 232. 85 Fed. Reg. 5281 (Jan. 29, 2020). Annex I to Proclamation 9980 specifies the derivatives of aluminum articles subject to tariff measures and Annex II specifies the affected derivatives of steel articles. *Id.* Canada, Mexico, Argentina, and Australia are exempted from the tariffs on derivative aluminum articles. Canada, Mexico, Argentina, Australia, Brazil, and South Korea are exempted from the tariffs on derivative steel articles.

F. INTELLECTUAL PROPERTY AND SECTION 301 OF THE TRADE ACT

1. Special 301 Report and Notorious Markets Report

The “Special 301” Report is an annual congressional report that in effect reviews 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 2020 Special 301 Report in April 2020. The Report is available at https://ustr.gov/sites/default/files/2020_Special_301_Report.pdf. The 2020 Report lists the following countries on the Priority Watch List: Algeria, Argentina, Chile, China, India, Indonesia, Russia, Saudi Arabia, Ukraine, and Venezuela. It lists the following on the Watch List: Barbados, Bolivia, Brazil, Canada, Colombia, Dominican Republic, Ecuador, Egypt, Guatemala, Kuwait, Lebanon, Mexico, Pakistan, Paraguay, Peru, Romania, Thailand, Trinidad and Tobago, Turkey, Turkmenistan, the United Arab Emirates, Uzbekistan, and Vietnam. See *Digest 2007* at 605–7 and the *2020 Special 301 Report* at 4-11 and Annex 1 for additional background on the watch lists.

USTR also released its “Review of Notorious Markets for Counterfeiting and Piracy,” available at [https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20\(final\).pdf](https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20(final).pdf). The Review highlights 38 online markets and 34 physical markets that are reported to engage in or

facilitate substantial trademark counterfeiting and copyright piracy. See April 29, 2020 USTR press release, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/april/ustr-releases-annual-special-301-report-intellectual-property-protection-and-review-notorious>.

2. Investigation of China's Policies on Technology Transfer, IP and Innovation

As discussed in *Digest 2019* at 421 and *Digest 2018* at 475-77, USTR determined that China's laws, policies, practices, and actions related to technology transfer, IP, and innovation are actionable under section 301 of the Trade Act of 1974, as amended, (the "Act") (19 U.S.C. 2411) and the United States imposed (and subsequently increased) tariffs on certain goods imported from China. USTR announced that the rate of additional duty on certain products from China was reduced from 15 percent to 7.5 percent effective February 14, 2020. 85 Fed. Reg. 3741 (Jan. 22, 2020). In 2020, USTR continued its product exclusion process under which several exclusions were granted or extended. See, e.g., 85 Fed. Reg. 6674 (Feb. 5, 2020); 85 Fed. Reg. 7816 (Feb. 11, 2020); 85 Fed. Reg. 9921 (Feb. 20, 2020); 85 Fed. Reg. 10,808 (Feb. 25, 2020); 85 Fed. Reg. 15,244 (Mar. 17, 2020); 85 Fed. Reg. 17,936 (Mar. 31, 2020); 85 Fed. Reg. 72,748 (Nov. 13, 2020); 85 Fed. Reg. 73,590 (Nov. 18, 2020); 85 Fed. Reg. 85,831 (Dec. 29, 2020).

3. Investigation of Digital Services Taxes

As discussed in *Digest 2019* at 421, USTR previously investigated the digital services tax ("DST") under consideration by the Government of France. On June 5, 2020, USTR announced an investigation into the DSTs adopted or under consideration by Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom. 85 Fed. Reg. 34,709 (June 5, 2020). The Federal Register notice identifies the primary concerns that will be the focus of the investigation:

Discrimination against U.S. companies; retroactivity; and possibly unreasonable tax policy. With respect to tax policy, the DSTs may diverge from norms reflected in the U.S. tax system and the international tax system in several respects. These departures may include: Extraterritoriality; taxing revenue not income; and a purpose of penalizing particular technology companies for their commercial success.

4. Section 301 investigation to enforce U.S. WTO rights in the Large Civil Aircraft dispute

USTR completed a review of the Section 301 action to enforce U.S. WTO rights in the Large Civil Aircraft dispute and decided to increase the rate of additional duties on certain large civil aircraft, and modify the list of other products of certain current and former EU member States subject to additional 25 percent duties. 85 Fed. Reg. 10,204 (Feb. 21, 2020).

5. World Intellectual Property Organization

On March 4, 2020, the State Department issued a press statement from Secretary Pompeo, available at <https://2017-2021.state.gov/election-of-daren-tang-of-singapore-as-director-general-of-the-world-intellectual-property-organization/index.html>, congratulating Daren Tang for his election as Director General of the World Intellectual Property Organization (“WIPO”). Secretary Pompeo stated:

Mr. Tang is an effective advocate for protecting intellectual property, a vocal proponent of transparency and institutional integrity, and a leader who can unify WIPO member states by forging consensus on difficult issues. We look forward to working closely with him during his tenure as Director General to advance WIPO’s core mission of safeguarding intellectual property as a means of driving innovation, investment, and economic opportunity.

On March 5, 2020, Secretary Pompeo reiterated U.S. congratulations for Mr. Tang’s election in remarks to the press, available at <https://2017-2021.state.gov/secretary-pompeos-remarks-to-the-press/index.html>.

G. OTHER ISSUES

1. Actions related to U.S. investors and Chinese companies

On June 4, 2020, the President issued a memorandum on “Protecting United States Investors From Significant Risks From Chinese Companies.” 85 Fed. Reg. 35,171 (June 9, 2020). Section 1 of the memorandum identifies the risks posed to U.S. investors due to the Chinese government preventing Chinese companies “from abiding by the investor protections that apply to all companies listing on United States stock exchanges.” Excerpts follow from the memorandum.

* * * *

...[W]e must take firm, orderly action to end the Chinese practice of flouting American transparency requirements without negatively affecting American investors and financial markets. We must ensure that laws providing protections for investors in American financial markets are fully enforced for companies listed on United States stock exchanges.

Sec. 2. *President’s Working Group on Financial Markets.* Executive Order 12631 of March 18, 1988 (Working Group on Financial Markets), established the President’s Working Group on Financial Markets (PWG), which is chaired by the Secretary of the Treasury, or his designee, and includes the Chairman of the Board of Governors of the Federal Reserve System, the Chairman of the SEC, and the Chairman of the Commodity Futures Trading Commission, or their designees. The Secretary of the Treasury shall convene the PWG to discuss the risks to investors described in section 1 of this memorandum and other risks to American investors and

financial markets posed by the Chinese government's failure to uphold its international commitments to transparency and accountability and its refusal to permit companies to comply with United States law.

Sec. 3. Report. Within 60 days of the date of this memorandum, the PWG shall submit to the President, through the Assistant to the President for National Security Affairs and the Assistant to the President for Economic Policy, a report that includes:

(a) Recommendations for actions the executive branch may take to protect investors in United States financial markets from the failure of the Chinese government to allow PCAOB-registered audit firms to comply with United States securities laws and investor protections;

(b) Recommendations for actions the SEC or PCAOB should take, including inspection or enforcement actions, with respect to PCAOB-registered audit firms that fail to provide requested audit working papers or otherwise fail to comply with United States securities laws; and

(c) Recommendations for additional actions the SEC or any other Federal agency or department should take as a means to protect investors in Chinese companies, or companies from other countries that do not comply with United States securities laws and investor protections, including initiating a notice of proposed rulemaking that would set new listing rules or governance safeguards. Any such actions should take into account the impact on investors and ensure the continued fair and orderly operation of United States financial markets.

* * * *

Also on June 4, 2020, the State Department issued a press statement by Secretary Pompeo, applauding the requirement that companies listed on the Nasdaq comply with international and reporting standards. The press statement, available at <https://2017-2021.state.gov/new-nasdaq-restrictions-affecting-listing-of-chinese-companies/>, further states:

Nasdaq's announcement is particularly important given a pattern of fraudulent accounting practices in China-based companies. To protect American investors and U.S. national security, President Trump moved to stop the investment of U.S. federal employee retirement funds into Chinese companies. The President also instructed the Presidential Working Group on Financial Markets to study the differing practices of Chinese companies listed on the U.S. financial markets.

On June 24, 2020, August 27, 2020, and December 3, 2020, the Department of Defense released its first three lists of companies designated as Communist Chinese military companies pursuant to section 1237 of the Fiscal Year 1999 National Defense Authorization Act, P.L. 105-261 (Oct. 17, 1998), as amended. 50 U.S.C. 1701, notes. The three lists are available at https://media.defense.gov/2020/Aug/28/2002486659/-1/-1/1/LINK_2_1237_TRANCHE_1_QUALIFYING_ENTITIES.PDF, https://media.defense.gov/2020/Aug/28/2002486689/-1/-1/1/LINK_1_1237_TRANCHE-23_QUALIFYING_ENTITIES.PDF, and <https://media.defense.gov/2020/Dec/03/2002545864/-1/-1/1/TRANCHE-4-QUALIFYING-ENTITIES.PDF>.

On November 12, 2020, President Trump issued Executive Order 13959, “on Addressing the Threat from Securities Investments that Finance Communist Chinese Military Companies,” prohibiting certain investments by U.S. persons in publicly traded securities, or any securities that are derivative of, or are designed to provide investment exposure to such securities, of Communist Chinese military companies, including companies designated as such by DOD under section 1237. 85 Fed. Reg. 73,185 (Nov. 17, 2020). The prohibitions take effect on various dates starting January 11, 2021. On December 28, 2020, the Treasury Department issued its first set of “Frequently Asked Questions” (“FAQs”), providing clarifying details on implementation of the E.O. Those and subsequently issued FAQs are available at <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/5671>.*

On December 8, 2020, the State Department released a “Fact Sheet: U.S. Investors Are Funding Malign PRC Companies on Major Indices,” available at <https://2017-2021.state.gov/u-s-investors-are-funding-malign-prc-companies-on-major-indices/index.html>. On December 28, 2020, Secretary of State Pompeo issued a press statement, “Protecting U.S. Investors from Financing Communist Chinese Military Companies,” available at <https://2017-2021.state.gov/protecting-u-s-investors-from-financing-communist-chinese-military-companies/index.html>. ^(OBJ)

2. Data Privacy

On July 17, 2020, the State Department issued a press statement from Secretary Pompeo expressing disappointment that the European Court of Justice (“ECJ”) invalidated the EU-U.S. Privacy Shield framework. The press statement is available at <https://2017-2021.state.gov/european-court-of-justice-invalidates-eu-u-s-privacy-shield/index.html>.

The United States shares the values of rule of law and protection of our democracies with our partners in the European Union (EU). Therefore, we are deeply disappointed that the Court of Justice of the European Union (“ECJ”) has invalidated the EU-U.S. Privacy Shield framework. The United States is reviewing this outcome and the consequences and implications for more than 5,300 European and U.S. companies, representing millions of transatlantic jobs and over \$7.1 trillion in commercial transactions.

The United States and the EU have a shared interest in protecting individual privacy and ensuring the continuity of commercial data transfers. Uninterrupted data flows are essential to economic growth and innovation, for companies of all sizes and in every sector, which is particularly crucial now as

* Editor’s note: There were several further developments in this area in early 2021, including the issuance of Executive Order 13974 (Jan. 13, 2021), amending E.O. 13959; the issuance by Treasury of several general licenses and additional FAQs by Treasury throughout January 2021; the release of an additional list of designated companies by DoD on January 14, 2021; and the release by the State Department on January 15, 2021 of a “fact sheet” listing many subsidiaries of designated companies.

both our economies recover from the effects of the COVID-19 pandemic. This decision directly impacts both European companies doing business in the United States as well as American companies, of which over 70 percent are small and medium enterprises. The United States will continue to work closely with the EU to find a mechanism to enable the essential unimpeded commercial transfer of data from the EU to the United States.

3. Telecommunications

On August 5, 2020, the State Department issued a press statement announcing the expansion of the “Clean Network” to protect the privacy of U.S. companies and citizens from intrusions by malign actors into U.S. critical telecommunications and technology infrastructure. The press statement is available at <https://2017-2021.state.gov/announcing-the-expansion-of-the-clean-network-to-safeguard-americas-assets/> and excerpted below. The Department also issued a fact sheet on the Clean Network on August 11, 2020, which is available at <https://2017-2021.state.gov/the-clean-network-safeguards-americas-assets/>. Further information on the Clean Network is available at <https://2017-2021.state.gov/5g-clean-network/>.

* * * *

These programs are rooted in internationally accepted digital trust standards and built upon the 5G Clean Path initiative, announced on April 29, 2020, to secure data traveling on 5G networks into U.S. diplomatic facilities overseas and within the United States.

The five new lines of effort for the Clean Network are as follows:

- Clean Carrier: To ensure untrusted People’s Republic of China (PRC) carriers are not connected with U.S. telecommunications networks. Such companies pose a danger to U.S. national security and should not provide international telecommunications services to and from the United States.
- Clean Store: To remove untrusted applications from U.S. mobile app stores. PRC apps threaten our privacy, proliferate viruses, and spread propaganda and disinformation. American’s most sensitive personal and business information must be protected on their mobile phones from exploitation and theft for the CCP’s benefit.
- Clean Apps: To prevent untrusted PRC smartphone manufacturers from pre-installing –or otherwise making available for download – trusted apps on their apps store. Huawei, an arm of the PRC surveillance state, is trading on the innovations and reputations of leading U.S. and foreign companies. These companies should remove their apps from Huawei’s app store to ensure they are not partnering with a human rights abuser.
- Clean Cloud: To prevent U.S. citizens’ most sensitive personal information and our businesses’ most valuable intellectual property, including COVID-19 vaccine research, from being stored and processed on cloud-based systems accessible to our foreign adversaries through companies such as Alibaba, Baidu, and Tencent.

- Clean Cable: To ensure the undersea cables connecting our country to the global internet are not subverted for intelligence gathering by the PRC at hyper scale. We will also work with foreign partners to ensure that undersea cables around the world aren't similarly subject to compromise.

Momentum for the Clean Network program is growing. More than thirty countries and territories are now Clean Countries, and many of the world's biggest telecommunications companies are Clean Telcos. All have committed to exclusively using trusted vendors in their Clean Networks.

The United States calls on our allies and partners in government and industry around the world to join the growing tide to secure our data from the CCP's surveillance state and other malign entities. Building a Clean fortress around our citizens' data will ensure all of our nations' security.

* * * *

In 2020, the United States published numerous bilateral memoranda of understanding ("MOUs") and joint statements on the security of fifth generation wireless communication networks ("5G") including with Albania, the Republic Bulgaria, the Czech Republic, Kosovo, Latvia, Lithuania, the Republic of North Macedonia, the Slovak Republic, Slovenia and Taiwan. For example, on September 17, 2020, the State Department released in a media note the text of the MOU between the United States of America and the Republic of Lithuania on the security of 5G. The media note providing the text of the MOU is excerpted below and available at <https://2017-2021.state.gov/united-states-republic-of-lithuania-memorandum-of-understanding-on-5g-security/>.

* * * *

Taking into account that secure fifth generation wireless communications networks (5G) will be vital to both future prosperity and national security, the Republic of Lithuania and the United States declare their desire to strengthen cooperation on 5G. 5G will enable a vast array of new applications, including the provision of critical services to the public, which will benefit our citizens and our economies. Increased amounts of data on 5G networks will further interconnect the economies of the world, including the Republic of Lithuania and the United States, and facilitate cross-border services and commerce. Protecting these next generation communications networks from disruption or manipulation and ensuring the privacy and individual liberties of the citizens of the Republic of Lithuania and the United States are vital to ensuring that our citizens are able to take advantage of the tremendous economic opportunities 5G will enable.

Therefore, the Republic of Lithuania and the United States welcome efforts such as the Council of the European Union "Conclusions on the significance of 5G to the European economy and the need to mitigate security risks linked to 5G" and the "Prague Proposals" as important steps toward developing a common approach to 5G network security, and ensuring a secure, resilient, and trustworthy 5G ecosystem. These proposals emphasize the need to develop,

deploy, and commercialize 5G networks based on the foundation of free and fair competition, transparency, and the rule of law.

The Republic of Lithuania and the United States emphasize the importance of encouraging the participation of reliable and trustworthy network hardware and software suppliers in 5G markets, taking into account risk profile assessments, and promoting frameworks that effectively protect 5G networks from unauthorized access or interference. The Republic of Lithuania and the United States further recognize that 5G suppliers should provide products and services that enable innovation and promote efficiency. These products and services should also enable fair competition and encourage downstream development by the maximum number of market participants. The Republic of Lithuania and the United States each expressed their belief that all governments have a shared responsibility to undertake a careful, balanced evaluation of 5G hardware and software suppliers and supply chains to promote a secure and resilient 5G architecture.

To promote a vibrant and robust 5G ecosystem, a rigorous evaluation of suppliers should take into account the rule of law; the security environment; ethical supplier practices; and a supplier's compliance with secure standards and industry best practices. Specifically, evaluations should include the following elements:

- 1) Whether network hardware and software suppliers are subject, without independent judicial review, to control by a foreign government;
- 2) Whether network hardware and software suppliers are financed openly and transparently using standard best practices in procurement, investment, and contracting;
- 3) Whether network hardware and software suppliers have transparent ownership, partnerships, and corporate governance structures; and
- 4) Whether network hardware and software suppliers exemplify a commitment to innovation and respect for intellectual property rights.

The Republic of Lithuania and the United States believe that it is critical for countries to transition from untrusted network hardware and software suppliers in existing networks to trusted ones through regular lifecycle replacements. Such efforts will not only improve national security, but also provide opportunities for private sector innovators to succeed under free and fair competition and benefit our respective digital economies.

The Republic of Lithuania and the United States intend to cooperate in promoting investments and information sharing in the areas of information and communication technologies and cybersecurity to decrease the security risks in developing, deploying and operating 5G networks and future communication technologies. Further the Republic of Lithuania and the United States intend to collaborate on raising awareness of the importance of 5G security among the North Atlantic Treaty Organization (NATO) Allies.

* * * *

The State Department announced in a July 14, 2020 media note that the International Telecommunication Advisory Committee ("ITAC") has been renamed the International Digital Economy and Telecommunication Advisory Committee ("IDET") and its charter has been renewed for two years. The media note is available at <https://www.state.gov/renaming-of-the-international-telecommunication-advisory-committee-as-the-international-digital-economy-and-telecommunication-advisory-committee-and-renewal-of-charter/>, and excerpted below.

The IDET will provide views and advice to the Department of State on international policy issues related to the digital economy, digital connectivity, economic aspects of emerging digital technologies, telecommunications, and communication and information policy matters. The IDET includes members of the telecommunications industry; organizations, institutions, or entities with specific interests in digital economy, digital connectivity, economic aspects of emerging digital technologies, and communications and information policy matters; academia; civil society; and officials of interested government agencies. The IDET intends to meet at least three times per year.

4. Corporate Responsibility Regimes

a. Energy Resource Governance Initiative

On October 21, 2020, representatives of the governments of the United States, Peru, and Botswana signed the Energy Resource Governance Initiative (“ERGI”) memorandum of understanding (“MOU”). Australia and Canada previously signed the ERGI MOU with the United States. The media note on the signing of the MOU with Peru and Botswana, available at <https://2017-2021.state.gov/united-states-signs-memorandum-of-understanding-with-peru-and-botswana-on-critical-energy-minerals/>, explains that the MOU provides a framework for cooperating to meet the increasing global demand for critical energy minerals. The media note also states:

The Energy Resource Governance Initiative (ERGI) promotes sound mining sector governance and resilient energy mineral supply chains. This initiative brings countries together to advance governance principles, share best practices, and encourage a level playing field for investment.

b. 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. 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.

On August 21, 2020, the Kimberley Process approved an administrative decision to postpone Russia’s chairmanship until 2021, due to the COVID-19 pandemic, putting Russia in the role of “caretaker” for 2020. The administrative decision is available at <https://www.kimberleyprocess.com/en/ad-postponement-russias-chairmanship-2021-and-botswanas-chairmanship-2022>.

c. Business and Human Rights

See Chapter 6.

5. Presidential Permits

a. Policy Guidance on Cross-Border Fiber Optic and Other Telecommunications Cables

On September 4, 2020, the White House issued interim no-action guidance relating to Presidential permit requirements for certain cross-border fiber optic and other telecommunication cable under E.O. 13867. The text of the policy guidance, “Presidential permits for cross-border infrastructure: interim White House policy concerning certain terrestrial cross-border fiber optic and other telecommunications cables,” follows.

* * * *

In Section 2(b) of Executive Order (E.O.) 13867 (Apr. 10, 2019), the President designated the Secretary of State to receive applications for the issuance or amendment of Presidential permits for the construction, connection, operation, or maintenance of certain infrastructure projects at an international border of the United States. The Department of State (DOS) has recently received inquiries as to whether such permits are required for certain terrestrial telecommunications cable infrastructure crossing the U.S. border.

In 2001, the Under Secretary of State for Economic, Business and Agricultural Affairs issued guidance to the effect that a Presidential permit would not be required with respect to cross-border fiber optic and other telecommunications cables that are wrapped in protective material and laid in a trench or that are “wholly encased” in a tunnel or pipe (that is, a conduit – a tunnel or pipe with sufficient space to contain only the enclosed cables and no other items). Office of the Legal Adviser, U.S. DOS, Digest of United States Practice in International Law, 566-68 (2001), <https://2009-2017.state.gov/documents/organization/139600.pdf> (pdf pp. 590-92). Inquiries have been received about the status of this guidance in light of E.O. 13867, which revoked and superseded prior executive orders on which the 2001 guidance was based (*see* E.O. 11423 (Aug. 16, 1968), *as amended by* E.O. 12847 (May 17, 1993), and E.O. 13337 (Apr. 30, 2004)).

As further described below, the substance of the 2001 guidance remains in effect, as an interim White House policy, at this time. This interim White House policy does not apply to all terrestrial cross-border fiber optic or other telecommunications cables. Instead, the interim White House policy applies only to a cross-border fiber optic or other telecommunications cable that either (a) is wrapped in protective material and laid in a trench or (b) is wholly encased in a tunnel or pipe that acts as a conduit (that is, a tunnel or pipe with sufficient space to contain the enclosed cables and no other items). For example, the interim White House policy does not apply to tunnels that do not “wholly encase” telecommunications cables, or to tunnels that are proposed to be used for dual purposes.

If a person or entity (party) seeks to place fiber optic or other telecommunications cable infrastructure across the U.S. border that would otherwise comport with the interim White House policy, the party should comply with the following conditions:

1. The party should provide a notice to the Secretary of State specifying
 - (a) the nature and location of the proposed crossing (including a description of the cable and related infrastructure);
 - (b) the purpose of the proposed crossing; and
 - (c) information identifying all direct or indirect owners of a material interest in, and any persons or entities holding or exercising a material degree of control of, the cable and any related infrastructure (including details regarding place of incorporation or organization; ultimate ownership; ownership or control by any non-U.S. person; any special arrangements regarding control; and other relevant information, including transfer instruments as relevant).

If such information changes before or after the connection is made, the owner or operator should promptly provide supplemental notices to the Secretary of State providing such new information.

2. Owners and operators of existing and new terrestrial fiber optic or other telecommunications cable connections at the United States border may be requested at any time to provide additional information to the United States Government concerning their operations and activities.
3. The party connecting, operating, or maintaining a cross-border tunnel or pipe that wholly encases the cable should notify the Secretary of State upon cessation of the operation, connection, or maintenance of the cross-border tunnel or pipe for the transmission of data over the cable.
4. Independent of the Presidential permitting process, approval of the International Boundary and Water Commission (for the U.S.-Mexico boundary) and other appropriate authorities is required for all structures, cables, tunnels and other such facilities that cross the U.S. border.
5. The interim White House policy does not create any enforceable rights and is subject to revocation or other change at any time. For example, in the future, a Presidential permit application may be required not only for new cross-border terrestrial telecommunications cables, but for cross-border terrestrial telecommunications cables that have been laid during this interim period and for previously laid cross-border terrestrial telecommunications cables, notwithstanding the length of time that may have passed since a cable was initially connected.

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b. *Cross-border petroleum pipelines*

Pursuant to E.O. 13867, the Secretary of State received applications for, and provided foreign policy recommendations with respect to, several Presidential permits for cross-border petroleum pipelines that were issued in 2020. See NuStar Presidential Permit, issued October 5, 2020 (<https://trumpwhitehouse.archives.gov/presidential-actions/presidential-permit-100520-3/>); Front Range Pipeline Presidential Permit, issued October 5, 2020 (<https://trumpwhitehouse.archives.gov/presidential->

[actions/presidential-permit-100520-2/](https://trumpwhitehouse.archives.gov/presidential-actions/presidential-permit-100520-2/)); Express Pipeline Presidential Permit, issued October 5, 2020 (<https://trumpwhitehouse.archives.gov/presidential-actions/presidential-permit-100520/>); Keystone Presidential Permit, issued July 29, 2020 (<https://trumpwhitehouse.archives.gov/presidential-actions/presidential-permit-072920-4/>); NuStar Presidential Permit, issued July 29, 2020 (<https://trumpwhitehouse.archives.gov/presidential-actions/presidential-permit-072920-3/>); NuStar Presidential Permit, issued July 29, 2020, <https://trumpwhitehouse.archives.gov/presidential-actions/presidential-permit-072920/>

6. Committee on Foreign Investment in the United States

In a Presidential Order of March 6, 2020, “Regarding the Acquisition of StayNTouch, Inc. by Beijing Shiji Information Technology Co., Ltd.,” the President found there to be credible evidence that the acquisition of StayNTouch, Inc. (“StayNTouch”), a Delaware corporation, by Beijing Shiji Information Technology Co., Ltd., a public company organized under the laws of China, and its wholly owned direct subsidiary Shiji (Hong Kong) Ltd., a Hong Kong limited company, threatens to impair the national security of the United States; and therefore blocked the StayNTouch transaction. 85 Fed. Reg. 13,719 (Mar. 10, 2020). The Order further directs divestment and certain notifications and certifications to the Committee on Foreign Investments in the United States (“CFIUS”). *Id.*

In an August 14, 2020 Presidential Order, “Regarding the Acquisition of Musical.ly by ByteDance Ltd.,” the President found there was credible evidence that ByteDance Ltd. (“ByteDance”), an exempted company with limited liability incorporated under the laws of the Cayman Islands, through acquiring all interests in musical.ly, an exempted company with limited liability incorporated under the laws of the Cayman Islands, might take action that threatens to impair the national security of the United States. 85 Fed. Reg. 51,297 (Aug. 19, 2020). As a result of the acquisition, ByteDance merged its TikTok application with musical.ly’s social media application to create a single integrated social media application. *Id.* The order prohibits the transaction to the extent that musical.ly or any of its assets is used in furtherance or support of, or relating to, musical.ly’s activities in interstate commerce in the United States, and requires ByteDance, on any conditions that CFIUS may impose, to divest all interests and rights in certain assets or property used to enable or support ByteDance’s operation of TikTok in the United States, and any data obtained or derived from TikTok or musical.ly application users in the United States. *Id.* ByteDance and TikTok Inc., a U.S. subsidiary, filed a legal action challenging the order; that action is pending in the D.C. Circuit Court of Appeals.**

** Editor’s note: As a separate action also involving TikTok, on August 6, 2020, President Trump signed Executive Order 13942, “Addressing the Threat Posed by TikTok ...” 85 Fed. Reg. 48,637 (Aug. 11, 2020). The order prohibits certain transactions, to be identified at a later date by the Secretary of Commerce, between persons subject

In 2020, the Department of the Treasury issued several sets of new regulations, principally to further implement provisions of the Foreign Investment Risk Review Modernization Act of 2018 (“FIRRMA”). See *Digest 2018* at 486-87 for background on FIRRMA. These include:

- Regulations issued January 17, 2020, effective February 13, 2020, revising and replacing 31 CFR Part 800 and amending 31 CFR Part 801, regarding investment transactions (following a proposed rule published September 24, 2019). 85 Fed. Reg. 3112 (Jan. 17, 2020).
- Regulations issued January 17, 2020, effective February 13, 2020, creating a new 31 CFR Part 802 for real estate transactions (following a proposed rule published September 24, 2019). 85 Fed. Reg. 3158 (Jan. 17, 2020),
- Regulations issued July 28, 2020, effective August 27, 2020, revising the definition of “principal place of business” (as initially adopted in interim rules in the two sets of January 17 regulations, effective February 13, 2020) and establishing a filing fee (as proposed in a notice of proposed rulemaking of March 9, 2020, and initially adopted in an interim rule published April 29, 2020, effective May 1, 2020). 85 Fed. Reg. 45,311 (July 28, 2020).
- Regulations issued September 15, 2020, effective October 15, 2020, modifying the investment regulations including their mandatory declaration provisions (as proposed in a notice of proposed rulemaking of May 21, 2020). 85 Fed. Reg. 57,124 (Sep. 15, 2020).

to the jurisdiction of the United States and ByteDance Ltd. On September 24, 2020, the Secretary of Commerce issued an “Identification of Prohibited Transactions To Implement Executive Order 13942...” 85 Fed. Reg. 60,061. In response to several legal challenges to the Executive Order and the Identification of Prohibited Transactions, two federal district courts issued a total of three preliminary injunctions against enforcement of the prohibition. *TikTok v. Trump*, 490 F.Supp.3d 73, (D.D.C., 2020); *Marland v. Trump* 498 F.Supp.3d 624, (E.D. Pa. 2020); *TikTok v. Trump*, --- F.Supp.3d ---, (D.D.C., Dec. 7, 2020). The government appealed all three decisions. Also on August 6, 2020, President Trump signed Executive Order 13943, “Addressing the Threat Posed by WeChat...” 85 Fed. Reg. 48,641 (Aug. 11, 2020). The order prohibits transactions related to WeChat, to be identified at a later date by the Secretary of Commerce, between persons subject to the jurisdiction of the United States and Tencent Holdings Ltd. On September 18, 2020, the Secretary issued an “Identification of Prohibited Transactions to Implement Executive Order 13943,” identifying the prohibited transactions. On September 19, 2020, a federal district court issued a preliminary injunction against its enforcement. *U.S. WeChat Users Alliance v. Trump*, 488 F.Supp.3d 912 (N.D. Ca. 2020). The government appealed this preliminary injunction.

Cross References

International crime issues relating to cyberspace, **Ch. 3.B.6**

Business and human rights, **Ch. 6.H**

Country of origin markings for goods originating in the West Bank and Gaza, **Ch. 9.B.8.c**

Expropriation exception to Immunity, **Ch. 10.A.3**

Sanctions related to cyber activity, **Ch. 16.A.8 & 16.A.11**

Export controls relating to Huawei, **Ch. 16.B.1.b**

Export controls relating to theft of trade secrets by China, **Ch. 16.B.1.c**

Applicability of international law to conflicts in cyberspace, **Ch. 18.A.4.b**

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. U.S. comments to the International Law Commission regarding sea-level rise

On February 14, 2020, the United States submitted comments to the International Law Commission (“ILC”) regarding sea-level rise in relation to the Law of the Sea. The U.S. comments follow.

* * * *

The United States welcomes the opportunity to provide written comments regarding U.S. practice relevant to sea-level rise in relation to the law of the sea. The United States extends its appreciation to the co-chairs of the Study Group on Sea-Level Rise in Relation to International Law, Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patricia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria, as well as to the other members of the Commission who have participated or intend to participate in the Study Group.

The Commission has requested examples from States of their practice that may be relevant (even if indirectly) to sea-level rise or other changes in circumstances of a similar nature. The United States offers the following comments and examples of U.S. practice that may be relevant to the Commission’s work on this topic.

The rules governing coastal baselines, from which the seaward limits of maritime zones are measured, are set forth in Part II of the Law of the Sea Convention (“Convention”). The United States considers these rules to reflect customary international law.

The normal baseline is the low-water line along the coast, as described in Article 5 of the Convention. The Convention also permits the method of straight baselines, but only where the coastal geography meets certain geographic conditions set forth in Article 7 of the Convention. The United States, as a matter of longstanding practice, uses the normal baseline. This is the

practice of the United States even in locations where the coastal geography meets the conditions specified in Article 7.

Certain artificial structures, such as permanent harbor works, can be considered part of the coast for purposes of determining the low-water line from which a coastal State's maritime zones are measured.¹³ The U.S. Supreme Court has concluded that structures and installations that are "part of the land", *i.e.* those that "in some sense enclose[] and shelter[] the waters within", constitute part of the coast for purposes of determining U.S. coastal baselines.¹⁴ In contrast, offshore installations, lighthouses that are unconnected to the land, and structures such as open piers that are elevated above the surface of the water (and that do not enclose and shelter the waters within) are not considered part of the coast and, therefore, are not part of the baseline from which U.S. maritime zones are measured.

Under existing international law, coastal baselines are generally ambulatory, meaning that if the low-water line along the coast shifts (either landward or seaward), such shifts may impact the outer limits of the coastal State's maritime zones.

The United States conducts routine surveys of its coasts and evaluates potential resulting changes to its baselines. For shifts other than de minimis ones (*i.e.*, shifts that are greater than 500 meters), an interagency baseline committee reviews and approves any changes to the U.S. baselines. In these instances, any associated changes to the outer limits of maritime zones are also made on official charts. The baseline committee also reviews and approves closing lines, such as those drawn across the mouths of bays and rivers.

The United States generally considers maritime boundaries established by treaty to be final. A maritime boundary established by treaty would not be affected by any subsequent changes to the baseline points that may have contributed to the construction of a maritime boundary, unless the treaty establishing the boundary provides otherwise.

The United States recognizes that sea-level rise may lead to increases in inundation and coastal erosion, which may result in changes to baselines and the corresponding limits of a coastal State's maritime zones. In this regard, the United States supports efforts to protect States' maritime zones in a manner that is consistent with the rights and obligations of other States. Such efforts could include physical measures for coastal reinforcement, such as the construction of seawalls, and coastal ecosystem protection and restoration. The United States also supports States' negotiation and conclusion of maritime boundary agreements, as well as the delineation and publication of the limits of their maritime zones in accordance with international law as reflected in the Convention.

* * * *

b. UN General Assembly Resolution on Oceans and the Law of the Sea

On December 8, 2020, Jennifer Barber, special advisor and public delegate for the U.S. Mission to the UN, delivered remarks at a UN General Assembly debate on oceans and the Law of the Sea and on sustainable fisheries. The portion of the statement relating to oceans and the Law of the Sea is excerpted below. The portion relating to sustainable fisheries is excerpted in Chapter 13. The full statement is available at

¹³ See Convention, Article 11.

¹⁴ *U.S. v. Louisiana*, 394 U.S. 11, 36–37 (1969); see also *U.S. v. Louisiana*, 389 U.S. 155, 158 (1967).

<https://usun.usmission.gov/remarks-at-a-un-general-assembly-debate-on-oceans-and-the-law-of-the-sea-and-on-sustainable-fisheries/>.

* * * *

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.

Faced with 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.

While our concern is global, freedom of the seas is especially threatened in the South and East China Seas. The assertion of unlawful and sweeping maritime claims—including through ongoing intimidation and coercion against long-standing oil and gas development and fishing practices by others—threatens the rules-based international order that has enabled the region to prosper. States are entitled to develop and manage the natural resources subject to their sovereign rights without interference.

Our position in the South China Sea—and elsewhere in the world—is simple: the rights and interests of all nations—regardless of size, power, and military capabilities—must be respected.

As Secretary Pompeo noted in his statement on the U.S. Position on Maritime Claims in the South China Sea on July 13, 2020, “[i]n the South China Sea, we seek to preserve peace and stability, uphold freedom of the seas in a manner consistent with international law, maintain the unimpeded flow of commerce, and oppose any attempt to use coercion or force to settle disputes. We share these deep and abiding interests with our many allies and partners who have long endorsed a rules-based international order.”

In this regard, we call on all States to resolve their territorial and maritime disputes peacefully and free from coercion, as well as 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 settle disputes peacefully in accordance with international law. We call on all states to ensure effective implementation of international law applicable to combating piracy, and to unite in the deterrence, prevention, and prosecution of transnational criminal organizations and those engaging in transnational crime at sea.

The United States values the platform that the General Assembly provides to elevate important ocean issues. The annual oceans and the law of the sea resolution serves as an opportunity for the global community to identify key ocean issues and develop constructive ways to address them.

Although this year’s resolution is a technical rollover from last year’s text because of the pandemic, with much of its text remaining the same as last year, delegations nevertheless succeeded in moving forward important processes and in recognizing a significant achievement in the international community’s understanding of the state of our ocean – the second World Ocean Assessment.

The United States expresses its sincere appreciation to the Co-Chairs, the Group of Experts, the Pool of Experts, the Bureau, the Secretariat, and all Member States, who demonstrated a shared commitment to completing the second World Ocean Assessment, and we welcome the beginning of the third cycle of the Regular Process. We believe a solid foundation has been built for the third cycle to make further strides in strengthening the scientific assessment of the state of the marine environment in order to enhance the scientific basis for policymaking. The World Ocean Assessment has a critical role to play in informing us all of the pressures our ocean is facing, and we look forward to continuing to work with our colleagues through the Regular Process to maximize its reach and impact.

* * * *

2. Maritime Claims

a. *China's unlawful maritime claims*

On July 1, 2020, U.S. Representative to the UN Kelly Craft conveyed to UN Secretary-General António Guterres a letter regarding Note Verbale No. CML/14/2019 sent by the People's Republic of China in response to Malaysia's submission to the Commission on the Limits of the Continental Shelf ("CLCS") on December 12, 2019. The letter is excerpted below and available at <https://usun.usmission.gov/protesting-chinas-unlawful-maritime-claims-at-the-un/>.

* * * *

... The present communication concerns only the views expressed by China regarding its maritime claims in the South China Sea and does not comment on Malaysia's submission to the CLCS. As China's note asserts excessive maritime claims that are inconsistent with the international law of the sea as reflected in the 1982 Law of the Sea Convention (hereinafter "the Convention"), and as those claims purport to unlawfully interfere with the rights and freedoms enjoyed by the United States and all other States, the United States considers it essential to reiterate its formal protests of these unlawful assertions and describe the relevant international law of the sea as reflected in the Convention.

In its note, China makes the following assertions:

- China has sovereignty over Nanhai Zhudao, consisting of Dongsha Qundao, Xisha Qundao, Zhongsha Qundao and Nansha Qundao;
- China has internal waters, territorial sea and contiguous zone, based on Nanhai Zhudao;
- China has exclusive economic zone and continental shelf, based on Nanhai Zhudao;
- China has historic rights in the South China Sea.

China made similar assertions immediately following the July 12, 2016 award in *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)* issued by an arbitral tribunal constituted under Part XV of the Convention (hereinafter "the

Tribunal”). The United States objected to those assertions in a demarche and note verbale on December 28, 2016 (enclosed).¹⁵

The United States reiterates its prior objections to China’s maritime claims.

Specifically, the United States objects to China’s claim to “historic rights” in the South China Sea to the extent that claim exceeds the maritime entitlements that China could assert consistent with international law as reflected in the Convention.¹⁶ The United States notes in this regard that the Tribunal unanimously concluded in its ruling—which is final and binding on China and the Philippines under Article 296 of the Convention—that China’s claim to historic rights is incompatible with the Convention to the extent it exceeds the limits of China’s possible maritime zones as specifically provided for in the Convention.

Additionally, the United States reiterates its prior objections to any claim of internal waters between the dispersed islands China claims in the South China Sea, and to any claim of maritime zones derived from treating island groups in the South China Sea as a collective. The Convention clearly and comprehensively regulates the circumstances under which coastal States can deviate from the normal baseline. Article 5 of the Convention provides, in express and unambiguous terms, that the normal baseline applies “[e]xcept where otherwise provided in this Convention.” No provision of the Convention establishes an applicable exception to the normal baseline that would allow China to enclose within a system of straight or archipelagic baselines the dispersed islands and other features over which China asserts sovereignty in the South China Sea. Moreover, the United States objects to any claimed maritime entitlements based on features that are not islands within the meaning of Article 121(1) of the Convention¹⁷ and thus do not generate maritime zones of their own under international law. China may not assert sovereignty over, or claim maritime zones derived from, entirely submerged features like Macclesfield Bank or James Shoal, or features like Mischief Reef and Second Thomas Shoal, which in their natural state are low-tide elevations¹⁸ that lie beyond a lawfully generated territorial sea entitlement. Such features do not form part of the land territory of a State in a legal sense, meaning that they are not subject to appropriation and cannot generate a territorial sea or other maritime zones under international law.¹⁹ These positions are consistent with the decision of the Tribunal in *The South China Sea Arbitration*.

In asserting such vast maritime claims in the South China Sea, China purports to restrict the rights and freedoms, including the navigational rights and freedoms, enjoyed by all States. The United States objects to these claims to the extent they exceed the entitlements China could

¹⁵ The note was subsequently published in the *Digest of United States Practice in International Law* (2016), at 520-22....

¹⁶ A detailed assessment of China’s South China Sea maritime claims was published in 2014 in the U.S. Department of State publication *Limits in the Seas No. 143—China: Maritime Claims in the South China Sea*, available at <https://www.state.gov/wp-content/uploads/2019/10/LIS-143.pdf>. That publication continues to reflect the views of the United States regarding the unlawfulness of China’s claim of “historic rights” in the South China Sea.

¹⁷ An island is defined in Article 121(1) of the Convention as “a naturally formed area of land, surrounded by water, which is above water at high tide.”

¹⁸ As reflected in Convention Article 13(1), “[a] low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide.”

¹⁹ Thus, with respect to the assertion that “China has sovereignty over Nanhai Zhudao, consisting of Dongsha Qundao, Xisha Qundao, Zhongsha Qundao and Nansha Qundao” the United States observes that while China and other South China Sea claimants assert competing territorial claims to islands situated within the South China Sea, no State could lawfully assert a territorial or sovereignty claim to features that are not islands (within the meaning of Article 121(1) of the Convention) or to maritime areas beyond the territorial sea generated from the normal baseline (or other applicable baseline as reflected in the rules of the Convention) of such individual islands.

claim under international law as reflected in the Convention. The United States notes that the governments of the Philippines,²⁰ Vietnam,²¹ and Indonesia²² have separately conveyed their legal objections to the maritime claims set out in China's Note Verbale No. CML/14/2019. The United States again urges China to conform its maritime claims to international law as reflected in the Convention; to comply with the Tribunal's July 12, 2016 decision; and to cease its provocative activities in the South China Sea.

* * * *

On July 13, 2020, the State Department issued a press statement by Secretary Pompeo repeating the U.S. position on maritime claims in the South China Sea. That statement is available at <https://2017-2021.state.gov/u-s-position-on-maritime-claims-in-the-south-china-sea/> and excerpted below.

* * * *

The United States champions a free and open Indo-Pacific. Today we are strengthening U.S. policy in a vital, contentious part of that region — the South China Sea. We are making clear: Beijing's claims to offshore resources across most of the South China Sea are completely unlawful, as is its campaign of bullying to control them.

In the South China Sea, we seek to preserve peace and stability, uphold freedom of the seas in a manner consistent with international law, maintain the unimpeded flow of commerce, and oppose any attempt to use coercion or force to settle disputes. We share these deep and abiding interests with our many allies and partners who have long endorsed a rules-based international order.

These shared interests have come under unprecedented threat from the People's Republic of China (PRC). Beijing uses intimidation to undermine the sovereign rights of Southeast Asian coastal states in the South China Sea, bully them out of offshore resources, assert unilateral dominion, and replace international law with "might makes right." Beijing's approach has been clear for years. In 2010, then-PRC Foreign Minister Yang Jiechi told his ASEAN counterparts that "China is a big country and other countries are small countries and that is just a fact." The PRC's predatory world view has no place in the 21st century.

The PRC has no legal grounds to unilaterally impose its will on the region. Beijing has offered no coherent legal basis for its "Nine-Dashed Line" claim in the South China Sea since formally announcing it in 2009. In a unanimous decision on July 12, 2016, an Arbitral Tribunal

²⁰ The Philippines Note No. 000191-2020 (March 6, 2020), available at https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_03_06_PHL_NV_UN_001.pdf.

²¹ Vietnam Note No. 22/HC-2020 (March 30, 2020), available at https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/VN20200330_ENG.pdf.

²² Indonesia Note No. 126/POL-703/V/20 (May 26, 2020), available at https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_05_26_IDN_NV_UN_001_English.pdf.

constituted under the 1982 Law of the Sea Convention – to which the PRC is a state party – rejected the PRC’s maritime claims as having no basis in international law. The Tribunal sided squarely with the Philippines, which brought the arbitration case, on almost all claims.

As the United States has previously stated, and as specifically provided in the Convention, the Arbitral Tribunal’s decision is final and legally binding on both parties. Today we are aligning the U.S. position on the PRC’s maritime claims in the SCS with the Tribunal’s decision. Specifically:

- The PRC cannot lawfully assert a maritime claim – including any Exclusive Economic Zone (EEZ) claims derived from Scarborough Reef and the Spratly Islands – vis-a-vis the Philippines in areas that the Tribunal found to be in the Philippines’ EEZ or on its continental shelf. Beijing’s harassment of Philippine fisheries and offshore energy development within those areas is unlawful, as are any unilateral PRC actions to exploit those resources. In line with the Tribunal’s legally binding decision, the PRC has no lawful territorial or maritime claim to Mischief Reef or Second Thomas Shoal, both of which fall fully under the Philippines’ sovereign rights and jurisdiction, nor does Beijing have any territorial or maritime claims generated from these features.
- As Beijing has failed to put forth a lawful, coherent maritime claim in the South China Sea, the United States rejects any PRC claim to waters beyond a 12-nautical mile territorial sea derived from islands it claims in the Spratly Islands (without prejudice to other states’ sovereignty claims over such islands). As such, the United States rejects any PRC maritime claim in the waters surrounding Vanguard Bank (off Vietnam), Luconia Shoals (off Malaysia), waters in Brunei’s EEZ, and Natuna Besar (off Indonesia). Any PRC action to harass other states’ fishing or hydrocarbon development in these waters – or to carry out such activities unilaterally – is unlawful.
- The PRC has no lawful territorial or maritime claim to (or derived from) James Shoal, an entirely submerged feature only 50 nautical miles from Malaysia and some 1,000 nautical miles from China’s coast. James Shoal is often cited in PRC propaganda as the “southernmost territory of China.” International law is clear: An underwater feature like James Shoal cannot be claimed by any state and is incapable of generating maritime zones. James Shoal (roughly 20 meters below the surface) is not and never was PRC territory, nor can Beijing assert any lawful maritime rights from it.

The world will not allow Beijing to treat the South China Sea as its maritime empire. America stands with our Southeast Asian allies and partners in protecting their sovereign rights to offshore resources, consistent with their rights and obligations under international law. We stand with the international community in defense of freedom of the seas and respect for sovereignty and reject any push to impose “might makes right” in the South China Sea or the wider region.

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b. Croatia

On February 4, 2020, Croatia delivered Note Verbale No. 591/KM/2020 to the United States about the January 30th passage of the USS Carson City in Croatian territorial waters without what Croatia claimed to be legally required prior notification. The U.S. reply to Croatian officials follows.

* * * *

The Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs and has the honor to refer to Note Verbale No. 591/KM/2020 regarding the navigation of U.S. warships through Croatia's territorial sea without prior notification to the Republic of Croatia. Under international law as reflected in the 1982 Law of the Sea Convention ("Convention"), all ships, including warships, enjoy the right of innocent passage through the territorial sea. International law does not permit a coastal State to condition the exercise of the right of innocent passage by any ships, including warships, on the provision of prior notification to the coastal State.

In reference to the requirement for prior notification contained in the Maritime Code of the Republic of Croatia for foreign warships exercising the right of innocent passage, the United States considers this requirement to be inconsistent with international law as reflected in the Convention. The United States will continue to exercise the right of innocent passage in accordance with its rights and obligations under international law.

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c. *Limits in the Seas Studies*

In 2020, the U.S. Department of State published five studies examining the maritime claims and boundaries of coastal States as part of its *Limits in the Seas* series. These studies are issued by the Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental and Scientific Affairs in the Department of State to provide the views of the United States Government regarding the consistency of such claims with international law. The five studies assess the maritime claims and boundaries of the following coastal States: Marshall Islands, Kiribati, Ecuador, Norway, and Spain. The reports are available at <https://www.state.gov/limits-in-the-seas/>.

3. Maritime Boundaries

On October 1, 2020, the State Department issued a press statement, welcoming the decision by the Governments of Israel and Lebanon to begin discussions on their maritime boundary with the United States as a mediator and facilitator. The press statement, available at <https://2017-2021.state.gov/framework-agreement-for-israel-lebanon-maritime-discussions//index.html>, notes that the United States brokered the agreement on a framework for discussions after three years of diplomatic engagement. The press statement describes the framework agreement and the ongoing involvement of the United States in the talks:

The agreement between the two parties on a common framework for maritime discussions will allow both countries to begin discussions, which have the potential to yield greater stability, security, and prosperity for Lebanese and Israeli citizens alike. Today's announcement is a vital step forward that serves the interests of Lebanon and Israel, of the region, and of the United States. Both

countries requested that the United States participate as mediator and facilitator in the maritime discussions. The United States looks forward to commencement of the maritime boundary discussions soon, to be held in Naqoura, Lebanon under the U.N. flag and hosted by the staff from the Office of the U.N. Special Coordinator for Lebanon (UNSCOL).

Also on October 1, 2020, Assistant Secretary for Near Eastern Affairs David Schenker held a special briefing on the framework agreement for Israel-Lebanon maritime discussions. The transcript of the briefing is available at <https://2017-2021-translations.state.gov/2020/10/01/briefing-with-assistant-secretary-for-near-eastern-affairs-david-schenker-on-the-framework-agreement-for-israel-lebanon-maritime-discussions//index.html>.

On October 14, 2020, representatives from the governments of Israel, Lebanon, and the United States began discussions on the Israel-Lebanon maritime boundary. A U.S. delegation mediated and facilitated the talks, and UN Special Coordinator for Lebanon (“UNSCOL”) Jan Kubis hosted. See joint statement by the United States and UNSCOL, available at <https://2017-2021.state.gov/joint-statement-on-the-launch-of-the-israel-lebanon-maritime-talks//index.html>.

Negotiations continued October 28 and 29, 2020. See October 29, 2020 joint statement by the United States and UNSCOL, available at <https://2017-2021.state.gov/joint-statement-on-the-israel-lebanon-maritime-talks//index.html>. On November 11, 2020, further negotiations were held. See November 11, 2020 joint statement, available at <https://2017-2021.state.gov/joint-statement-on-the-israel-lebanon-maritime-talks-2//index.html>.

As of the end of 2020, the parties remained far apart. See December 22, 2020 State Department press statement, available at <https://2017-2021.state.gov/israel-lebanon-maritime-negotiations//index.html>. The December 22, 2020 press statement also offers that, “The United States remains ready to mediate constructive discussions and urges both sides to negotiate based on the respective maritime claims both have previously deposited at the United Nations.”

4. Marine Scientific Research

On September 9, 2020, President Donald J. Trump signed Proclamation 10071, “Revision to United States Marine Scientific Research Policy,” which revised U.S. policy on marine scientific research (“MSR”). 85 Fed. Reg. 59,165 (Sep. 18, 2020). The revised policy provides, in Section 1 of the Proclamation that,

The United States will exercise its right to regulate, authorize, and conduct marine scientific research, with a specific requirement to authorize, in advance, all instances of foreign marine scientific research, in the United States [exclusive economic zone, or “EEZ”] and on its continental shelf to the extent permitted under international law.

With respect to the applicable international law, the Proclamation refers to the 1982 UN Convention on the Law of the Sea, which “generally reflects customary international law.” Part XIII of the Convention governs matters related to MSR. The text of the Proclamation is excerpted below.

The revised policy covers areas of U.S. continental shelf, including continental shelf areas beyond 200 nautical miles from the territorial sea baselines. Because the outer limits of the U.S. continental shelf beyond 200 nautical miles have not yet been published, the Department has provided guidance to applicants with respect to any MSR conducted on the U.S. continental shelf beyond 200 nautical miles from the territorial sea baselines in the Arctic Ocean, Atlantic Ocean, Bering Sea, and Gulf of Mexico. The guidance is available at <https://www.state.gov/research-application-tracking-system/>. On September 16, 2020, the State Department issued a media note regarding the revised U.S. marine scientific research policy, available at <https://2017-2021.state.gov/on-presidential-revisions-to-the-u-s-marine-scientific-research-policy-by-the-president-of-the-united-states/> (not excerpted herein).

* * * *

The United Nations Convention on the Law of the Sea of 10 December 1982 (Convention) generally reflects customary international law. Section 3 of Part XIII of the Convention provides that coastal states, in the exercise of their jurisdiction, have the right to regulate, authorize, and conduct marine scientific research in their Exclusive Economic Zone (EEZ) and on their continental shelf. Marine scientific research in the EEZ or on the continental shelf shall be conducted with the consent of the coastal state.

In Proclamation 5030 of March 10, 1983 (Exclusive Economic Zone of the United States of America), the President announced the establishment of the EEZ of the United States. The Proclamation asserts the sovereign rights and jurisdiction of the United States in its EEZ and confirms the rights and freedoms of all states, as provided under international law. In an accompanying Presidential Statement of March 10, 1983 (United States Oceans Policy), the President acknowledged that international law allows coastal states to exercise jurisdiction over marine scientific research in their respective EEZs, but stated that the United States had elected not to do so to the fullest extent permitted under international law, in an effort to encourage such research. Presidential Decision Directive–36 of April 5, 1995 (United States Policy on Protecting the Ocean Environment), emphasizes that the policy of the United States is to protect and monitor the ocean and coastal environment and conserve living marine resources, recognizing that doing so, in an open and collaborative manner, supports our economic and national security interests.

In Executive Order 13840 of June 19, 2018 (Ocean Policy to Advance the Economic, Security, and Environmental Interests of the United States), I reaffirmed that the United States will continue to promote lawful use of the ocean by agencies, including the Armed Forces, and that the United States will continue to exercise its rights and jurisdiction and perform duties in accordance with applicable international law, including customary international law. Further, the United States will use the best available ocean-related science and knowledge, in partnership with the science and technology communities, to inform decisions and enhance entrepreneurial

opportunities. In the Presidential Memorandum of November 19, 2019 (Ocean Mapping of the United States Exclusive Economic Zone and the Shoreline and Nearshore of Alaska), I affirmed the importance of understanding our ocean systems and natural resources to our security, economic, and environmental interests.

Likewise, the exercise of jurisdiction by the United States over marine scientific research in its EEZ and on its continental shelf will result in greater access to data collected during such research and will increase maritime domain awareness, thereby reducing potential exposure to security, economic, and environmental risks.

* * * *

Sec. 2. Implementation. The Secretary of State (Secretary) shall have lead responsibility for implementing this proclamation, in consultation with relevant executive departments and agencies (agencies) and with the Ocean Policy Committee established in Executive Order 13840 (Ocean Policy Committee).

Sec. 3. Intelligence. The Intelligence Community of the Federal Government shall support the implementation of this proclamation, as appropriate.

Sec. 4. Information Sharing. To facilitate the process for reviewing applications for marine scientific research, agencies not part of the Intelligence Community shall share information related to marine scientific research with the Department of State, to the maximum extent authorized by law.

* * * *

5. Maritime Drug Law Enforcement

On March 18, 2020, the United States filed a brief in the U.S. Court of Appeals for the First Circuit in *United States v. Aybar-Ulloa*, No. 15-2377, a case involving international law issues related to the U.S. exercise of jurisdiction over persons on stateless vessels found to be engaged in drug trafficking. Excerpts follow from the U.S. brief. The First Circuit heard oral argument on the case on June 23, 2020.*

* * * *

For 40 years, the Maritime Drug Law Enforcement Act (MDLEA) and its predecessor have played a vital role in law-enforcement efforts to curtail maritime drug trafficking, an activity that Congress has found to present “a serious international problem” and “a specific threat to the security and societal well-being of the United States.” 46 U.S.C. § 70501(1). Congress was particularly focused on the need to prosecute those who traffic drugs aboard stateless vessels in cases where evidence of a U.S. destination or other U.S. nexus may be lacking. *See United States v. Howard-Arias*, 679 F.2d 363, 369-72 (4th Cir. 1982). For the last four decades, the federal courts of appeals have uniformly upheld Congress’s authority to reach that core class of misconduct, both under Article I of the Constitution and under principles of international law governing stateless vessels. *See* U.S. Supp. Br. 1.

* Editor’s note: The First Circuit Court of Appeals issued its en banc decision on January 25, 2021, affirming the conviction of Aybar-Ulloa.

Aybar offers no sound reason for this Court to deviate from that consensus. His argument that the Felonies Clause is limited to crimes that have a case-specific nexus to the United States or have attained universal jurisdiction under international law finds no support in the Clause's text and is in tension with its drafting history and actions of the First Congress. International law does not limit Congress's Felonies Clause power, but even assuming it did, application of the MDLEA in this case conforms to the settled principle that all nations have the authority to apply their criminal laws to a stateless vessel and its crew operating beyond the territorial waters of any nation. Application of the MDLEA in this case is also consistent with the protective principle, especially in light of Congress's findings. Aybar provides no basis to conclude otherwise, and he likewise cannot justify jettisoning the soundly reasoned precedents that have governed these issues for decades. As did the panel, *United States v. Aybar-Ulloa*, 913 F.3d 47 (1st Cir. 2019), the *en banc* Court should reaffirm that the MDLEA is a constitutional exercise of Congress's Article I powers as applied to Aybar and should affirm his convictions.

ARGUMENT

I. Although The Felonies Clause Does Not Incorporate International-Law Limits, The MDLEA Would Satisfy Any Such Limit When Applied To Drug Trafficking Aboard A Stateless Vessel On The High Seas.

As explained in the government's supplemental brief (at 18-20), the Felonies Clause in Article I, § 8, cl. 10 does not incorporate international-law limits on prescriptive jurisdiction. Aybar's contrary position engrafts onto the Felonies Clause words not found in the constitutional text and lacks support in the Clause's drafting history. But to the extent this Court holds or assumes that principles of prescriptive jurisdiction under international law are relevant in construing the Felonies Clause, those principles are satisfied in cases involving drug trafficking aboard stateless vessels operating beyond the territorial sea of any state.

A. Congress's Authority Under The Felonies Clause Is Not Limited By International Law

Article I, § 8, cl. 10 of the Constitution empowers Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." Aybar urges (Supp. Br. 5-6, 8-9) this Court to read international law limits into this provision by restricting Congress's powers under the Felonies Clause to offenses that have "attained universal jurisdiction" or involve conduct that "bears a nexus to the United States." His arguments do not withstand scrutiny.

Aybar's argument—which tracks the panel dissent and a previous dissent by Judge Torruella, *see United States v. Cardales-Luna*, 632 F.3d 731, 740-45 (1st Cir. 2011)—relies on two law review articles by the same law professor. *See* E. Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 Minn. L. Rev. 1191 (2009); E. Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 Nw. U. L. Rev. 149 (2009).

As Professor Kontorovich himself acknowledges, however, his interpretation encounters a serious threshold problem: it finds little support in the constitutional text. *See Define and Punish Clause, supra*, at 152 ("the text itself * * * contains no explicit jurisdictional limits"); *Article I Horizon, supra*, at 1195 (interpretation is "only suggested by the text"); *id.* at 1208 (accepting that "the evidence for this proposition as an original matter is not entirely compelling"). This Court has previously recognized that the nexus requirement Aybar proposes lacks a basis in the constitutional text, explaining that "the [Felonies] Clause does not explicitly

require a nexus between the unlawful conduct committed on the high seas and the United States be established before Congress can punish that conduct.” *United States v. Nueci-Peña*, 711 F.3d 191, 198 (1st Cir. 2013); see *United States v. Saac*, 632 F.3d 1203, 1209-10 (11th Cir. 2011) (same); cf. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) (explaining that the Commerce Power, “like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution”).

Aybar’s proposed universality limitation fares no better. Textually, the provision at issue references international law (“Law of Nations”) in the Offences Clause but not in the Felonies Clause. Moreover, the Framers deliberately empowered Congress to “define” felonies on the high seas. See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158-59 (1820). The term “felony” had no settled international definition at the Founding, and Framers such as James Madison resisted enshrining in the Constitution even the British understanding of the term, which would have been most familiar to that generation. See U.S. Supp. Br. 17-19; see also, e.g., S. Cleveland & W. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 Yale L.J. 2202, 2226 (2015) (Madison “did not think that felonies should be defined by English law”). And, while Professor Kontorovich makes much of the Felonies Clause’s placement alongside the universally punishable crime of piracy, see *Define and Punish Clause*, *supra*, at 167-68, he does not provide a sound explanation for why Founders who declined to adopt the relatively familiar British definition of felony would have instead tied Congress’s powers to the more amorphous body of international law—much less to a jurisdictional basis (universality) that remained unsettled well into the 20th century. See Restatement (Second) of the Foreign Relations Law of the United States § 34 reporters’ n.2 (1965).

Aybar’s (and Kontorovich’s) proposed universality limitation has two additional problems. First, it is hard to square with legislation enacted by the First Congress, a source the Supreme Court has afforded significant weight in construing the Constitution. See *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986) (decisions by the First Congress “provide[] contemporaneous and weighty evidence of the Constitution’s meaning since many of the Members of the First Congress had taken part in framing that instrument”) (internal quotation marks omitted). Pertinent here, the Crimes Act of 1790 included a provision punishing “any seaman or other person [who] commit[s] manslaughter upon the high seas.” Ch. 9, § 12, 1 Stat. 112, 115; see *United States v. Campbell*, 743 F.3d 802, 811 (11th Cir. 2014); *United States v. Suerte*, 291 F.3d 366, 372 (5th Cir. 2002). Congress would have enacted this prohibition under the Felonies Clause, since manslaughter was neither piracy, see *Smith*, 18 U.S. (5 Wheat.) at 160, nor an offense against the law of nations, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004). And because manslaughter was not (and is not) a universal-jurisdiction crime, see Restatement (Fourth) § 413, Congress could have used its Felonies Clause power in this way only if, contrary to Aybar’s contention, that Clause does *not* contain an implicit universal-jurisdiction limit.

Second, the proposed universality limitation would lead to stark—and potentially anomalous—consequences. It would at a minimum mean that Congress cannot criminalize under the Felonies Clause drug trafficking aboard a vessel lacking a nexus to the United States even when the vessel’s flag state consents to the United States’ exercise of authority. But see *United States v. Robinson*, 843 F.2d 1, 4 (1st Cir. 1988) (Breyer, J.) (deeming consent sufficient under international law); *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999) (same); Restatement (Fourth) § 406 reporters’ n.2 (same).

The remaining consequences of Aybar's rule would depend on whether his limitation reflects universal jurisdiction as understood at the Founding or instead extends to "all offenses that the contemporary international law treats as universally cognizable." *Article I Horizon*, *supra*, at 1218. As Professor Kontorovich acknowledges, if Congress is limited to the Founding-era understanding, then "piracy is the one and only offense which Congress can ever punish without a U.S. nexus," *id.* at 1217-18; on that view, the Felonies Clause would add no additional authority. But even if universality expanded "to keep up with external changes in international law," *id.* at 1218, Aybar's position would still mean that Congress is disabled from acting under the Felonies Clause unless and until an international consensus develops that particular misconduct satisfies the criteria for universal jurisdiction—something that can take decades, if not centuries, to materialize. *Compare id.* at 1215-17 (explaining Congress's efforts to ban the slave trade in the early 1800s), *with* Restatement (Second) § 34 reporters' n.2 (as of 1965, the "universal interest in the suppression of slavery * * * ha[d] not as yet been carried to the point of recognizing * * * the principle of universal jurisdiction").

The series of Supreme Court decisions cited by Aybar (and the panel dissent, 913 F.3d at 59-60) also do not support his proposed rule. Decisions such as *United States v. Palmer*, 16 U.S. (3 Wheat) 610 (1818), and *United States v. Furlong*, 18 U.S. (5 Wheat) 184 (1820), centered on questions of statutory construction under early federal laws criminalizing piracy and murder. *See Nueci-Peña*, 711 F.3d at 198 n.7 (discussing *Furlong*); *Saac*, 632 F.3d at 1209-10 (same); *Campbell*, 743 F.3d at 811-12 (*Palmer*). They did not address Congress's constitutional authority generally or its Felonies Clause power specifically. *See Smith*, 18 U.S. (5 Wheat.) at 158 (noting that, "notwithstanding a series of contested adjudications" under the early piracy law, "no doubt has hitherto been breathed of its conformity to the constitution"). Indeed, to the extent those decisions are relevant here, it is because they reflect the application of federal laws to acts aboard ships equivalent to today's stateless vessels, even where those same laws did not extend to analogous acts aboard a foreign-flagged ship. *See* U.S. Supp. Br. 37-38.

B. Longstanding Principles Recognizing Jurisdiction Over Stateless Vessels Satisfy Any International-Law Limits Applicable To The Felonies Clause

Even if Congress's powers under the Felonies Clause are limited by principles of prescriptive jurisdiction under international law, Aybar fails to establish that universal jurisdiction is the only category relevant to sustaining the MDLEA's application to his criminal conduct—*viz.*, drug trafficking on a stateless vessel. As the government has explained (U.S. Supp. Br. 21-28), the statute's application here is fully consistent with the longstanding recognition in international law that any nation may apply its laws to a stateless vessel operating beyond the territorial sea of any state. *See also id.* at 28-35; Part II, *infra* (addressing the protective principle). Aybar's efforts to avoid that settled principle are unavailing.

1. Aybar contends (Supp. Br. 40-41) that a nation cannot assert authority over a vessel based on its stateless status because the operation of a stateless vessel, without more, is not a universal jurisdiction crime. That contention rests on the mistaken premise that a state's authority over a vessel and its crew must fall within one of the five "traditional bases of prescriptive jurisdiction" under international law, *United States v. Matos-Luchi*, 627 F.3d 1, 11 n.10 (1st Cir. 2010) (Lipez, J., dissenting)—and, in particular, the universality principle. As the government has shown, international law treats state authority over vessels as a "*sui generis*" category that "do[es] not map neatly onto the general bases of prescriptive jurisdiction." Restatement (Fourth) § 408 cmt. b; *id.* § 407 cmt. c; *accord* Restatement (Third) of the Foreign Relations Law of the United States § 402 reporters' n.4 (1987). And the relevant rule within that *sui generis* category

is “that international law permits any nation to subject stateless vessels on the high seas to its jurisdiction.” *United States v. Marino-Garcia*, 679 F.2d 1373, 1383 (11th Cir. 1982); see *United States v. Victoria*, 876 F.2d 1009, 1010-11 (1st Cir. 1989) (Breyer, J.) (same, and collecting cases).

In resisting that rule, Aybar faults (Supp. Br. 39-40) the pathmarking decision in *Marino-Garcia* for equating “the lack of a restriction” on a nation’s authority to regulate stateless vessels with an affirmative “grant of authority.” That line of argument inverts the foundational *Lotus* principle of international law, under which state actions not barred by a specific international rule are generally permitted. See U.S. Supp. Br. 47. Regardless, the Eleventh Circuit in *Marino-Garcia* identified a specific domestic law grant of authority, see 679 F.2d at 1382 n.16 (citing U.S. Const. art. I, § 8, cl. 10), and relied on treatises that themselves speak of state authority in affirmative terms. See H. Meyers, *The Nationality of Ships* 320 (1967) (“[A]ny state may prescribe [law] for the ship-users [of a stateless vessel], and the state first to take action on board may take enforcement measures.”); M. McDougal & W. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* 1084 (1962) (“So great a premium is placed upon the certain identification of vessels for purposes of maintaining minimum order upon the high seas * * * that extraordinary deprivational measures are permitted with respect to stateless ships.”).

Those sources, moreover, accord with developments indicating that an international legal consensus with respect to stateless vessels had further crystallized by the time Congress enacted the MDLEA in 1986. See U.S. Supp. Br. 24 n.10. Specifically, while Article 22(1) of the 1958 High Seas Convention had recognized a nation’s authority to board a foreign ship on the high seas in only three situations, the 1982 U.N. Convention on the Law of the Sea (UNCLOS) added “[r]ight of visit” authority to board a vessel when the approaching ship has “reasonable ground for suspecting that * * * the ship is without nationality.” UNCLOS, Art. 110(1). The strong “implication” of that provision, as another treatise recognizes, is that “any State may assert legislative and enforcement jurisdiction over the [stateless] vessel and its crew.” 1 T. Schoenbaum, *Admiralty & Maritime Law* § 2:19 (6th ed. 2018).

Echoing the panel dissent, Aybar also asserts (Supp. Br. 41) that applying the MDLEA to those aboard a stateless vessel “would convert the operation of [such a] vessel into a universal jurisdiction crime.” *Aybar-Ulloa*, 913 F.3d at 63 (Torruella, J., dissenting). That is incorrect. The MDLEA proscribes not the operation or “piloting” of a ship, see *id.*, but *drug trafficking* aboard certain vessels, including ones that qualify as stateless (“without nationality”). 46 U.S.C. §§ 70502(b) & (c), 70503(a)(1). The vessel’s stateless status is simply what renders it “subject to action by all nations proscribing certain activities aboard stateless vessels and subjects those persons aboard to prosecution for violating th[ose independent] proscriptions.” *Marino-Garcia*, 679 F.2d at 1383.

2. Aybar separately contends (Supp. Br. 31-32, 39-43) that, even if international law recognizes a nation’s authority over stateless vessels, the MDLEA exceeds the bounds of that rule because its definition of a “vessel without nationality,” 46 U.S.C. § 70502(d)(1), is broader than statelessness under international law. As the government has explained, this Court should not reach that contention, which Aybar did not develop until the *en banc* stage. U.S. Supp. Br. 24-25. In any event, the argument lacks merit. See *id.* at 25-28.

According to Aybar (Supp. Br. 41-42), the MDLEA provision relevant here (46 U.S.C. § 70502(d)(1)(B)) contravenes international law by placing the burden on the vessel’s occupants to establish its nationality, thereby permitting the United States to treat as stateless a vessel that

actually has a nationality but is unable to demonstrate it. The scenario that Aybar describes is a far cry from the facts of his as-applied constitutional challenge. AA70; SA169. And he identifies no case in which a vessel's master refused to make a claim of nationality "on request of [the U.S.] officer," 46 U.S.C. § 70502(d)(1)(B), but the MDLEA defendant later asserted—and a foreign country validated—a claim of vessel nationality for the first time in advance of trial.

Regardless, the applicable MDLEA provision conforms to international law. As this Court explained in *Matos-Luchi*, it is not enough under international law "that a vessel have a nationality; she must claim it and be in a position to provide evidence of it." 627 F.3d at 6 (quoting Anderson, *Jurisdiction over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law*, 13 J. Mar. L. & Com. 323, 341 (1982)); accord John Colombos, *The International Law of the Sea* 289 (6th ed. 1967) ("[E]very ship which sails the high seas must possess a national character *and be in a position to provide evidence of it.*") (emphasis added); N.P. Ready, *Ship Registration* 1 (3d ed. 1998) (describing a 1995 British law as precluding port clearance "for any ship until the master has declared to an officer of customs the name of the nation to which he claims [the ship] belongs"). Were it otherwise, then a vessel's occupants could avoid the authority of a country conducting a legitimate right-of-visit approach—and undermine the vessel identification regime critical to maintaining order at sea, see McDougal & Burke, *supra*, at 1084—simply by staying silent. U.S. Supp. Br. 27.

Neither international law as reflected in Conventions pertaining to the law of the sea nor the cases cited by Aybar (Supp. Br. 41-43) support his contrary position. He relies in particular on provisions in UNCLOS (Arts. 91, 94) and the 1958 High Seas Convention (Arts. 5, 10) that "enacted requirements only upon the signatory States, not the master of the vessel." Supp. Br. 42. But those show simply that the Conventions operate as international agreements generally do—they address the obligations of states, rather than individuals. See *Humane Soc'y of the U.S. v. Glickman*, 217 F.3d 882, 887 (D.C. Cir. 2000) ("Treaties are undertakings between nations; the terms of a treaty bind the contracting powers."). Accordingly, the fact that the Conventions oblige *states* to establish rules for conferring vessel nationality and to provide supporting documentation does not create a negative inference that *vessels* navigating on the high seas cannot be required to claim such nationality or support that claim with relevant state-issued documentation.

Aybar also misreads (Supp. Br. 41) then-Judge Alito's opinion in *United States v. Rosero*, 42 F.3d 166 (3d Cir. 1994), as announcing an all-encompassing definition of statelessness that clashes with the MDLEA. *Rosero* did not take that approach. Rather, it described a "residual" category of vessels qualifying as stateless under international law, *id.* at 171, *in addition* to the situations expressly listed in the MDLEA. See *Matos-Luchi*, 627 F.3d at 4 (reading *Rosero* to stand for the proposition that "Congress intended to include in section 70502(d), in addition to the specific examples given, those vessels that could be considered stateless under customary international law"). In so doing, the Third Circuit disclaimed any suggestion that its description was "comprehensive." 42 F.3d at 171. And it in no way implied that the MDLEA's criteria for classifying a vessel as without nationality ran afoul of international law. To the contrary, the court *applied* the MDLEA definition of "vessel without nationality"—including the provision applicable to Aybar's case, 46 U.S.C. § 70502(d)(1)(B)—in rejecting the defendants' challenge to the sufficiency of the evidence. 42 F.3d at 174. *Rosero*, in short, reflects the MDLEA's conformity with, not any deviation from, international law.⁴

II. In Light Of Congress's Findings In 46 U.S.C. § 70501(1), The Protective Principle Provides An Additional Basis For Jurisdiction Under International Law.

The protective principle of “[i]nternational law recognizes a state’s jurisdiction to prescribe law with respect to certain conduct outside its territory by [foreign] nationals that is directed against the security of the state or against a limited class of other fundamental state interests.” Restatement (Fourth) § 412. The government’s supplemental brief shows (at 28-35) that, to the extent that international law matters in construing the Felonies Clause, the protective principle provides additional support for the MDLEA’s application to Aybar, especially in light of Congress’s finding that maritime drug trafficking “presents a specific threat to the security and societal well-being of the United States.” 46 U.S.C. § 70501(1). This Court has so held in *Cardales* and several other cases, e.g., *United States v. Bravo*, 489 F.3d 1, 7-8 (1st Cir. 2007), and Aybar’s arguments do not support a contrary conclusion.

Aybar does not dispute that Congress’s findings in the MDLEA track the criteria for protective-principle jurisdiction set forth in the Restatement and case law. *See* U.S. Supp. Br. 30. Relying on decisions interpreting the Commerce Clause, however, he suggests (Supp. Br. 33-35) that those findings are not determinative and that this Court must conduct an “independent evaluation” of the threats maritime drug trafficking poses. He does not address more recent Supreme Court authority that has exhibited deference to the national-security judgments of the political branches, including assessments made in statutory findings. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 29-30, 33-34 (2010). And the result would be same under the precedents Aybar invokes, because Congress had “a rational basis,” e.g., *Gonzales v. Raich*, 545 U.S. 1, 22 (2005); *United States v. Lopez*, 514 U.S. 549, 557 (1995), for determining that maritime drug trafficking presents a threat to the security of the United States, when judicial decisions at the time shared that assessment, the international community has taken multiple steps to address the threat, and current data continue to support the same conclusion. *See* U.S. Supp. Br. 30-33.5

Aybar’s other main arguments misapprehend the potential relevance of the protective principle to this case and the role of the Restatement in describing that principle. On the first point, Aybar appears to view (Supp. Br. 19-21) this Court’s precedents as having relied on the protective principle to *expand* Congress’s Article I powers. But as the Court identified in its *En Banc* Order, the relevant question is whether international-law concepts such as the protective principle define (and therefore *limit*) Congress’s authority to enact legislation under the Felonies Clause despite the absence of any such limitation in the constitutional text itself. *See United States v. Dávila-Reyes*, 937 F.3d 57, 62 (1st Cir. 2019) (addressing defendants’ argument “that Congress’s authority under the Felonies Clause is *limited* by the principles of international law”) (emphasis added).

On the second point, Aybar parses the Restatement (Fourth)’s description of the protective principle as if it were a statute, urging the Court to apply to it the doctrine of “constitutional avoidance” and the canon that statutes must be read as a whole. Supp. Br. 22-24. The Restatement, however, is not a statute. It is a “kind of treatise or commentary” that, by “provid[ing] evidence of the practice of States,” sheds light on principles “of customary international law.” *United States v. Yousef*, 327 F.3d 56, 99, 101 & n.31 (2d Cir. 2003) (discussing the Restatement (Third)). A federal court therefore need not wait for the latest Restatement to list a particular statute as supported by the protective principle—or any other specific jurisdictional basis—before determining that the statute falls within the bounds of that principle.

In any event, Aybar's cited Restatement footnote overstates the supposed circuit disagreement "on whether the protective principle properly extends to narcotics trafficking." Restatement (Fourth) § 402 reporters' n.9. A footnote in *United States v. Wright-Barker*, 784 F.2d 161 (3d Cir. 1986), said that the protective principle "[a]rguably" applied to drug trafficking, and concluded only that "*international agreements ha[d] yet to recognize drug smuggling as a threat to a nation's security * * * warranting protective jurisdiction.*" *Id.* at 167 n.5 (emphasis added; internal quotation marks omitted). And in *United States v. Perlaza*, 439 F.3d 1149, 1162-63 (9th Cir. 2006), the Ninth Circuit noted its previous statement that "[d]rug trafficking presents the sort of threat to our nation's ability to function that merits application of the protective principle," but declined to read that statement as obviating otherwise-applicable prerequisites for establishing jurisdiction over a defendant on a foreign-flagged vessel. Neither of these decisions purported to resolve definitively whether the protective principle applies to narcotics trafficking.

The protective principle also does not, as Aybar contends, require a showing that an individual defendant's "particular conduct endangered the United States." Supp. Br. 27 (quoting *United States v. Angulo-Hernández*, 576 F.3d 59, 61 (1st Cir. 2009) (Torruella, J., dissenting)). The "particular conduct" gloss originated in one of Professor Kontorovich's articles, which acknowledges that "[m]ost courts" take a different view and interpret the protective principle to permit "jurisdiction over conduct of the general kind that could endanger the United States." *Article I Horizon*, *supra*, at 1230. That understanding aligns with the Eleventh Circuit's pre- MDLEA view—which this Court has cited with approval, *United States v. Vilches-Navarrete*, 523 F.3d 1, 22 (1st Cir. 2008)—that the protective principle applies so long as the extraterritorial conduct has a "potentially adverse effect" on the nation's security interests. *United States v. Gonzalez*, 776 F.2d 931, 939 & n.11 (11th Cir. 1985) (citing Restatement (Second) § 33 & cmt. c).

Gonzalez is instructive in another regard as well. Quoting early observations by Chief Justice Marshall, the court in *Gonzalez* explained that, while a state has the right under international law to act extraterritorially to protect itself and its citizens from harm, a nation's exercise of that right "will be resisted" by other countries if it is "extended too far." 776 F.2d at 939 (quoting *Church v. Hubbard*, 6 U.S. (2 Cranch.) 187, 235 (1804)). The court further explained that what counts as "too far" in the high-seas context depends on the circumstances, and it emphasized that foreign nations had recognized the reasonableness of the United States' pre-MDLEA enforcement efforts in Caribbean waters beset by "the massive drug trade." *Id.* Post- MDLEA developments—including the U.N. Convention Against Illicit Traffic and an array of bilateral and multilateral agreements pledging cooperation in interdiction efforts,⁶ U.S. Supp. Br. 7-8—underscore the continued international acceptance of U.S. efforts in this field. And they dispel any concern that reaffirming this Court's application of the protective principle fails "to respect the sovereignty of other nations." *Dávila-Reyes*, 937 F.3d at 70 (Lipez, J., concurring). These include bilateral agreements with Aybar's country of origin (Dominican Republic) and that of one of his co-defendants (Venezuela). The agreement with Venezuela—which is publicly available, *contra* Supp. Br. 12—notes that the need for international cooperation in thwarting maritime drug trafficking is reflected not only in the U.N. Convention Against Illicit Traffic but in two earlier Conventions: "the 1961 Single Convention on Narcotic Drugs and its 1972 Protocol, [and] in the 1971 Convention on Psychotropic Substances." Agreement Between the Government of the United States of America and the Government of the

Republic of Venezuela to Suppress Illicit Traffic in Narcotic Drugs and Psychotropic Substances By Sea, T.I.A.S. No. 11827, 1991 WL 538877, at *1.

III. Congress May Proscribe Drug Trafficking On A Stateless Vessel Operating Beyond The Territorial Sea Of Any State Without Requiring Proof Of A Geographic Or Other Nexus Between The Defendants' Criminal Conduct And The United States.

The government has shown (U.S. Supp. Br. 35-45) that (A) the text and structure of the Felonies Clause do not support limiting Congress's powers under that Clause to conduct having a geographic or other nexus to the United States; and (B) if the nexus concept is relevant, it is as a proxy for a due process fundamental fairness standard that is amply satisfied in cases involving maritime drug trafficking aboard stateless vessels beyond the territorial sea of any state. Aybar does not raise the due-process issue, and his arguments under the Felonies Clause are addressed above in Part I. One additional point, however, warrants brief mention. Specifically, Aybar's discussion of *United States v. Smith*, 680 F.2d 255 (1st Cir. 1982), highlights the difficulties that this Court would face if it adopts his proposed nexus requirement. Aybar stresses (Supp. Br. 38) that *Smith* satisfied that requirement because it involved a U.S. vessel, U.S.-citizen crew, "and a 100 mile proximity to the [U.S.] coast." But Aybar does not address whether that proximity alone is sufficient to establish a nexus, or whether additional proof the drugs were destined for the United States would be required. Nor does he address whether it would be enough that a boat in the Caribbean Sea "appeared * * * to be sailing towards Florida," *Victoria*, 876 F.2d at 1011, if a navigational chart on board indicated a course similarly consistent with a destination of "the northern Bahamas," *id.* at 1010. *Cf. Aybar-Ulloa*, 913 F.3d at 61 (Torruella, J., dissenting) (suggesting that the facts of *Victoria* sufficed to show a nexus). These are the types of questions that courts faced with a nexus requirement would have to sort through, raising the very proof problems that Congress sought to eliminate when it dispensed with a nexus requirement in 1980. *See* U.S. Supp. Br. 2, 35.

IV. A State's Authority Under International Law To Exercise Jurisdiction Over A Stateless Vessel Includes The Authority To Exercise Domestic Criminal Jurisdiction Over Its Foreign National Crewmembers.

The government's supplemental brief shows (at 41-45) that, contrary to the panel dissent, international law does not recognize a distinction between a nation's authority over a stateless vessel and its authority over the vessel's crew, and that this Court therefore correctly stated the governing international-law rule in *Victoria*, 876 F.2d at 1010. *See also United States v. Juda*, 46 F.3d 961, 967 (9th Cir. 1995) (a nation's authority "over stateless vessels * * * extends to individuals arrested on board a stateless vessel"). Because Aybar does not take up the distinction proposed in the panel dissent, *Aybar-Ulloa*, 913 F.3d at 62, the government rests on the arguments in its Supplemental Brief.

* * * *

B. OUTER SPACE

1. Artemis Accords

In an October 13, 2020 press release, NASA announced that seven countries had signed bilateral agreements with the United States implementing the "Artemis Accords." The press release is excerpted below and available at <https://www.nasa.gov/press->

[release/nasa-international-partners-advance-cooperation-with-first-signings-of-artemis-accords](#). The signed Artemis Accords document is available at <https://www.nasa.gov/specials/artemis-accords/img/Artemis-Accords-signed-13Oct2020.pdf>. Further information about the Artemis Accords is available at <https://www.nasa.gov/specials/artemis/>.

* * * *

International cooperation on and around the Moon as part of the Artemis program is taking a step forward today with the signing of the [Artemis Accords](#) between NASA and several partner countries. The Artemis Accords establish a practical set of principles to guide space exploration cooperation among nations participating in the agency's 21st century lunar exploration plans.

"Artemis will be the broadest and most diverse international human space exploration program in history, and the Artemis Accords are the vehicle that will establish this singular global coalition," said NASA Administrator Jim Bridenstine. "With today's signing, we are uniting with our partners to explore the Moon and are establishing vital principles that will create a safe, peaceful, and prosperous future in space for all of humanity to enjoy."

While NASA is leading the Artemis program, which includes sending the first woman and next man to the surface of the Moon in 2024, international partnerships will play a key role in achieving a sustainable and robust presence on the Moon later this decade while preparing to conduct a historic human mission to Mars.

The founding member nations that have signed the Artemis Accords, in alphabetical order, are: Australia, Canada, Italy, Japan, Luxembourg, United Arab Emirates, United Kingdom, United States of America.

NASA announced it was establishing the Artemis Accords earlier this year to guide future cooperative activities, to be implemented through bilateral agreements that will describe responsibilities and other legal provisions. The partners will ensure their activities comply with the accords in carrying out future cooperation. International cooperation on Artemis is intended not only to bolster space exploration but to enhance peaceful relationships among nations.

"Fundamentally, the Artemis Accords will help to avoid conflict in space and on Earth by strengthening mutual understanding and reducing misperceptions. Transparency, public registration, deconflicting operations—these are the principles that will preserve peace," said Mike Gold, NASA acting associate administrator for international and interagency relations. "The Artemis journey is to the Moon, but the destination of the Accords is a peaceful and prosperous future."

The Artemis Accords reinforce and implement the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, otherwise known as the Outer Space Treaty. They also reinforce the commitment by the U.S. and partner nations to the Registration Convention, the Agreement on the Rescue of Astronauts, and other norms of behavior that NASA and its partners have supported, including the public release of scientific data.

The principles of the Artemis Accords are:

- **Peaceful Exploration:** All activities conducted under the Artemis program must be for peaceful purposes
- **Transparency:** Artemis Accords signatories will conduct their activities in a transparent fashion to avoid confusion and conflicts
- **Interoperability:** Nations participating in the Artemis program will strive to support interoperable systems to enhance safety and sustainability
- **Emergency Assistance:** Artemis Accords signatories commit to rendering assistance to personnel in distress
- **Registration of Space Objects:** Any nation participating in Artemis must be a signatory to the Registration Convention or become a signatory with alacrity
- **Release of Scientific Data:** Artemis Accords signatories commit to the public release of scientific information, allowing the whole world to join us on the Artemis journey
- **Preserving Heritage:** Artemis Accords signatories commit to preserving outer space heritage
- **Space Resources:** Extracting and utilizing space resources is key to safe and sustainable exploration and the Artemis Accords signatories affirm that such activities should be conducted in compliance with the Outer Space Treaty
- **Deconfliction of Activities:** The Artemis Accords nations commit to preventing harmful interference and supporting the principle of due regard, as required by the Outer Space Treaty
- **Orbital Debris:** Artemis Accords countries commit to planning for the safe disposal of debris

Additional countries will join the Artemis Accords in the months and years ahead, as NASA continues to work with its international partners to establish a safe, peaceful, and prosperous future in space. Working with emerging space agencies, as well as existing partners and well-established space agencies, will add new energy and capabilities to ensure the entire world can benefit from the Artemis journey of exploration and discovery.

* * * *

2. Gateway Partnership

As part of NASA's "Artemis Program" of exploration, NASA intends to construct a habitable station in orbit around the Moon to support human and robotic exploration of the Moon and provide a training ground for future missions to Mars. This station—named "Gateway"—will be constructed and operated by an international group of partners.

On December 16, 2020, NASA issued a press release announcing the signing of an agreement between the United States and Canada (through the Canadian Space Agency of "CSA"), relating to cooperation in constructing the Gateway station in orbit around the Moon. The press release is available at <https://www.nasa.gov/press-release/nasa-canadian-space-agency-formalize-gateway-partnership-for-artemis-program>. The Gateway "will provide vital support for a sustainable, long-term return of astronauts to the lunar surface as part of NASA's [Artemis](#) program" and will "demonstrate technologies needed for human missions to Mars." As further explained in the press release:

Under this agreement, CSA will provide the Gateway's external robotics system, including a next-generation robotic arm, known as Canadarm3. CSA also will provide robotic interfaces for Gateway modules, which will enable payload installation including that of the [first two scientific instruments](#) aboard the Gateway. The agreement also marks NASA's commitment to provide two crew opportunities for Canadian astronauts on Artemis missions, one to the Gateway and one on Artemis II.

* * * *

Approximately one-sixth the size of the International Space Station, the Gateway will function as a way station located tens of thousands of miles at its farthest distance from the lunar surface, in a near-rectilinear halo orbit. From this lunar vantage, NASA and its international and commercial partners will conduct unprecedented deep space science and technology investigations. It will serve as a rendezvous point for astronauts traveling to lunar orbit aboard NASA's Orion spacecraft and [Space Launch System](#) rocket prior to transit to low-lunar orbit and the surface of the Moon.

On October 27, 2020, NASA announced the signing of an agreement with ESA (European Space Agency) regarding ESA's contributions to the Gateway program, including habitation and refueling modules, and enhanced lunar communications and service modules for Orion. See NASA press release, available at <https://www.nasa.gov/press-release/nasa-european-space-agency-formalize-artemis-gateway-partnership>. Further information about the Gateway program is available at <https://nasa.gov/gateway>.^{**}

3. U.S. National Space Policy

On December 9, 2020, President Trump issued a memorandum regarding U.S. national space policy. 85 Fed. Reg. 81,755 (Dec. 16, 2020). See also December 10, 2020 State Department press statement on the President's national space policy, available at <https://2017-2021.state.gov/the-presidents-national-space-policy/index.html>. Included in the memorandum is the following regarding international law:

4. As established in international law, outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means. The United States will pursue the extraction and utilization of space resources in compliance with

^{**} Editor's note: The United States signed an agreement with Japan for its cooperation on the Gateway program early in 2021. See press release, available at <https://www.nasa.gov/press-release/nasa-government-of-japan-formalize-gateway-partnership-for-artemis-program>.

applicable law, recognizing those resources as critical for sustainable exploration, scientific discovery, and commercial operations.

5. All nations have the right to explore and to use space for peaceful purposes and for the benefit of all humanity, in accordance with applicable law. Consistent with that principle, the United States will continue to use space for national security activities, including for the exercise of the inherent right of self-defense. Unfettered access and freedom to operate in space is a vital national interest.

6. The United States considers the space systems of all nations to have the right to pass through and conduct operations in space without interference. Purposeful interference with space systems, including supporting infrastructure, will be considered an infringement of a nation's rights. Consistent with the defense of those rights, the United States will seek to deter, counter, and defeat threats in the space domain that are hostile to the national interests of the United States and its allies. Any purposeful interference with or an attack upon the space systems of the United States or its allies that directly affects national rights will be met with a deliberate response at a time, place, manner, and domain of our choosing.

4. Weapons in Outer Space

On April 6, 2020, Assistant Secretary of State Christopher Ashley Ford addressed the Center for Strategic and International Studies on arms control in outer space. His remarks are available at <https://2017-2021.state.gov/whither-arms-control-in-outer-space-space-threats-space-hypocrisy-and-the-hope-of-space-norms/>, and excerpted below.

* * * *

I. The Threat

One cannot have a coherent discussion about outer space security solutions without understanding the problem, so let me first outline the nature and gravity of the space threats that Russia and the PRC present today to every country that depends upon space-based assets. ...

... It is clear that Beijing conceives of outer space as a critical warfighting domain, and that it expects to escalate in this arena very quickly in wartime. Military and strategic thinkers in the PRC now openly talk and write about their intentions to move against U.S. satellites early in any future conflict.

... [H]owever, it is Russia that enjoys the dubious honor of being the poster child for dangerous and provocative space postures. Nor do the Russians bother to hide it, instead openly bragging about their development of counterspace capabilities. ...

... Thanks to observations and analyses by amateur astronomers, commercially provided information, and the orbital data that the U.S. Government releases to the public, it is

now possible to talk at the unclassified level about Russia's apparent *development of in-orbit anti-satellite weaponry*.

* * * *

II. Dangerous and Hypocritical Answers

...Russia and the PRC are offering what they describe as a draft "Treaty on the Prevention of Placement of Weapons in Outer Space," or PPWT—an instrument that purports to help solve the problems that its drafters have themselves worked hard to create. They also proffer something Russia calls the "No First Placement" initiative, in which countries voluntarily agree not to be the "first" to place weapons in space.

... The draft PPWT would by careful design fail to address in any meaningful fashion the terrestrially-based ASAT systems that both Russia and China have long since developed and deployed. As for Russia's initiative about not placing weapons *in* space, a more accurate term for this efforts might be the "No *Second* Placement" initiative, for the point of this diplomatic overture seems simply to be propaganda, or worse. In the spirit of Moscow's so-called "moratorium" on intermediate-range nuclear forces in Europe, the effort apparently aims to lock in unilateral military advantage—that is, to persuade other countries *not* to do in space what Russia gives every sign of already having done itself.

It's ... hard not to come to a conclusion that this call for quick negotiations looks like an attempt by Russia and the PRC to constrain the United States and our allies without either Moscow or Beijing having the slightest intention of abiding by the commitments they are proffering.

... So how are we in the United States approaching these challenges?

III. A Better Way Forward

To answer that question, let me begin by mentioning what we are doing in order to protect our security interests and deter outer space-related provocations directly before turning to our diplomatic efforts.

A. Deterrence

First and foremost, we are working to deter aggression and dangerous, escalatory provocations in outer space. First and foremost, you can see how serious an issue this is in the President's creation of the U.S. Space Force as a sixth branch of the armed services. Additionally, the [U.S. National Security Strategy](#) (NSS) makes clear that "[t]he United States considers unfettered access to and freedom to operate in space to be a vital interest," and that "[a]ny harmful interference with or an attack upon critical components of our space architecture that directly affects this vital U.S. interest will be met with a deliberate response at a time, place, manner, and domain of our choosing." This covers not just attacks upon assets that are themselves *in* space, but also attacks upon any aspects of our space architecture, including ground systems. Our potential adversaries need to know that there is nothing "different" in this respect about any component of the U.S. space architecture: if you attack it, you are attacking *us*.

Indeed, we have made clear that we do not rule out even the use of nuclear weapons in response to a sufficiently severe attack upon critical aspects of our space architecture. The latest [U.S. Nuclear Posture Review](#) (NPR) declares that "[t]he United States would only consider the use of nuclear weapons in extreme circumstances to defend the vital interests of the United States, its allies, and partners." As you'll recall, our space architecture is specified in the NSS as a "vital U.S. interest." This is no coincidence.

In fact, the NPR goes on to clarify that the “extreme circumstances” in which the United States will not rule out nuclear weapons use “could include significant non-nuclear strategic attacks.” ...

...Any harmful interference with or attacks upon such components of our space architecture at any time, even if undertaken only with non-nuclear tools, thus starts to move into “significant non-nuclear strategic attack” territory, and would lead to a significant and potentially drastic escalation of a crisis or conflict. ...

B. Normative Development

That said, our hope is to do much more than just *deter* the worst sorts of behavior in outer space. We also hope to build broad international support for norms of responsible behavior that will help forestall problems and reduce escalation and accident risks in this rapidly evolving domain.

...I am convinced, however, that it remains possible to develop better and better *normative expectations* in outer space—just as we have been making progress on doing in the even faster-moving arena of cyberspace during the last few U.N.-sponsored cyberspace Groups of Governmental Experts (GGEs). U.S. diplomats are looking, in other words, to work constructively with their counterparts in other spacefaring nations to develop approaches to outer space norms that will help improve predictability and collective “best practices” in the space domain.

There is nothing untoward about trying to develop normative expectations in outer space. Important standards for space-related behavior already exist. Some have grown from *legally-binding* instruments, such as the Outer Space Treaty (which bars placing nuclear weapons into orbit, or on celestial bodies), or the Registration Convention (which calls for registration of all space objects). In the interests of preserving the efficacy of arms control verification, a number of arms control precedents between the United States and the USSR or the Russian Federation prohibited interference with space-based “national technical means” of verification. The Constitution of the International Telecommunications Union (ITU) and its Radio Regulations articulate a norm against harmful interference with space radiocommunications services, while there are also legally binding rules against nuclear testing in outer space written in to the Limited Test Ban Treaty (LTBT).

As a consensus study in 2013 by a UN Group of Government Experts noted, moreover, norms and transparency and confidence building measures (TCBMs) do not have to be legally-binding or be articulated in legally-binding instruments in order to be useful and contribute to constructive behavior and the promotion of global “best practices” for governmental and a broadening range of private sector space activities. The Hague Code of Conduct (HCoC), for instance, urges the provision of Pre-Launch Notification (PLNs) for missile tests in order to improve trust and confidence and reduce the risk of inadvertent escalation. The 2019 United Nations Committee on Peaceful Uses of Outer Space (UNCOPUOS) process guidelines on the Long-term Sustainability (LTS) of the Outer Space Environment Activities, the U.N. S2007 COPUOS Space Debris Mitigation Guidelines, and the recently updated U.S. Orbital Debris Mitigation Standard Practices are also articulations of expected “best practices” that are proving helpful in the outer space domain.

There is also constructive thinking underway in both government and the private sector about how to formulate analogous best practices in areas such as satellite collision avoidance, and on-orbit rendezvous and servicing operations and utilization of space resources. As a result,

U.S. diplomatic engagements on these issues rely on extensive and thoughtful inputs provided by American companies and academic experts.

So far, however, none of these various efforts, as salutary as they are, have yet directly addressed the *security* problems that are emerging as a result of ongoing Russian and PRC weaponization of the space domain and placement of weapons in outer space. We clearly need to do more to develop non-legally-binding international norms of responsible behavior that are complementary to the existing legal regime – both through “bottom-up” best practices developed cooperatively with other the full range of established and emerging space actors, and through “top-down” voluntary, non-legally binding TCBMs. And we need to do this in the security arena, in order to cope with the challenges presented by Russian and Chinese space weaponry.

* * * *

Why not, for instance, start where the cyberspace GGEs did, in acknowledging that there’s nothing special about outer space that would make it an arena of warfare different from any other with regard to the applicability of International Humanitarian Law (IHL) — and that, therefore, traditional IHL principles of humanity, necessity, proportionality, and distinction between combatants and non-combatants apply in outer space? Is it possible also for the space domain to follow the Cyber GGEs in articulating a nonbinding norm against peacetime attacks upon critical civilian infrastructure that is largely owned and operated by the private sector? And what about those Russian satellites that appear to be capable of firing projectiles but yet maneuver up alongside of other countries’ satellites? Is it possible to articulate a standard for what constitutes responsible — and thus, impliedly, *irresponsible* — behavior in proximity operations?

...[P]erhaps we could consider whether it would be beneficial to establish a norm that it is irresponsible to conduct on-orbit experiments such as the ones Russia did recently in close proximity to another country’s satellites without prior consultations. That sort of behavior is easy to detect. The establishment of such a norm, coupled with the fact that this sort of orbital “pattern of life” is increasingly easy to detect and assess, would enable the international community to develop a response – and perhaps we could thereby help deter such irresponsible behavior.

* * * *

Cross References

Cyprus Center for Land, Open-seas, and Port Security ("CYCLOPS"), **Ch. 9.B.6**

UN General Assembly on oceans and sustainable fisheries, **Ch. 13.B.1**

China sanctions related to the South China Sea, **Ch. 16.A.4.c**

Export controls relating to China's activities in the South China Sea, **Ch. 16.B.1.c**

Agreement on technology for space launches from the UK, **Ch. 19.B.2.b**

CHAPTER 13

Environment and Other Transnational Scientific Issues

A. LAND AND AIR POLLUTION AND RELATED ISSUES

Climate Change

The 26th session of the Conference of the Parties (“COP26”) to the UN Framework Convention on Climate Change (“UNFCCC”), scheduled for November 2020, was rescheduled for November 2021, due to COVID-19.

B. PROTECTION OF MARINE ENVIRONMENT AND MARINE CONSERVATION

1. Fishing Regulation

On August 2, 2020, the State Department issued a press statement from Secretary Pompeo in which he called out the People’s Republic of China for illegal, unreported, and unregulated fishing near Ecuador’s Galápagos marine reserve. The statement is excerpted below and available at <https://2017-2021.state.gov/on-chinas-predatory-fishing-practices-in-the-galapagos/>.

The People’s Republic of China subsidizes the world’s largest commercial fishing fleet, which routinely violates the sovereign rights and jurisdiction of coastal states, fishes without permission, and overfishes licensing agreements. Given this unfortunate record of illegal, unreported, and unregulated fishing, rule-breaking, and willful environmental degradation, it is more important than ever that the international community stands together for the rule of law and insists on better environmental stewardship from Beijing.

The Ecuadorian government has done just that in raising the alarm about the hundreds of PRC-flagged vessels fishing near Ecuador’s important Galápagos

marine reserve and harvesting endangered sharks for their fins, along with many other protected species. We firmly support Ecuador's efforts to ensure PRC-flagged vessels do not engage in illegal, unreported, and unregulated fishing and stand with States whose economies and natural resources are threatened by PRC-flagged vessels' disregard for the rule of law and responsible fishing practices.

See Chapter 12 for the December 8, 2020 U.S. statement on the UN General Assembly resolution on oceans and the law of the sea and on sustainable fisheries, which is available at <https://usun.usmission.gov/remarks-at-a-un-general-assembly-debate-on-oceans-and-the-law-of-the-sea-and-on-sustainable-fisheries/>. The portion of the statement relating to fisheries follows.

* * * *

We are also pleased to join consensus on the resolution on sustainable fisheries. As with the resolution on oceans and the law of the sea, limitations on our ability to meet and negotiate led to a technical rollover of the sustainable fisheries resolution. Accordingly, we refer to past U.S. statements on any issues of substance.

We appreciate the constructive cooperation of delegations, under the patient leadership of the Coordinator, to develop a pragmatic approach to rescheduling meetings related to sustainable fisheries disrupted by the pandemic. The United States looks forward to an informal consultation of States Parties to the UN Fish Stocks Agreement in the second half of 2021, if conditions allow, and the resumed Review Conference and bottom fishing review in 2022.

We encourage States and relevant organizations to consider providing updates that could inform the upcoming workshop on the implementation of measures to address the impacts of bottom fishing on vulnerable marine ecosystems and the long-term sustainability of deep-sea fish stocks. The United States also notes with appreciation the clarification provided via correspondence that any such submissions will be published as they are received, following the current practice of the Secretariat. We believe posting reports unedited as they are received promotes transparency and would like to thank delegations for engaging in these discussions to ensure views are always shared in such an impartial manner.

Finally, while we did not have an opportunity to discuss new substantive issues in the sustainable fisheries resolution, the past year has highlighted new challenges in fisheries management. Fishing activities continue around the world—contributing to livelihoods and food security during this challenging time, even as COVID-19 has made the monitoring of some fisheries more difficult. The international community has also focused with new urgency on specific examples of inadequately controlled fishing activities, including illegal, unreported, and unregulated fishing, which affect everything from the health of ecosystems and coastal communities to the working conditions of observers and crew to the economic development and prosperity of individual Member States. We will continue to call for flag states to take responsibility for these activities and adopt more robust management measures where needed in regional fisheries management organizations.

* * * *

2. Marine Debris

On July 16, 2020, the State Department released a media note providing notice that the United States had signed “a statement of support for the Global Ghost Gear Initiative (“GGGI”), pledging continued U.S. government support for addressing abandoned, lost, or discarded fishing gear (“ALDFG”) in our ocean.” The media note, available at <https://2017-2021.state.gov/the-united-states-signs-statement-reaffirming-commitments-to-protecting-marine-ecosystems/>, also includes the following:

Addressing marine debris, including ALDFG (also known as “ghost gear”), is a key administration priority. By signing this statement of support, the U.S. Government joins [more than eighty-five organizations and fifteen other countries](#) in acknowledging the significant impact ghost gear has on marine ecosystems and human health and livelihoods. The U.S. Government recognizes that mitigating these adverse impacts will require a global multi-stakeholder approach supporting a variety of multilateral initiatives such as the [UN Food and Agriculture Organization’s \(FAO\) Voluntary Guidelines on the Marking of Fishing Gear](#). The United States played a key role in drafting these guidelines, and GGGI serves as FAO’s sole civil society partner in implementing them.

Ghost gear is the main type of submerged marine debris; when improperly discarded in a natural environment, it can indiscriminately entangle fish and other animals while severely damaging marine habitats. An estimated 640,000 metric tons of ALDFG enter the ocean every year, and surveys suggest that derelict fishing gear comprises up to 70 percent of floating macro-plastics in the ocean by weight. ALDFG is the deadliest and most harmful form of marine debris to marine animals, primarily due to entanglement. Nearly 80 percent of animals that become entangled in ALDFG are injured or die as a result. GGGI is the preeminent international initiative addressing this problem of ghost gear and has broad representation across industry, government, and civil society. Managed by the Washington-based NGO [Ocean Conservancy](#), GGGI conducts much needed work to quantify the impacts of ghost gear and to develop, share, and document best practices for addressing it.

The signed statement of support is available at <https://www.state.gov/wp-content/uploads/2020/07/United-States-Statement-of-Support-for-GGGI-508.pdf>.

3. Antarctic Treaty

Article VII of the Antarctic Treaty and Article 14 of the Protocol on Environmental Protection grant to Antarctic Treaty Consultative Parties the right of unannounced inspections of stations, equipment, and vessels in Antarctica. In a February 12, 2020 media note, available at <https://2017-2021.state.gov/united-states-conducts->

[inspections-in-antarctica/](https://www.state.gov/wp-content/uploads/2020/09/United-States-Antarctic-Inspection-2020-508.pdf), the State Department provided notice of the conclusion of a five-day inspection in Antarctica by a team of U.S. government officials from the U.S. Department of State, National Science Foundation, National Oceanic and Atmospheric Administration (“NOAA”), and United States Coast Guard. The inspection report is available at <https://www.state.gov/wp-content/uploads/2020/09/United-States-Antarctic-Inspection-2020-508.pdf>. The team inspected the following foreign research stations, installations, and equipment: the Mario Zucchelli Station and Boulder Clay runway (Italy), Jang Bogo Station (Republic of Korea), a station under construction on Inexpressible Island (China), and Antarctic Specially Protected Area 161. The United States has conducted fifteen inspections in Antarctica, including the 2020 one, which was the first since 2012. The United States conducts inspections to promote the objectives and ensure the observation of the Antarctic Treaty. The media note states:

The United States continues to promote Antarctica’s status as a continent reserved for peace and science in accordance with the provisions of the Antarctic Treaty of 1959. The purpose of the inspection was to verify compliance with the Antarctic Treaty and its Environmental Protocol, including provisions prohibiting military measures and mining, as well as provisions promoting safe station operation and sound environmental practices. Inspections emphasize that all of Antarctica is accessible to interested countries despite territorial claims and reinforce the importance of compliance with the Antarctic Treaty’s arms control provisions. The United States will present its report on the inspection at the next Antarctic Treaty Consultative Meeting in Helsinki, Finland, in May 2020.

The U.S. Department of State’s Bureau of Oceans and International Environmental and Scientific Affairs leads U.S. policy on Antarctica in cooperation with the National Science Foundation, the federal agency that administers the U.S. Antarctic Program (USAP), which coordinates and provides logistical support for all U.S. government research on the southernmost continent and in the Southern Ocean, and other federal agencies. Through the USAP, the United States maintains three year-round scientific stations on Antarctica and has more personnel based in Antarctica than any other country.

The yearly meeting of Antarctic Treaty Consultative Parties scheduled for 2020 did not take place due to public health precautions associated with the COVID-19 pandemic.

4. Arctic Strategy

On April 23, 2020, the State Department offered a special briefing with a senior official on the Trump Administration’s strategy regarding the Arctic and how that strategy relates to plans to reestablish a U.S. diplomatic presence in Nuuk, Greenland. The transcript of the briefing is available at <https://2017-2021.state.gov/briefing-with-senior-state-department-official-on-the-administrations-arctic-strategy/> and excerpted below.

* * * *

...I want to start at the 100,000-foot level, ... and then slowly come down to ... the very specific issue of our presence in Greenland and our assistance to Greenland.

I want to state a couple principles right up front, which is we have a very clear set of goals and objectives in the Arctic, and they're quite straightforward. We want a secure and stable Arctic where U.S. interests are safeguarded, ... the American homeland ... is protected, and the Arctic states are working cooperatively to address shared challenges. And the ... Department of State ... is working in collaboration with other agencies across the United States Government to ensure that the Arctic remains a region free of conflict as well as characterized by respect for national sovereignty, a rules-based order, constructive engagement among Arctic states to address our shared economic, scientific, and environmental challenges.

We ... are working closely with our Arctic partners through the Arctic Council, which is the premier recognized forum for matters of Arctic governance, ... made up of the eight Arctic states: the United States, Canada, the Kingdom of Denmark, Finland, Iceland, Norway, the Russian Federation, and Sweden. ... The work of the Arctic Council, since its formation in 1996, has been on promoting this coordination and cooperation among Arctic states and working, of course, with Arctic indigenous communities and other inhabitants on the issues that I identified.

But we also are in the process of adjusting our Arctic policy to today's new strategic realities, and those are characterized by the return of geopolitics, if I can put it that way, not just to the Arctic but generally across the globe. And it's a change that's driven by the desire of Russia and the People's Republic of China to challenge the United States and the West. We see this playing out in other parts of the world. The Arctic is not immune from the implications of these changes and we can expect, as you all probably know, the rapidly changing Arctic system to create greater incentives for the Kremlin and the PRC to pursue agendas that clash with the interests of the United States and our allies and partners.

... I want to be clear that the United States recognizes that Russia has legitimate Arctic interests. It's an Arctic Council member. It's cooperated with the United States and other Arctic states in a number of areas, including oil spill response, search and rescue, pollution issues. That work is continuing; it's ongoing; it's welcome. We have no concerns about it or no objections to it, and we want it to continue.

But we also have concerns about Russia's military buildup in the Arctic. Its presence has grown dramatically in recent years with the establishments of new Arctic commands, new Arctic brigades, refurbished airfields and other infrastructure, deep water ports, new military bases along its Arctic coastline, an effort to establish air defense and coastal missile systems, early warning radars, and a variety of other things along the Arctic coastline. We've seen an enhanced ops tempo of the Russian military in the Arctic, including last October one of the largest Russian military exercises in the Arctic since the end of the Cold War. ...

China is a bit of a different challenge. It claims that its interests in the Arctic are focused on access to natural resources and the opportunities offered by Arctic sea routes for shipping. And as you all probably know, it outlined plans in 2018 to develop a Polar Silk Road, claimed it was a near-Arctic state, and signaled its intention to play a more active role in Arctic governance. We have found this disconcerting because the PRC's behavior outside the Arctic, it often disregards international norms, as it has in the South China Sea, for example. And if I can

quote Secretary Pompeo, he said this last year in May of 2019 in Finland: “There are only Arctic states and non-Arctic states.” There are—“No third category exists,” so we do not accept Beijing’s claims to be a near-Arctic state.

And we’ve also seen across the globe that China’s soft-power tools often have a soft edge when deployed by the PRC. It’s weaponized its state capitalism in an effort to secure control of critical infrastructure such as ports and telecommunications networks. It’s demonstrated a willingness to use coercion and influence operations and other methods to get what it wants, including in the Arctic. The recent experience of the Faroe Islands over the threats to drop a trade agreement because the Faroese did not sign a 5G contract with Huawei is just one example. So their behavior, the PRC’s behavior over the last decade underscores that we can’t necessarily assume its good intentions with regards to its activities in the Arctic.

...[T]he work we are doing with Arctic states, the work that we are doing collaboratively internationally on environmental challenges, on sustainable development, on search and rescue, on clean-up of oil spills, all of that is continuing, should continue, and is an important and critical part of our Arctic policy and Arctic agenda. And it’s in that context, ... that we are seeking to enhance our engagement and our work right across the Arctic, not just in Greenland but ... in other Arctic states as well.

Which brings me to Nuuk. We have been, as everyone knows, an Arctic nation for 150 years, so it’s not new that we’re engaged in the Arctic, and we are pretty excited about the prospects of reopening our consulate in Nuuk later this summer. The first consulate ... was in place from 1940 to 1953. The backstory here is that during World War II after Denmark fell to the Nazis, the Danish ambassador to the United States wanted to see and ensured there was continued cooperation with America to help Greenland stay out of Hitler’s hands. That’s how Greenland became in part a self-regulating territory. ...

After the war, the new Danish Government adopted and ratified the wartime agreement between the United States and Greenland ... that remains in place to this day and is the legal basis for ... the American Thule Air Force Base in the ... northwest of Greenland. And the scientific cooperation that we started during World War II also continues to this day. The United States National Science Foundation invests as much as \$15 million each year in its Greenland-based research programs and supports more than 50 research projects there, and literally hundreds of U.S. researchers travel to Greenland every year conducting research with international partners that benefit Americans, Greenlanders, Danes, and the entire global community.

So the opening of our consulate in Nuuk will be both the culmination of a process of working with the Greenlanders and the Danes that looks to build on our decades of cooperation, and in some ways it’s also a new beginning. ...

...[T]he Kingdom of Denmark approved the opening of the consulate in December of 2019 ... We have signed agreements that provide for cooperation in specific areas and development assistance in specific areas ...

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Our goal is to be the partner of choice for Arctic states... We want to increase our engagements across the region for just that reason. ...[W]e’ve developed, again, in consultation with the Kingdom of Denmark and the Government of Greenland, a \$12.1 million funding package to sort of jumpstart this new beginning ..., and it includes some assistance in a few different areas,

Energy – some assistance in the energy and national resource development areas. ... We signed a couple memoranda with a couple Greenlandic ministries in June of last year, and our goal here is to support their efforts to encourage competitive and transparent investment by companies, promote sound mining and energy sector governance, and advance the use of new energy technologies and renewable energy in towns and settlements in Greenland.

The second piece of this is going to involve strengthening educational and people-to-people ties. Specifically, we hope to have a university education capacity-building program that will focus on the sectors of tourism and hospitality development and sustainable land and fisheries management, and these areas were focused on for a reason. ...

And then the last area is we're going to take a look ... at opportunities to ...advance economic opportunities through tourism and the ... sustainable development of rural communities.

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... Part of the objective of the energy and natural resource assistance we're providing, ... is to ensure that the development of these natural resources proceeds in a way that is competitive, it's transparent, there's sound mining and energy sector governance in place so that the potential for problems that ... would be associated with fly-by-night companies, shady investors, ... or corruption or bad practices on governance, safety, environmental rules ... would be avoided. ...

...[T]he United States is continuing to invest, through the National Science Foundation and others, literally millions of dollars every year into research designed to take a look at the Arctic system, how it's developing, what the changes to the ecosystem mean for the region's built, social, and natural environment, and contributing the – our data and our findings to the global effort to obtain a better understanding of this change, whether it's to the Greenland ice sheet or to the extent of sea ice. And so that's going to continue. In fact, that's not just happening there, it's happening in other parts of the government as well – the U.S. Navy, for example.

... More recently ... an agreement on scientific collaboration and cooperation came into force that had been negotiated by the Arctic Council, and we were one ... of the lead players in that negotiation. We were also very involved in recent negotiations to conclude an agreement involving a moratorium on fishing in the central Arctic Ocean, in part because we wanted to ensure that we didn't see resource competition develop in a way that was environmentally unsound.

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5. 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 note, which prohibits imports of shrimp and shrimp products harvested with methods that may adversely affect sea turtles. On April 30, 2020, the Department of State certified which nations (or specific fisheries within those nations) have adequate measures in place to protect sea turtles during the course of commercial shrimp fishing. 85 Fed. Reg. 24,074

(Apr. 30, 2020). The State Department released a media note on the 2020 certification on May 11, 2020. The media note, available at <https://2017-2021.state.gov/sea-turtle-conservation-and-shrimp-imports-to-the-united-states-3/>, states, in part:

This year, the Department suspended the certification of the People's Republic of China for using shrimp trawl fishing methods that may adversely affect sea turtles. The Department also suspended the certification of Venezuela because the former Maduro regime would not permit the U.S. technical team into the country to assess Venezuela's shrimp harvesting practices.

For 2020, the Under Secretary of State for Economic Growth, Energy, and the Environment certified 37 nations and Hong Kong and granted determinations for 12 fisheries as having adequate measures in place to protect sea turtles during the course of commercial shrimp fishing. ...

C. OTHER ISSUES

1. The Global Health Response to the COVID-19 Pandemic

On May 19, 2020, the United States provided a written statement explaining its position on the 73rd World Health Assembly ("WHA") resolution on the COVID-19 response. The U.S. statement is available at <https://geneva.usmission.gov/2020/05/19/explanation-of-position-covid-19-response-resolution/> and excerpted below.

* * * *

The United States thanks the European Union and the other co-sponsors for their leadership in preparing the COVID-19 Response resolution for adoption at the virtual 73rd World Health Assembly (WHA). That we are meeting in virtual session, at a time when more than 300,000 people have lost their lives and the global economy has been deeply affected, is a testament to the need to come together in response to this pandemic. This resolution makes an important contribution to that global response, immediately calling for whole-of-government and whole-of-society approaches to fighting the pandemic with the best available evidence, and by urging the international community to come together around all aspects of the response.

Most importantly, the terms of this resolution take the first critical steps necessary to ensure that, when we face the next pandemic, we will have a World Health Organization (WHO) and an international system capable of responding effectively and decisively to save lives and protect the vulnerable. We applaud the call for an impartial, independent, and comprehensive review of the WHO's response, to be undertaken in consultation with Member States, and we urge that work to begin now. This will help ensure we have a complete and transparent understanding of the source of the virus, timeline of events, early discussions, and the decision-making process for the WHO's response to the COVID-19 pandemic. We must reform the WHO and supporting entities to be fully capable of fulfilling their core and crucial mission moving

forward. We further appreciate the mandate given by the resolution to the WHO to investigate the origins of the virus, and we are confident that through this knowledge, researchers and medical practitioners around the world will be empowered in the pursuit of vaccines and other countermeasures.

Finally, we wholeheartedly endorse the call in the resolution for all Member States to provide the WHO with timely, accurate, and sufficiently-detailed public health information related to the COVID-19 pandemic, as required by the International Health Regulations (IHR 2005). We stand ready to work with all partners to implement this resolution. If we are to fully realize the promise contained in the IHRs of a safer world for everyone, changes must be made within the WHO to hold Member State accountable to address and reduce risks that threaten public health.

Unfortunately, despite our best efforts at working toward consensus language in all areas of this resolution, we regret that the United States must disassociate itself from a few paragraphs due to the following issues:

The United States dissociates from operative paragraphs 7.5 and 9.4. The United States strongly supports women reaching the highest attainable outcomes for health, life, dignity, and well-being throughout their lives. We champion access to high-quality health care for women and girls across the lifespan. However, we do not accept references to “sexual and reproductive health,” or other language that suggests or explicitly states that access to abortion is included in the provision of population and individual level health services. The United States believes in legal protections for the unborn, and rejects any interpretation of international human rights (such as General Comment 36 on the International Covenant on Civil and Political Rights) to require any State Party to provide access to abortion. As President Trump has stated, “Americans will never tire of defending innocent life.” Each nation has the sovereign right to implement related programs and activities consistent with their laws and policies, free from external pressure. There is no international right to abortion, nor is there any duty on the part of States to finance or facilitate abortion. Further, consistent with the 1994 International Conference on Population and Development Programme of Action and the 1995 Beijing Declaration and Platform for Action, we do not recognize abortion as a method of family planning, nor do we support abortion in our global health assistance.

The United States must also disassociate from operative paragraphs 4, 8.2 and 9.8 because the language in these operative paragraphs does not adequately capture all of the carefully negotiated, and balanced, language in the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) and the Doha Declaration of 2001 and instead presents an unbalanced and incomplete picture of that language at a time where all actors need to come together to produce vaccines and other critical health products. The United States recognizes the importance of access to affordable, safe, high-quality, and effective health products and the critical role that intellectual property plays in incentivizing the development of new and improved health products. However, as currently drafted, paragraphs 4, 8.2 and 9.8 send the wrong message to innovators who will be essential to the solutions the whole world needs.

We are concerned that a misinterpretation of international trade obligations in non-WTO multilateral fora may negatively affect countries’ abilities to incentivize new drug development and expand access to medicines. We would also like to clarify our understanding of the reference in 8.2 to “existing mechanisms for voluntary pooling ... of patents.” The United States interprets this reference as limited to voluntary mechanisms existing before the COVID-19 pandemic, not

new or proposed “patent pooling” mechanisms created in response to the pandemic. It is critical that any such voluntary mechanisms as applied to COVID-19 related technologies be narrowly tailored in scope and duration to the medical needs of the current crisis, and that the World Intellectual Property Organization (WIPO), as the UN agency with technical expertise on intellectual property issues, play an appropriate role in their operation and evolution.

The United States is leading global efforts for the development of vaccines, for therapies and treatments for COVID-19, including providing significant funding and leading other initiatives to accelerate innovation in this space, for example the ACTIV Partnership recently unveiled by the United States National Institutes of Health. We applaud other global efforts as well and are committed to supporting a collaborative approach to ensuring that all efforts support one another and that we are truly accelerating progress toward a vaccine.

Going forward, given the need for innovation incentives in the development of new health products, the U.S. Government encourages member states to engage with innovators to find mutually-acceptable solutions that achieve increased access to affordable, safe, effective, and high-quality COVID-19 health products. By taking an unbalanced and incomplete approach to the issue of access to medicines and TRIPS, this resolution misses an opportunity to galvanize the world, beyond bureaucracy and UN bodies, toward the critical goal of accelerating research, development, distribution and access to affordable, safe, quality and effective COVID-19-related products. We remain committed to working with all partners toward that goal.

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On April 22, 2020, Secretary Pompeo discussed the importance of the International Health Regulations (“IHR”), and China’s adherence to the IHR during the COVID-19 pandemic, at a press availability. The transcript of those remarks is excerpted below and available at <https://it.usembassy.gov/secretary-michael-r-pompeo-remarks-to-the-press-at-a-press-availability-april-22-2020/>.

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Turning to the World Health Organization, I want to spend a few minutes telling the American people a little bit more about the problems that we’re trying to work our way through.

The WHO has two primary functions. First, it’s a regulator and an advisory role, and a health emergency and humanitarian aid operation on top of that.

After the first SARS outbreak in 2003, the United States led the reform of the WHO, the WHO rules that govern how countries report on public health threats. So a major reform effort at 2003.

Those rules—they’re called the International Health Regulations—went into effect in 2007.

We set very clear expectations. We—the world—set very clear expectations for how every country must disclose data to protect global health.

For example, Article 6 of the IHR says that “each State Party shall notify the World Health Organization...within 24 hours...of all events which may constitute a public health emergency of international concern within its territory...”

Annex 2 of those same rules provides that countries must notify the World Health Organization of any unusual or unexpected public health events such as SARS, a close genetic cousin of the virus that causes COVID-19.

Those rules also said how countries should evaluate when to notify the WHO of diseases of unknown causes or sources.

We strongly believe that the Chinese Communist Party did not report the outbreak of the new coronavirus in a timely fashion to the World Health Organization.

Article 6 of the IHRs, which was a part of this reform, further mandates that a State Party—that would include China—“shall continue to communicate to WHO timely, accurate and sufficiently detailed public health information...” That is, there’s an ongoing obligation.

Even after the CCP did notify the WHO of the coronavirus outbreak, China didn’t share all of the information it had.

Instead, it covered up how dangerous the disease is. It didn’t report sustained human-to-human transmission for a month until it was in every province inside of China. It censored those who tried to warn the world, it ordered a halt to testing of new samples, and it destroyed existing samples.

The CCP still has not shared the virus sample from inside of China with the outside world, making it impossible to track the disease’s evolution.

Not making a legal determination here today on China’s adherence to the IHRs, but the World Health Organization’s regulatory arm clearly failed during this pandemic.

I’d also note that when countries adopted these new rules in 2007, we also gave the director-general of the WHO encouragement and the ability to go public when a member-country wasn’t following those rules, and that didn’t happen in this case either.

It’s why we continue to insist this is an ongoing requirement for transparency and openness according to the WHO rules, and the WHO has responsibility to continue to enforce them today. This transparency and getting it right is critical to saving lives today and in the future.

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On September 11, 2020, the United States provided an explanation of its “no” vote on the omnibus UN General Assembly resolution on the response to the COVID-19 pandemic. The U.S. statement is excerpted below and available at <https://usun.usmission.gov/explanation-of-vote-on-the-omnibus-resolution-comprehensive-coordinated-response-to-the-covid19-pandemic/>.

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The United States appreciates the cooperation and collaboration of the international community in the global effort to combat COVID-19. As we strive to make progress to defeat COVID-19, it is important that we focus our efforts and jointly address this virus.

I would like to begin today by expressing our condolences for the illnesses, deaths, and other adverse consequences—including those affecting healthcare and humanitarian personnel—resulting from the COVID-19 pandemic. Our never-ending gratitude goes out to all health care

workers, to all UN staff, to all essential personnel who continue to put themselves in harm's way every day to make us all safer.

The United States has been and remains the largest bilateral donor of global health assistance. Over just the past few weeks, we have increased our funding for the development of vaccines and therapeutics, global preparedness efforts, and overseas economic, health, and humanitarian aid from \$12 billion to more than \$20.5 billion. Our steadfast and heartfelt support for such efforts encompasses all facets of the pandemic response, including second- and third-order effects. And we are working directly with those on the ground to combat this virus, including governments, multilateral organizations, faith-based organizations, NGOs, the private sector, research institutions, and many other organizations.

Additionally, we have supported the Secretary General's call to resource the UN response. As of August 14, the United States has funded a total of \$908 million in 44 countries to eight UN agencies—that equates to 44% of the total humanitarian response raised to date. We welcome the increased contributions that many have already made and we encourage other countries and stakeholders to do the same immediately. We all need to step up.

Since this pandemic began, the Trump Administration has been very clear that transparency and the timely sharing of public health data and information are essential to fighting it effectively. Unfortunately, however, failures at the outset of the pandemic by the People's Republic of China, where COVID-19 originated and was first diagnosed, have imperilled all of us and caused needless additional suffering and death. In the early days of the virus, the Chinese Communist Party hid the truth about the outbreak from the world and prevented researchers from accessing vital information—innumerable deaths that could have been prevented were the result. We must hold those responsible accountable for their actions, and inaction, early in this pandemic, and ensure that future pandemics are reported in a transparent manner early, instead of being hidden from the world.

Unfortunately, we might never know for certain how much of the pain and suffering caused by COVID-19 could have been avoided if the Chinese Communist Party had behaved like a responsible government and immediately warned the rest of the world of the virus that they uncovered in Wuhan.

Not only did they fail the world, but the World Health Organization's failures in the early days of the pandemic also contributed to needless suffering and the worsening of this pandemic. The WHO needs to reform, including by demonstrating its independence from the Chinese Communist Party. That lack of independence, transparency, and accountability is why President Trump made the decision for the United States to withdraw from the WHO. We will continue to call for its reform, and we will seek alternative, transparent partners in our fight against the COVID-19 pandemic. It is incumbent on each of us to collectively commit to the timely sharing of public health data and information with the international community. Doing so is paramount to our ability to overcome this crisis together, and to building our resiliency to future pandemics.

For those reasons, the United States does not concur with the references to the World Health Organization (WHO) in perambulatory paragraphs 11, 12, 13, 15 and operating paragraph 1.

The United States welcomes strong health-specific language in the text including language on therapeutics and antimicrobial resistance. We also welcome language on countering disinformation and calling for an independent evaluation of the WHO-coordinated international health response to COVID-19.

The United States also welcomes the human rights references in this text, including a stand-alone paragraph on human rights and fundamental freedoms and several references to civil society and other stakeholders throughout the text. Promoting and protecting human rights and fundamental freedoms is critical to ensuring that all people are fully included in COVID-19 response and recovery efforts.

The United States welcomes the strong stand-alone paragraph on persons with disabilities and particularly welcomes the reference to the disproportionate impact of COVID-19 on them, as well as their inclusion in policy and decision-making at all levels and in all aspects of COVID-19 response and recovery. We also welcome the listing of members of marginalized groups in the text but regret that the full listing was not included.

Despite these positive elements, we cannot support a resolution that is missing key issues. It is regrettable that the final text did not contain even one mention of human rights defenders, which was in the zero draft. We cannot in good faith adopt a resolution on COVID-19 response and recovery without recognizing those civil society and human rights defenders at the forefront of these efforts. We do not accept some delegations' ongoing assertion that this phrase is a redline, particularly as we use this phrase throughout UN documents and we have a consensual declaration on human rights defenders.

We appreciate the addition of a reference to UNSCR 1325. We still think, however, that this text could have benefited from a stand-alone paragraph on women, peace and security, especially as we near the 20th anniversary of the critical agenda and the critical role women and girls play in COVID-19 response and recovery. We also reject the assertion that this topic does not belong in the General Assembly or that it is a redline for delegations, particularly as those same delegations are members of the Security Council and voted to create the agenda twenty years ago.

We also cannot allow the resolution to be hijacked by several themes that are not pertinent to the discussion, and for this reason, we voted against this resolution.

The United States defends human dignity and supports access to high-quality health care for women and girls across the lifespan. We appreciate the co-coordinators' recognition of our redline position on Sexual and Reproductive Health (SRH) and Sexual Reproductive Health and Reproductive Rights (SRHR) and the removal of one SRH reference in the PPs.

We do not accept references to "sexual and reproductive health," "sexual and reproductive health and reproductive rights," or other language that suggests or explicitly states that access to legal abortion is necessarily included in the more general terms "health services" or "health care services" in particular contexts concerning women. The United States believes in legal protections for the unborn, and rejects any interpretation of international human rights to require any State Party to provide safe, legal, and effective access to abortion. As President Trump has stated, "Americans will never tire of defending innocent life." Each nation has the sovereign right to implement related programs and activities consistent with their laws and policies. There is no international right to abortion, nor is there any duty on the part of States to finance or facilitate abortion. Further, consistent with the 1994 International Conference on Population and Development Programme of Action and the 1995 Beijing Declaration and Platform for Action, and their reports, we do not recognize abortion as a method of family planning, nor do we support abortion in our global health assistance. We also do not recognize references to non-UN negotiated conferences, summits or their respective outcome documents. We believe that the General Assembly should only include references to conferences and summits that were clearly mandated through UN modalities resolutions, such as this year's

Beijing+25, and other ones, such as the Nairobi summit, have no direct or indirect place in any UN resolutions.

With respect to language in OP47, we would like to thank the co-coordinators and in particular our colleagues from the UK, EU and AOSIS for a constructive discussion and small group negotiation on this paragraph. Regarding the substance of the text, we consider it outside of the scope of what this resolution on COVID-19 is intended to address. We further note that the United States submitted formal notification of its withdrawal from the Paris Agreement to the United Nations on November 4, 2019. The withdrawal will take effect one year from the delivery of the notification. Therefore, references to the Paris Agreement and climate change are without prejudice to U.S. positions.

On OP34, the United States agrees with the need to improve global supply chain connectivity and security in addressing COVID-19, which includes numerous interconnected processes. However, we do not see a clear link between global sustainable transportation and COVID-19 as phrased in the paragraph. We made our concerns about this paragraph clear at the beginning of negotiations.

The United States cannot support the new OP20 language. The text in OP20 of this resolution inappropriately challenges the sovereign right of States to determine their economic relations and to protect legitimate national interests, including taking certain related actions in response to national security concerns.

It also attempts to undermine the international community's ability to respond to acts that are offensive to international norms. Economic sanctions are a legitimate means to achieve foreign policy, security, and other national and international objectives, and the United States is not alone in that view or in that practice.

I wish to point out that all U.S. sanctions include humanitarian exemptions. It has already been well proven that suffering and death is due to the bombing of civilians, including doctors and hospitals, suppressing the flow of information about the pandemic, and abuses of human rights by authoritarian, non-democratic regimes against their own people.

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2. Biodiversity

In 2017, the UN General Assembly convened an intergovernmental conference ("IGC") 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 State Department provided notice of a public information session regarding upcoming United Nations negotiations concerning marine biodiversity in areas beyond national jurisdiction, scheduled for February 25, 2020, 85 Fed. Reg. 6010 (Feb. 3, 2020), was rescheduled for August 2021, and will now be rescheduled again for 2022, due to COVID-19. Additional information on the BBNJ process is available at <https://www.un.org/bbnj/>.

The meeting of the Conference of the Parties to the UN Convention on Biological Diversity ("CBD"), which was scheduled to take place in May 2020 in Kunming, China,

was rescheduled (due to the COVID-19 pandemic) for October 2021 in the same location.

3. Sustainable Development

On August 12, 2020, Jason Mack, counselor for the U.S. Mission to the UN, delivered the U.S. explanation of position regarding Resolution A/74/L.83 on the high-level political forum on sustainable development and the follow-up and review of the 2030 Agenda for Sustainable Development and the review of the Economic and Social Council. G.A. Res. A/74/L.83 (Aug. 6, 2020). The U.S. EOP is excerpted below and available at <https://usun.usmission.gov/explanation-of-position-of-the-united-states-of-america-regarding-resolution-a-74-l-83/>.

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The United States takes this opportunity to express our appreciation to the Permanent Representatives and delegations of Benin and Georgia for their facilitation of resolution A/74/L.83 on the High-Level Political Forum and ECOSOC review process.

The United States wishes to underscore that the 2030 Agenda is non-binding and does not create or affect rights or obligations under international law, nor does it create any new financial commitments. The United States recognizes the 2030 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, including national responsibility, in the 2030 Agenda and emphasize that all countries have a role to play in achieving its vision. 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 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.

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On November 18, 2020, Jesse Walter, advisor to the U.S. Mission to the UN, delivered the general statement for the United States at a meeting of the Second Committee. The U.S. statement is excerpted below and available at <https://usun.usmission.gov/general-statement-in-a-meeting-of-the-second-committee/>.

* * * *

We take this opportunity to clarify the U.S. policy position on several issues found in Second Committee resolutions.

We underscore that the resolutions negotiated during the Second Committee session as well as many of the outcome documents referenced therein, including the 2030 Agenda for Sustainable Development and the Addis Ababa Action Agenda, are non-binding and do not create new or affect existing rights or obligations under international law, nor does it create any new financial commitments.

2030 Agenda for Sustainable Development: The United States recognizes the 2030 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, including national responsibility, in the 2030 Agenda and emphasize that all countries have a role to play in achieving its vision. The 2030 Agenda recognizes that each country must work toward implementation in accordance with its own national policies and priorities, and we will interpret calls that reaffirm the 2030 Agenda or call for the full implementation of its Sustainable Development Goals to be aspirational.

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 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 World Trade Organization (WTO) agreement or decision, including the Agreement on Trade-Related Aspects of Intellectual Property.

Further, citizen-responsive governance, including the respect for human rights, sound economic policy and fiscal management, government transparency, and the rule of law are essential to the implementation of the 2030 Agenda.

Finally, the 2030 Agenda states that “no one” will be left behind. We believe any alteration from the 2030 language, such as “no country left behind,” erodes the people-centered focus of the Agenda and distracts from the many multi-faceted and multi-stakeholder efforts to advance sustainable development.

Addis Ababa Action Agenda: Regarding the reaffirmation of the Addis Ababa Action Agenda, we note that much of the trade-related language in the outcome document is immaterial to our position. Therefore, our reaffirmation of the outcome document has no standing for ongoing work and negotiations that involve trade.

Trade: 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 fair and reciprocal trade. However, as President Trump stated to the 73rd UN General Assembly on September 25, 2018, the United States will act in its sovereign interest, including on trade matters. The United States does not take our trade policy direction from the UN.

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Climate Science: With respect to references to the Intergovernmental Panel on Climate Change (IPCC) special reports, the United States has indicated at the IPCC that acceptance of such reports and approval of their respective Summaries for Policymakers by the IPCC does not imply U.S. endorsement of the specific findings or underlying contents of the reports. References to the IPCC special reports are also without prejudice to U.S. positions.

Disaster Risk Reduction: 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 strongly support 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.

Women's Equality and Empowerment: Consistent with the Geneva Consensus Declaration, the United States is committed to promoting women's equality and to empowering women and girls. The United States is leading through our W-GDP Initiative, which seeks to enhance opportunities for women to participate meaningfully in the economy and advance both prosperity and national security, as well as through the Women, Peace, and Security (WPS) agenda. Accordingly, when the subject of a resolution text is "women," or in some cases "women and girls," our preference in this context is to use these terms, rather than "gender," for greater precision. The United States does not consider the outcome documents from the 63rd session of the Commission on the Status of Women to be the product of consensus.

New Urban Agenda: 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 can be a successful means of achieving national security and foreign policy objectives. In cases where the United States has applied sanctions, we have done so with specific objectives in mind, including as a means to promote a return to rule of law, democratic systems, or human rights and fundamental freedoms, or to prevent threats to international security. We are within our rights to deploy our trade and commercial policy as tools to achieve our foreign policy and national security objectives. Targeted economic sanctions can be an appropriate, effective, and legitimate alternative to the use of force.

Illicit Financial Flows: While the United States acknowledges the UN system increasingly uses the term "illicit financial flows," we continue to have concerns that this term lacks an agreed-upon international definition. Without an agreed-upon definition, resolutions should be clearer about the specific underlying illegal activities, such as embezzlement, bribery, money laundering, other corrupt practices, and other crimes that produce or contribute to the generation and movement of illicit finance. Equally, all Member States should focus more concretely on preventing and combating these crimes at home.

Official Development Assistance: Concerning official development assistance, the proper forum to discuss eligibility measures is the Boards of the Multilateral Development Banks and the Organization for Economic Cooperation and Development. We do not accept the UN as the appropriate forum for determining eligibility for, and allocation of, these resources.

Inclusive Growth: 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, we must ensure that any work or goal related to inclusivity remain grounded in evidence and proven best practices.

Build Back Better and Greener: For decades, the United States, alongside our partners, has worked successfully to build and strengthen the capacity and resilience of communities and countries, before and after both natural and manmade disasters. We continue to do so to achieve a more resilient recovery from the COVID-19 pandemic. However, we must acknowledge that greater transparency and open information sharing is an essential first step. We encourage the use of actionable terms that allow for more precise understanding of resolution language as an important step towards achieving this complex and significant task. We should avoid the use of undefined phrases such as “build back better” and clearly explain our intentions. In addition, the United States notes that the term “greener” is not clearly defined, and reads this term to pertain to sustainable development, while also noting the need to focus on economic recovery for those devastated by the COVID-19 pandemic. It is incumbent on us to ensure our citizens all understand the important work we undertake here at the UN by using language in resolutions that is widely understandable.

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4. Wildlife Trafficking

On October 26, 2020, the State Department released its 2020 Report to Congress pursuant to the Eliminate, Neutralize, and Disrupt (“END”) Wildlife Trafficking Act of 2016, P.L. 114-231, Section 201. The report is available at <https://www.state.gov/2020-end-wildlife-trafficking-report/>. On November 6, 2020, the State Department released a media note on the END Wildlife Trafficking Report for 2020, which is available at <https://2017-2021.state.gov/eliminate-neutralize-and-disrupt-end-wildlife-trafficking-report-2020/>, and excerpted below.

The U.S. Department of State submitted the fourth annual report to Congress as required by the Eliminate, Neutralize, and Disrupt Wildlife Trafficking Act of 2016 (the END Wildlife Trafficking Act). Wildlife trafficking is a serious transnational crime that threatens security, economic prosperity, the rule of law, long-standing conservation efforts, and human health. In Executive Order 13773, President Trump called for a comprehensive and decisive approach to dismantle organized crime syndicates, specifically recognizing the connection between wildlife trafficking and transnational criminal organizations. 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 and reduces the threat to U.S. citizens.

The END Wildlife Trafficking Act directs the Secretary of State, in consultation with the Secretaries of the Interior and Commerce, to submit to Congress a report that lists Focus Countries and Countries of Concern, as defined in the Act. Each Focus Country is a major source, transit point, or consumer of wildlife trafficking products or their derivatives. Identification as a Focus Country is neither a positive nor a negative designation. A Country of Concern is defined

as a Focus Country whose government has actively engaged in or knowingly profited from the trafficking of endangered or threatened species. Many Focus Countries have already taken significant steps to combat wildlife trafficking, including in partnership with the United States. The United States looks forward to a continued dialogue with Focus Countries and Countries of Concern to thwart transnational organized crime engaged in wildlife trafficking.

5. Columbia River Treaty

The United States and Canada continued negotiations to modernize the Columbia River Treaty regime in 2020. See *Digest 2018* at 511 regarding the first four rounds of negotiations, conducted in 2018 and see *Digest 2019* at 460-61 regarding the fifth through eighth rounds. In a March 12, 2020 media note, available at <https://2017-2021.state.gov/conclusion-of-the-ninth-round-of-the-columbia-river-treaty-negotiations/>, the State Department announced the conclusion of the ninth round of the negotiations. On June 30, 2020, the State Department announced the conclusion of the tenth round of the negotiations in a media note available at <https://2017-2021.state.gov/conclusion-of-the-tenth-round-of-the-columbia-river-treaty-negotiations/>. The United States and Canada conducted the tenth round via videoconference. Further information on the Treaty and related meetings is available at <https://www.state.gov/columbia-river-treaty/>.

Cross references

Withdrawal from World Health Organization, **Ch. 4.B.2**

World Health Organization, **Ch. 7.A.1**

Presidential permits (Keystone), **Ch. 11.G.5**

U.S. remarks at UN General Assembly on oceans and the Law of the Sea, **Ch. 12.A.1.b**

Marine Scientific Research Policy, **Ch. 12.A.4**

CHAPTER 14

Educational and Cultural Issues

A. CULTURAL PROPERTY: IMPORT RESTRICTIONS

In 2020, the United States entered into four new agreements and received or acted on two requests for agreements, 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. §§ 2601-2613. In addition, one such agreement expired during this period.

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 2020 to protect the cultural property of Jordan, Yemen, Ecuador, El Salvador, Costa Rica, and Chile by extending an existing memorandum of understanding (“MOU”), entering into a new one, or considering a request for emergency measures, and imposing corresponding import restrictions on certain archaeological and/or ecclesiastical ethnological material. During the same period, the MOU with Nicaragua expired according to its terms. Current import restrictions and MOUs pertaining to those restrictions can be found at <https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions>.

1. Jordan

An MOU between the United States and Jordan on the imposition of import restrictions on certain categories of archaeological material entered into force on February 1, 2020 and can be found at <https://www.state.gov/jordan-20-201>. Customs and Border Protection (“CBP”) regulations reflecting the imposition of these import restrictions and

the Designated List of archeological material to which they apply have been published in the Federal Register. 85 Fed. Reg. 7204 (Feb 7, 2020). According to its terms, the MOU will remain in effect for five years, until February 1, 2025.

2. Yemen

See *Digest 2019* at 465 regarding Yemen's request, under Article 9 of the Convention, for U.S. import restrictions on archaeological and ethnological material representing Yemen's cultural patrimony. The final rule amending CBP regulations to reflect the imposition of emergency import restrictions on certain archaeological and ethnological material from Yemen and the Designated List of Archaeological and Ethnological Material of Yemen to which the import restrictions apply were published in the Federal Register on February 7, 2020. 85 Fed. Reg. 7209 (Feb. 7, 2020).

3. Ecuador

An MOU between the United States and Ecuador on the imposition of import restrictions on certain categories of archaeological and ethnological material entered into force on February 11, 2020 and can be found at <https://www.state.gov/ecuador-20-211>. CBP regulations reflecting the imposition of these import restrictions and the Designated List of archeological and ethnological material to which they apply, have been published in the Federal Register. 85 Fed. Reg. 8389 (Feb 14, 2020). According to its terms, the MOU will remain in effect for five years.

4. El Salvador

The MOU between the United States and El Salvador on the imposition of import restrictions entered into force on March 2, 2020 and can be found at https://www.state.gov/el_salvador-20-302. Under the terms of this new MOU, the import restrictions for archaeological material, which had been imposed under a 1995 agreement that was repeatedly extended, will remain in effect for an additional five years until March 2, 2025. In addition, the new MOU provides for import restrictions on ecclesiastical ethnological material until March 2, 2025, as well. 85 Fed. Reg. 15,363 (Mar. 18, 2020).

5. Costa Rica

On December 2, 2019, the U.S. Department of State received a request from the government of the Republic of Costa Rica under Article 9 of the Convention. Costa Rica's request seeks U.S. import restrictions on archaeological material representing Costa Rica's cultural patrimony. Notification of the request was published in the Federal Register on March 3, 2020. 85 Fed. Reg. 12,647 (Mar. 3, 2020).

6. Nicaragua

The U.S.-Nicaragua MOU regarding the imposition of import restrictions on certain categories of archeological material expired according to its terms on September 15, 2020.

7. Chile

The MOU between the United States and the Republic of Chile on the imposition of import restrictions on certain archaeological material from Chile entered into force on September 30, 2020, and can be found at <https://www.state.gov/chile-20-930>. U.S. CBP regulations reflecting the imposition of these import restrictions and the Designated List of archeological material to which they apply have been published in the Federal Register. 85 Fed. Reg. 64,020 (Oct. 9, 2020). According to its terms, the MOU will remain in effect for five years, until September 30, 2025.

B. CULTURAL PROPERTY

On July 1, 2020, the State Department issued a press statement from Secretary Pompeo on the status of the Hagia Sophia in Turkey. That statement is excerpted below and available at <https://2017-2021.state.gov/the-status-of-the-hagia-sophia/>.

* * * *

The Government of Turkey has administered the Hagia Sophia as a museum—officially recognized by UNESCO as part of the Historic Areas of Istanbul World Heritage Site—in an outstanding manner for nearly a century. We urge the Government of Turkey to continue to maintain the Hagia Sophia as a museum, as an exemplar of its commitment to respect the faith traditions and diverse history that contributed to the Republic of Turkey, and to ensure it remains accessible to all.

This extraordinary site is a testament to religious expression and to artistic and technical genius, reflected in its rich and complex 1,500-year history. Moreover, the site’s status as a museum has allowed people from all over the world to access and reflect upon this magnificent achievement.

The United States views a change in the status of the Hagia Sophia as diminishing the legacy of this remarkable building and its unsurpassed ability—so rare in the modern world—to serve humanity as a much-needed bridge between those of differing faith traditions and cultures. We seek to continue to work with the Government of Turkey on a broad range of issues of mutual interest, including the preservation of religious and cultural sites.

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C. EXCHANGE PROGRAMS

1. Mexico

Effective November 26, 2020, the United States and Mexico agreed to a further extension of their 1990 Fulbright Agreement (“Concerning the Establishment of the U.S.-Mexico Commission for Educational and Cultural Exchange”) for an additional 10 years (through November 26, 2030), pursuant to an exchange of diplomatic notes. The Agreement had previously been extended in 2010 (through November 26, 2020). The exchange of notes is available at <https://www.state.gov/wp-content/uploads/2021/04/20-1125-Mexico-Education-Fulbright.pdf>.

2. Andorra

Effective December 31, 2020, the 2015 Memorandum of Understanding (“MOU”) between the United States and the Principality of Andorra (“on the Fulbright Exchange Program”) was extended for an additional five-year period, through December 31, 2025. The exchange of notes constituting the agreement to extend the 2015 MOU is available at <https://www.state.gov/andorra-21-222>.

3. Termination of the Fulbright program with China and Hong Kong

As discussed in Chapter 9, Executive Order 13936 of July 14, 2020 is the “President’s Executive Order on Hong Kong Normalization,” following on the State Department determination that Hong Kong is no longer sufficiently autonomous to warrant treatment different than the rest of the People’s Republic of China under U.S. laws. 84 Fed. Reg. 43,413 (July 17, 2020). Paragraph (i) of Section 3 of E.O. 13936 directs that U.S. government agencies, “take steps to terminate the Fulbright exchange program with regard to China and Hong Kong with respect to future exchanges for participants traveling both from and to China or Hong Kong.”

4. Litigation: *ASSE International*

As discussed in *Digest 2019* at 467-70, *Digest 2018* at 520-21; *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 and then brought a second appeal after the Department imposed a lesser sanction. *ASSE Int’l v. Pompeo*, No. 18-55979 (9th Cir.). On January 29, 2020, the Ninth Circuit reversed the district court’s order granting summary judgment to defendants and remanded for further consideration by the State Department. *ASSE Int’l, Inc. v. Pompeo*, 802 Fed. Appx. 234 (9th Cir. 2020).

5. *Capron v. Massachusetts*—the au pair program

See *Digest 2018* at 521-25 and *Digest 2019* at 470-75 for discussion *Capron v. Massachusetts*, a case decided by the First Circuit Court of Appeals regarding the U.S. au pair program. *Capron v. Massachusetts*, 944 F.3d 9 (1st Cir. 2019). Plaintiffs filed a petition for writ of certiorari in the Supreme Court of the United States, which was denied. Case no. 19-1031 (June 22, 2020).

D. INTERNATIONAL EXPOSITIONS

On January 15, 2020, the State Department announced that the United States would have a pavilion at Expo 2020 Dubai, the first ever “World’s Fair” to be held in the Middle East. The announcement, available at <https://2017-2021.state.gov/u-s-participation-in-expo-2020-dubai/>, also explains:

The U.S. pavilion is made possible by the generosity of the Emirati government in recognition of the strong partnership between the United States and the United Arab Emirates. This is a historic opportunity for a global audience to experience the U.S. pavilion and Expo 2020 Dubai when it opens its gates in October 2020 for an expected 25 million visits during the six-month long event.

The organizers of Expo 2020 Dubai postponed the opening date from October 20, 2020 to October 1, 2021 due to the global coronavirus pandemic.

Cross References

Hong Kong, **Ch. 9.B.7**

Confucius Institute, **Ch. 10.C.2.b**

CHAPTER 15

Private International Law

A. COMMERCIAL LAW/UNCITRAL

1. UNCITRAL

Julian Simcock, deputy legal adviser, delivered the U.S. statement at the UN General Assembly Sixth Committee on November 10, 2020, on the report of the United Nations Commission on International Trade Law (“UNCITRAL”) on the work of its 53rd session. The U.S. statement is excerpted below and available at https://usun.usmission.gov/remarks-at-a-meeting-of-the-sixth-committee-on-agenda-item-78-united-nations-commission-on-international-trade-law/?_ga=2.140925618.1092795757.1610142023-1377599470.1602608057.

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The United States welcomes the Report of the 53rd session of the United Nations Commission on International Trade Law (UNCITRAL) and commends the efforts of UNCITRAL’s Member States, observers, and Secretariat in continuing to promote the development and harmonization of international commercial law.

We note that, as a result of the unprecedented COVID-19 crisis, Working Groups were unable to meet for their spring 2020 sessions, and the UNCITRAL Commission did not approve any new legal instruments this year. Although the delays in the important work of UNCITRAL are unfortunate, we would like to thank the Secretariat for its tireless efforts to help us adjust to new working methods and continue to make progress during this time. Despite the many challenges presented by new, remote processes, the Secretariat was able to facilitate both an abbreviated Commission session and an important series of webinars discussing the relevance of

UNCITRAL's instruments in addressing the COVID-19 economic crisis. These webinars made a valuable contribution to the global discourse on the impact of COVID-19 on cross-border economic activity and the responses of States to the challenges posed by the pandemic.

We note with satisfaction that the Commission has approved work on a number of new projects, ensuring that UNCITRAL will continue its important normative work in the coming years. Among others, the Commission approved a joint UNCITRAL-Unidroit project to prepare a model law on warehouse receipts, which we believe will advance UNCITRAL's long-standing and important role in expanding access to credit, particularly in developing economies. In the area of insolvency, we welcome the preparatory and related work that will continue in order to develop two projects – one on civil asset tracing to promote greater availability of mechanisms to trace and recover assets related to insolvency proceedings and another on applicable law in insolvency proceedings. We welcome the Commission's decision to hold a colloquium on the topic of applicable law, so that the contours of that topic can be developed. Following additional work by the Secretariat on both insolvency-related topics, we are hopeful that next year the Commission will be in a position to authorize work on them and give a mandate to Working Group V, which is focused on insolvency, to take up both these projects.

We look forward to continuing our productive engagement with UNCITRAL this year. While there was no consensus on a decision to request additional resources for Working Group III's work of ISDS reform as some delegations had proposed, we welcome the willingness of all delegations to engage in a discussion about the future work plan on ISDS reform in the coming year to inform a potential decision on this issue at next year's Commission meeting. We welcome continuing discussions on the appropriate size and composition of UNCITRAL's membership, and appreciate the emphasis the Commission has placed on reaching a decision on this matter by consensus. We hope such discussions will focus on ensuring UNCITRAL can maintain and improve upon its ability to develop and promote effective, usable instruments supporting stable and predictable legal outcomes for citizens and businesses of our country, and the world.

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2. Cape Town Convention

The United States participated in the negotiations to conclude a protocol to the Cape Town Convention under the auspices of UNIDROIT. Information regarding the Mining, Agriculture, and Construction ("MAC") Protocol can be found at <https://www.unidroit.org/instruments/security-interests/mac-protocol-2019>. On October 1, 2020, Secretary of State Michael R. Pompeo delivered remarks at the signing of the MAC Protocol at UNIDROIT headquarters in Rome. Secretary Pompeo's remarks are available at <https://2017-2021.state.gov/secretary-michael-r-pompeo-at-the-mining-agriculture-and-construction-protocol-signing-ceremony//index.html>, and excerpted below.

* * * *

This is an important moment. This will generate literally tens of billions of dollars in annual economic gains for member states of your organization. Twenty-three billion of that will go to developing countries; it will give them easier access to equipment, machinery. That's important to them. Seven billion dollars will go to manufacturers, American companies—global companies like John Deere, Caterpillar, and Vermeer. Easier access to finance critical global economic assets like this machinery will, as you said, give real opportunity to troubled people all across the world, as the world climbs out of this economically challenging time.

You should know that this demarks, too, that the U.S. is not, as some have said, retreating, but is deeply engaged. Where multilateralism makes sense and it works and benefits the world and the American people, the United States will be an eager and aggressive participant. And we're proud of the efforts that have extended over now many years of the U.S. interagency team that has been negotiating this document.

I want to thank, too, South Africa for hosting this year's event. Congratulations, too, to the countries that have previously signed—to Nigeria and Paraguay, the Gambia, and the Republic of Congo—who moved ahead on this protocol and already benefitting from the global acceleration that will occur as a result of this agreement. So thank you. It's great to be here, and it'll be a proud moment to sign the document.

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B. FAMILY LAW

See Chapter 2 for discussion of litigation regarding the Hague Abduction Convention.

C. INTERNATIONAL CIVIL LITIGATION

See Chapter 5 for discussion of cases considering application of the doctrine of international comity.

Cross References

Children's issues, **Ch. 2.B.**

CHAPTER 16

Sanctions, Export Controls, and Certain Other Restrictions

This chapter discusses selected developments during 2020 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.

A. IMPOSITION, IMPLEMENTATION, AND MODIFICATION OF SANCTIONS AND OTHER RESTRICTIONS

1. Iran

a. General

On February 27, 2020, the U.S. and Swiss Governments finalized the terms of the Swiss Humanitarian Trade Arrangement ("SHTA") to facilitate the flow of humanitarian goods to the Iranian people while maintaining sanctions relating to the Iranian regime's malign activities. See Treasury Department press release, available at <https://home.treasury.gov/news/press-releases/sm919>. The Departments of State and the Treasury announced a framework to facilitate humanitarian trade with Iran in 2019 and the SHTA is the first operational channel established under that framework.

On April 1, 2020, the Treasury Department's Office of Foreign Assets Control ("OFAC") published a list of 13 individuals, 252 entities, as well as aircraft, designated in

2018 pursuant to various sanctions programs, as well as 249 individuals, entities, and vessels which had been blocked under E.O. 13599, but were transferred to the SDN list as a result of the U.S. ceasing to participate in the Joint Comprehensive Plan of Action with Iran (“JCPOA”). 85 Fed. Reg. 18,334 (Apr. 1, 2020).

On May 14, 2020, the State Department announced in a media note, available at <https://2017-2021.state.gov/united-states-publishes-a-global-maritime-advisory-to-counter-sanctions-evasion-by-iran-north-korea-and-syria/>, that the U.S. government had issued a global maritime advisory to counter sanctions evasion by Iran, North Korea, and Syria. The media note specifies:

The U.S. Department of State, the U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC), and the U.S. Coast Guard issued a global advisory to alert the maritime industry, and those active in the energy and metals sectors to deceptive shipping practices used to evade sanctions, with a focus on Iran, North Korea, and Syria. The advisory includes a detailed set of best practices for private industry to consider adopting to mitigate exposure to sanctions risk. The deceptive shipping practices discussed in this report may create significant sanctions risk for individuals and entities involved in these industries.

The advisory is available at

https://home.treasury.gov/system/files/126/05142020_global_advisory_v1.pdf.

On May 27, 2020, the Secretary of State announced the end of the waiver covering all remaining JCPOA-related nuclear projects in Iran. The announcement came in a press statement, available at <https://2017-2021.state.gov/keeping-the-world-safe-from-irans-nuclear-program/>, which identifies the projects which had been subject to a sanctions waiver: “the Arak reactor conversion, the provision of enriched uranium for the Tehran Research Reactor, and the export of Iran’s spent and scrap research reactor fuel.” The press statement further explains:

As the waiver covering JCPOA-related activities comes to an end, the United States is providing a 90-day extension for the waiver covering ongoing international support to the Bushehr Nuclear Power Plant Unit 1 to ensure safety of operations. We will continue to closely monitor all developments in Iran’s nuclear program and can modify this waiver at any time.

Following the Secretary of State’s announcement, the Treasury Department issued a statement, available at <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/829>, explaining that there would be a wind-down period for persons engaged in activities permitted by the waivers:

Persons engaged in activities currently permitted by the Department of State’s nuclear-related waivers associated with the Arak reactor modernization redesign, the transfer into Iran of enriched uranium for the Tehran Research Reactor, and the transfer out of Iran of certain nuclear fuel scrap and of spent

research reactor fuel will have a final, 60-day wind-down period in which to cease these activities without risking exposure to covered sanctions. The 60-day wind-down period ends on July 27, 2020. Persons engaged in such activities should take the steps necessary to wind down those activities by July 27, 2020 to avoid potential exposure to sanctions under U.S. law. Persons engaged in such activities after that date may be exposed to certain sanctions under the Iran Freedom and Counter-Proliferation Act (IFCA) absent a waiver or exception. IFCA provides for sanctions on persons determined to knowingly provide significant financial, material, technological, or other support to, or goods or services in support of any activity or transaction on behalf of or for the benefit of, an Iranian person on OFAC's SDN List, such as the Atomic Energy Organization of Iran (AEOI). IFCA also provides for sanctions on persons determined to knowingly sell, supply, or transfer, directly or indirectly, to or from Iran certain materials, including raw and semi-finished metals, if the materials are provided to or from an Iranian person on OFAC's SDN List, such as AEOI. ...

b. 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' cessation of participation in the JCPOA did not have any effect on Resolution 2231. On April 30, 2020, Special Representative for Iran Brian Hook provided a briefing in which he reviewed the history of the arms embargo on Iran, which was set to expire in 2020 in accordance with resolution 2231. The transcript of the briefing is available at <https://2017-2021.state.gov/briefing-with-special-representative-for-iran-and-senior-advisor-to-the-secretary-brian-hook-on-depriving-iran-of-the-weapons-of-war/>, and excerpted below.

October 18th is when the arms embargo on the Iranian regime expires, so we are now within six months. It's important to understand the history of this ban. ... Iran has been under various embargoes since March of 2007, ... Resolution 1747 ... includes a ban on Iranian export of arms and material. And then in 2010, ... UN Security Council Resolution 1929 ... put restrictions on Iranian imports of restricted weapons in addition to their export.

These restrictions ... on the import and export of weapons—were unanimously passed by the UN Security Council. That includes China and Russia. And the reason is because Iran for decades has not been at peace with its neighbors and has not been a good neighbor and has also conducted terrorist

campaigns across five continents. Unfortunately, the UN Security Council resolution ...that prohibited the import and export of weapons was lifted. It was replaced by 2231.

... under 2231, ... the arms embargo sunsets after five years. ...

On June 24, 2020 U.S. Permanent Representative to the UN Ambassador Kelly Craft and Special Representative Hook briefed the UN Security Council on a proposed resolution to extend the arms embargo on Iran. See State Department media note, available at <https://2017-2021.state.gov/un-ambassador-kelly-craft-and-special-representative-for-iran-brian-hook-brief-un-security-council-on-efforts-to-extend-iran-arms-embargo/>.

On June 29, 2020, at the conclusion of consultations between Special Representative Hook and representatives of the Kingdom of Bahrain, the two countries issued a joint statement calling on members of the Security Council to extend the arms embargo on Iran. The media note including the joint statement is available at <https://2017-2021.state.gov/the-united-states-and-the-kingdom-of-bahrain-issue-joint-statement-on-iran-arms-embargo-following-consultations/>.

On June 30, 2020, the State Department issued a fact sheet regarding the latest UN report on resolution 2231 implementation. The fact sheet, available at <https://2017-2021.state.gov/un-report-exposes-irans-defiance-of-the-united-nations/>, summarizes the report's findings relating to the arms embargo and restrictions on Iran's ballistic missile and nuclear activity, and goes on to urge adoption of the draft resolution circulated by the United States to extend the arms embargo.

On August 12, 2020, Ambassador Craft delivered a statement on the introduction of a resolution extending the existing embargo on conventional weapons transfers to and from Iran. Ambassador Craft's statement is excerpted below and available at <https://usun.usmission.gov/statement-by-ambassador-kelly-craft-on-the-introduction-of-a-u-s-resolution-extending-the-iran-arms-embargo/>.

* * * *

Today the United States introduced a draft Security Council resolution to extend the existing embargo on conventional weapons sales to and from Iran. The resolution introduced by the United States follows months of active American diplomacy. It is a straightforward, common-sense measure requested by countries in the Middle East that have suffered the most as a result of the Iranian regime's active support for terrorism and mayhem across the region and beyond.

Iran's actions fuel conflict, chaos, and human suffering on a broad scale. It continues to endanger the lives and livelihoods of millions of innocent men, women, and children by actively supporting proxy groups and terrorist organizations in countries like Syria, Yemen, Lebanon, and Iraq.

It is unimaginable that the UN Security Council would overlook this behavior – verified by the Secretary-General in his recent report on UNSCR 2231 – and unlock Iran’s access to combat aircraft, attack helicopters, warships, tanks, missile systems, and other advanced weapons.

I call upon all Security Council members to wake up to the real-world implications of allowing this arms embargo to lapse. The Security Council’s central purpose is to promote global peace and security. Failure to extend the arms embargo would make a mockery of that sacred responsibility on which the United Nations was created.

* * * *

On August 13, 2020, the U.S. Mission to the UN released a fact sheet about the proposed resolution to extend the arms embargo on Iran. The fact sheet is available at <https://usun.usmission.gov/fact-sheet-u-s-introduces-commonsense-resolution-to-extend-arms-embargo-on-worlds-leading-state-sponsor-of-terrorism/> and excerpted below.

* * * *

The resolution reflects input from Security Council members. The United States has been committed to a fair and deliberative diplomatic process to advance this proposal.

The resolution is fully consistent with more than a decade of Security Council precedent. China, Russia, France, and the United Kingdom as Permanent Members of the Security Council have all voted in the past to support the same provisions we are now proposing.

The UN Security Council has a responsibility to maintain international peace and security. It will betray this responsibility if it opposes our reasonable proposal and allows Iran to buy and sell weapons like tanks, combat aircraft, and certain missile systems.

Middle East countries overwhelmingly support the U.S. proposal. They are calling on the Security Council to extend the arms embargo to prevent Iran from fueling more conflict.

The six members of the Gulf Cooperation Council (GCC) recently came together in an unprecedented way to call on the Security Council to extend the arms embargo. As the Secretary General of the GCC said, “we call on Members of the United Nations Security Council to uphold your mandate to maintain international peace and security and to act to maintain UN restrictions on Iran’s ability to purchase or provide arms.”

Israel has also called on the Security Council to support this proposal. In a letter to the Security Council, Israel’s Ambassador to the UN stated, “in light of all the Iranian regimes’ blatant violations of UN Security Council resolutions 2231 and 2140 it would be unthinkable and calamitous to allow the lifting of the arms embargo on October 18th.”

Iran continues to fuel conflict and spread terrorism across the Middle East.

Iran is the world’s leading state sponsor of terrorism. It supports partners, proxies and terrorist organizations across the Middle East, including in Syria, Iraq, Bahrain, Yemen, and Lebanon. These groups stockpile Iranians weapons and use them to fuel conflicts.

A UN report released in June by the Secretary-General confirmed weapons used to attack Saudi Arabia in September 2019 were of Iranian origin. The report also confirmed that certain arms and related materiel interdicted off the coast of Yemen in November 2019 and February 2020 were of Iranian origin. If the embargo is lifted, it will become easier for Iran to acquire new weapons and sell advanced arms to its partners and proxies.

* * * *

On August 14, 2020, Ambassador Craft delivered an explanation of vote on the U.S. proposed resolution to extend the Iran arms embargo. The resolution was not adopted. Her statement is excerpted below and available at <https://usun.usmission.gov/explanation-of-vote-on-the-u-s-resolution-extending-the-iran-arms-embargo/>. Secretary Pompeo also issued a statement (not excerpted herein) on August 14, 2020, available at <https://2017-2021.state.gov/on-the-security-councils-failure-to-hold-iran-accountable/>, criticizing the Security Council's failure to uphold its mission when it rejected the U.S.-proposed resolution to extend the arms embargo on Iran.

* * * *

...[T]oday, the United States stands sickened—but not surprised—as the clear majority of Council members gave the green light to Iran to buy and sell all manner of conventional weapons. The Council's failure today will serve neither peace nor security. Rather, it will fuel greater conflict and drive even more insecurity.

Failing to step up to this moral challenge validates the world's number one state sponsor of terror, just to save face and protect a failed political deal made outside the Council. A flawed deal, it is worth noting, under which Iran remains in significant non-performance of its commitments.

I've spoken in the Council about Iran's malign behavior. I've spoken of the risks in allowing the Iranian regime to import and export new and more powerful weapons. I've spoken to each of you about American determination to contain the Iranian threat.

* * * *

... The questions before us were simple today. Has Iran done anything to warrant reconsideration of its status as the world's number one state sponsor of terrorism? Should UN arms restrictions that have been in place for 13 years be lifted?

Rather than acknowledge these questions, members of this body sought refuge in the remnants of the failed Iran nuclear deal. Preserving the last threads of that deal became the objective, not the interests of humanity or the pursuit of peace.

And even in this context, I remind my colleagues from France, Germany, and the United Kingdom that their governments made clear just this June that, and I quote, "...we believe that the planned lifting of the UN conventional arms embargo established by Resolution 2231 next October would have major implications for regional security and stability."

That belief appears to have been short-lived.

The United States has acted in good faith throughout this process, and made clear to all parties that failure was simply not an option. Under Resolution 2231, the United States has every right to initiate snapback of provisions of previous Security Council resolutions. In the coming days, the United States will follow through on that promise to stop at nothing to extend the arms embargo.

* * * *

On August 20, 2020, Ambassador Craft conveyed a letter from Secretary of State Pompeo to the president of the Security Council providing notice of significant non-performance by Iran of its commitments under the JCPOA. The text of the letter is excerpted below and available at <https://digitallibrary.un.org/record/3878023?ln=en>.

* * * *

In accordance with paragraph 11 of Security Council resolution 2231 (2015), I write to notify the Security Council, on behalf of my Government, that Iran is in significant non-performance of its commitments under the Joint Comprehensive Plan of Action (JCPOA). Pursuant to this notification, which the United States makes as one of the JCPOA participants identified in paragraph 10 of resolution 2231 (2015), the process set forth in paragraphs 11 and 12 of that resolution leading to the reimposition of specified measures terminated under paragraph 7 (a) has been initiated.

The United States makes this notification to the Council only after substantial efforts have been made by Member States to remedy Iran's significant non-performance. This includes efforts by the United Kingdom, France and Germany to bring Iran back into performance of its JCPOA commitments, including by referring Iran's non-performance to the JCPOA Joint Commission under the arrangement's dispute resolution mechanism, as announced on 14 January 2020. Yet, despite extensive efforts and exhaustive diplomacy on the part of those Member States, Iran's significant non-performance persists. The United States is therefore left with no choice but to notify the Council that Iran is in significant non-performance of its JCPOA commitments.

Iran's significant non-performance is incontestable and a matter of public record. This is demonstrated by, among other actions, the following conduct by Iran:

- Iran's enrichment of uranium above the JCPOA limit of 3.67 per cent in non-performance of paragraphs 5 and 7 of the JCPOA main text and paragraph 28 of annex I to the JCPOA, reported most recently in paragraph 13 of the 5 June 2020 report of the International Atomic Energy Agency (IAEA) Director General on verification and monitoring in the Islamic Republic of Iran in light of United Nations Security Council resolution 2231 (2015) (the "June 2020 IAEA report").
- Iran's accumulation of an enriched uranium stockpile in excess of 300 kilograms of uranium hexafluoride or the equivalent in other chemical forms in non-performance of paragraph 7 of the JCPOA main text and paragraph 56 of annex I, reported most recently in paragraphs 27–29 of the June 2020 IAEA report.

- Iran's conduct of uranium enrichment activities that are not in line with its long-term enrichment and enrichment research and development plan (including with respect to the number and types of advanced centrifuges installed and undergoing testing) in non-performance of, inter alia, paragraph 1 of the JCPOA main text and paragraph 52 of annex I, reported most recently in paragraph 13 of the June 2020 IAEA report.
- Iran's conduct of enrichment research and development in a manner that accumulates enriched uranium in non-performance of paragraph 3 of the JCPOA main text and paragraph 32 of annex I, reported most recently in paragraphs 15 and 22 of the June 2020 IAEA report;
- Iran's enrichment of uranium at the Fordow Fuel Enrichment Plant in non-performance of, inter alia, paragraph 5 of the JCPOA main text and paragraphs 45 and 72 of annex I, reported most recently in paragraphs 13, 16 and 28 of the June 2020 IAEA report.
- Iran's accumulation of "excess" heavy water (i.e., in excess of its needs for the modernized Arak reactor, which the JCPOA states is estimated to be 130 metric tons) in non-performance of paragraph 10 of the JCPOA main text and paragraph 14 of annex I, reported most recently in paragraph 11 of the June 2020 IAEA report.

Pursuant to paragraph 12 of resolution 2231 (2015), if the Security Council does not adopt a resolution under paragraph 11 to continue in effect the terminations in paragraph 7 (a), then effective midnight Greenwich Mean Time after the thirtieth day after this notification to the Security Council, all of the provisions of resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008) and 1929 (2010) that have been terminated pursuant to paragraph 7 (a) shall apply in the same manner as they applied before the adoption of resolution 2231 (2015), and the measures contained in paragraphs 7, 8 and 16 to 20 of resolution 2231 (2015) shall be terminated.

Apart from Iran's significant non-performance of its commitments under the JCPOA, Iran has repeatedly defied the restrictions contained in annex B to resolution 2231 (2015). As has been extensively documented, most recently in the ninth report of the Secretary-General on the implementation of resolution 2231 (2015), Iran has repeatedly violated the arms embargo by proliferating weapons to its partners and proxies throughout the Middle East region. In addition, Iran has repeatedly defied the Security Council's call on it not to undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons by conducting launches using such ballistic missile technology. While not relevant to the clear and indisputable fact of Iran's significant non-performance of JCPOA commitments, these issues are also cause for serious concern and demonstrate Iran's defiance of the Security Council.

* * * *

On August 21, 2020, in response to letters from 13 members of the UN Security Council taking the view that the U.S. "snapback" notification was ineffective because the United States lacked legal standing to submit such a notification, Ambassador Craft conveyed the U.S. explanation of the legal basis for its right to initiate "snapback" of sanctions on Iran under resolution 2231. The legal brief is excerpted below (with

footnotes omitted).^{*} The full text is available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

* * * *

**The United States Has an Explicit Right to Initiate Snapback under
United Nations Security Council Resolution 2231**

The United States has an explicit right under United Nations (UN) Security Council resolution 2231 (2015) (Resolution 2231) to initiate the snapback of UN measures on Iran. Any argument to the contrary would supplant the resolution’s plain text with silent conditions, effectively allowing any State’s national policy decision to strike critical text from a UN Security Council resolution. Such an approach would create a perilous precedent that could threaten the force of virtually any Security Council decision.

* * *

Resolution 2231 provides the United States with the right to initiate the “snapback” of UN measures on Iran that had been in place prior to January 2016. That right is available to the United States irrespective of its current position on, or activities in relation to, the Joint Comprehensive Plan of Action (JCPOA), a non-binding political arrangement that is related to but distinct from Resolution 2231. As explained in section I, Resolution 2231 establishes a term, “JCPOA participants,” that is fixed in content and fixed over time, and provides the States identified in that term’s definition, including the United States, the right to initiate snapback. Resolution 2231 sets no other conditions on the eligibility of such States to initiate snapback. Additionally, as set out in section II, no events subsequent to Resolution 2231’s adoption have altered the United States’ right to initiate snapback. In particular, the United States’ May 8, 2018 announcement that, for national security reasons, it did not intend to continue to provide Iran with relief from U.S. sanctions that had been lifted under the JCPOA had effects only for that non-binding political arrangement. That announcement, and the United States’ actions to implement it, did not, and as a legal matter, could not, alter Resolution 2231 and the United States’ right to initiate snapback thereunder.

I. The Text of Resolution 2231 Gives “the United States” a Fixed Right to Initiate Snapback

“[T]he United States” and any other “JCPOA participant State” may initiate snapback. Operative paragraph (OP) 11 of Resolution 2231 sets out the requirements for initiating snapback. Those requirements are that (i) a “JCPOA participant State” (ii) notify the UN Security Council (iii) of an issue it believes constitutes “significant non-performance” of commitments under the JCPOA. As described further in section II below, non-binding political commitments under the JCPOA are separate and distinct from the legal right to initiate snapback under Resolution 2231.

^{*} Editor’s Note: The U.S. Mission to the UN submitted a letter to the UN Security Council on February 18, 2021, reversing the U.S. position regarding snapback, notifying the Council of the withdrawal of letters the United States previously submitted to the Council triggering the snapback mechanism and laying out the U.S. legal case for doing so.

a. Resolution 2231 Establishes a Fixed Term, “JCPOA Participants,” That Expressly Includes “the United States” in Its Definition

The text of Resolution 2231 provides the United States with the right to initiate snapback regardless of its current position on, or activities in relation to, the JCPOA’s non-binding political commitments. Specifically, OP 10 of Resolution 2231 creates a defined term—“JCPOA participants”—and expressly lists “the United States” as one of those “JCPOA participants,” in addition to “China, France, Germany, the Russian Federation, the United Kingdom, ... the European Union (EU), and Iran.” OP 11 explicitly states that a “JCPOA participant State” may initiate snapback. That right endures regardless of whether one views the United States as being in non-performance of the commitments it made under the JCPOA or as not currently participating in that political arrangement.

b. Resolution 2231 Places No Other Conditions on the Eligibility of States That Are Among the Named “JCPOA Participants”

The Security Council could have defined the term “JCPOA participants” in OP 10 by means other than a list of named entities. But it did not do so. It fixed a list of entities, including “the United States,” that are eligible to initiate snapback. Similarly, if it had wished to condition the right to initiate the snapback mechanism on more than just that the actor initiating snapback be one of the States identified as “JCPOA participants” in OP 10, it could have done so. But it did not do so. It would have been a simple task for the Council, for example, to have stated that the right to initiate snapback is available only to States considered to be “currently” participating in the JCPOA or in full performance of their JCPOA commitments at the time of the initiation. But it did not do so.

Instead, the Council provided the right to initiate the snapback mechanism to States identified as “JCPOA participants” in OP 10. Indeed, the fact that the Council used the phrase “JCPOA participant State” (emphasis added) to purposefully exclude one “JCPOA participant” listed in OP 10—the European Union—from the set of actors that could initiate snapback demonstrates that the Council: (i) clearly contemplated whether the right should be limited in some manner; (ii) was aware of how to draft such a limitation; and (iii) affirmatively decided that the only limitation on the “JCPOA participants” that have that right under OP 11 is that they be one of the States listed by name in OP 10, including the United States.

The assertion that the term “JCPOA participant State” in OP 11 should be interpreted independently from the definition of “JCPOA participants” in OP 10 and that paragraph’s express listing of entities within that grouping is also not persuasive. Specifically, this argument overlooks—and gives no force to—the drafters’ purposeful modification in OP 11 of the OP 10 term with the additional word “State” to exclude the European Union from the group given the right to initiate snapback. If the term “JCPOA participants” established in OP 10 were to have no relevance in interpreting the meaning of references to a “JCPOA participant” or “JCPOA participant State” in subsequent paragraphs of the resolution—all of which appear in binding provisions—then the establishment of that term in OP 10 would be rendered mere surplusage. It should be clear to all that the Council did not intend to waste its words. Whether one calls the term “JCPOA participants” in OP 10 a “defined term,” “shorthand,” or a “label” for a grouping that is then given operative effect in later paragraphs, including in OP 11, is irrelevant. The fact is that OP 10 establishes a term—“JCPOA participants”—that is given a meaning that is fixed in content and fixed over time.

c. Developments Beyond the Four Corners of Resolution 2231 Did Not and Could

Not Change the United States' Right To Initiate Snapback

Unilateral statements or other actions by a UN Member State cannot alter the language or meaning of a term defined by the Security Council, nor the rights it created for the States identified. Only the Security Council itself can modify the text of one of its resolutions by adopting a subsequent resolution. One UN Member State, even one Member of the Security Council, cannot unilaterally change the text of a Security Council resolution. For example, UN Security Council resolution 2531 (2020) established the term “the Malian Parties” and defined it as “the Government of Mali and the Plateforme and Coordination armed groups.” That resolution then proceeds to urge “the Malian Parties” to take certain action. No Member State has the ability to declare that—due to a changed circumstance or some other reason—one of the three named entities is no longer one of “the Malian parties” to which the resolution Council’s entreaties in resolution 2531 are directed. It is a defined term, with fixed content, used for purposes of that resolution. The only way to adjust the definition of “the Malian parties” for purposes of the Council’s efforts to address the situation in Mali would be through adoption of a subsequent Security Council resolution amending the definition of the term. Any argument to the contrary aggrandizes power to UN Member States that they simply do not have as a matter of international law. The meaning of OPs 10 and 11 of Resolution 2231 must be determined in accordance with the plain language of the text negotiated, drafted, and adopted by the Council, and that text alone.

II. The May 8, 2018 U.S. Decision To Cease Performance of Commitments It Had Under the JCPOA Had No Effect on U.S. Rights and Obligations under Resolution 2231

a. The JCPOA Is a Non-Binding Political Arrangement, and Resolution 2231 Did Not Change That

The JCPOA is a political arrangement consisting of non-binding political commitments, not an international agreement that imposes binding obligations. Resolution 2231 did not transform the JCPOA from a non-binding political arrangement, despite unfounded claims to the contrary. The JCPOA participants therefore were and are free to cease performing the nonbinding political commitments they had under the nuclear arrangement at any time without violating international law, so long as they comply with international obligations they have that are independent of the JCPOA, including their obligations under Resolution 2231. Ceasing performance of non-binding political commitments under the JCPOA has no effect on Member States’ rights and obligations under Resolution 2231.

The non-binding JCPOA is distinct from Resolution 2231, even though there is a close relationship between the two, and even though Resolution 2231 makes binding some aspects of the political arrangement—particularly, the nuclear-related “procurement channel.” When the Security Council imposes obligations under Chapter VII, as is the case for Resolution 2231, it does not mean that all of the provisions contained therein are legally binding. Because article 25 of the UN Charter requires Member States to “accept and carry out” the “decisions” of the Security Council, and article 41 of Chapter VII of the Charter authorizes the Security Council to “decide” to impose certain measures, it is generally understood that when the Council uses other verbs, such as “calls upon” or “urges” or even “demands,” it is not imposing legally binding obligations.

In Resolution 2231, the Council went to great lengths to make clear which of the Resolution’s provisions were intended to impose legal obligations. The Council not only used the word “decides” in Resolution 2231 when it intended to impose obligations on UN Member

States, but also took the unusual step of specifying in such provisions that it was “acting under Article 41 of the Charter of the United Nations” to make clear that those provisions of the resolution are legally binding. These legally binding provisions do not include OP 1, which “endorses” the JCPOA, or OP 2, which “calls upon all Member States to support implementation of the JCPOA. The Security Council’s endorsement of the JCPOA in OP 1 of Resolution 2231 was, consistent with the plain meaning of that word and Council precedent, simply an expression of political support. Neither that endorsement nor the inclusion of the JCPOA as an annex to the resolution transformed the JCPOA into a set of legal obligations binding on either the JCPOA Participants or other UN Member States. The text of Resolution 2231 itself makes clear that the annexes to the resolution are not automatically rendered legally binding. OP 7(b) of Resolution 2231 specifies that certain provisions of Annex B are legally binding; if the entire annex were automatically legally binding by annexation, then OP 7(b) would serve no purpose. Similarly, in OP 2, the Council issued a non-binding request that “calls upon” Member States to support implementation of the JCPOA rather than a binding directive that “decides” Member States shall do so. Other Member States have repeatedly pointed out that Iran’s missile launches do not violate Iran’s obligations under Resolution 2231 because paragraph 3 of Annex B “call[s] upon” Iran not to undertake certain missile activity, and such “calls upon” provisions are non-binding. Resolution 2231 thus imposes no obligation on Member States as a general matter to implement or support implementation of the non-binding commitments made under the JCPOA.

b. The U.S. Re-Imposition of Sanctions on Iran Did Not Change the United States’ Legal Rights and Obligations under Resolution 2231

Thus, the United States’ decision, announced on May 8, 2018, that the JCPOA failed to protect U.S. national security interests and, therefore, that the United States would immediately begin the process of re-imposing U.S. sanctions on Iran that had been lifted under the political arrangement did not violate any obligations of the United States under international law. Moreover, the United States is in full compliance with its obligations under Resolution 2231, namely the measures in Annex B to the resolution that the Council rendered legally binding through OP 7(b), which place restrictions on nuclear- and missile-related transfers to Iran, as well as transfers of arms in and out of Iran, and establish a targeted asset freeze and travel ban.

In disputing the U.S. right to initiate snapback, some have asserted that a State cannot avail itself of legal rights if it is in violation of corresponding legal obligations. Without a hint of irony, those who make this assertion nevertheless recognize that Iran continues to reap significant benefits from Resolution 2231, even though Iran has repeatedly violated the resolution through numerous arms transfers that have been widely recognized as a violation by other JCPOA participants and the international community. Even assuming, *arguendo*, that the aforementioned principle applies in this context, the premise that the United States is in violation of international obligations under the JCPOA and/or Resolution 2231 is legally inaccurate. As explained above, the U.S. decision to cease performing the commitments it had under the JCPOA violated no U.S. obligations under international law. Therefore, even on such a theory, it cannot be said that the United States no longer has the right under OP 11 of Resolution 2231 to initiate the snapback of UN measures on Iran.

The May 8, 2018 U.S. action—deciding not to perform commitments the United States had under the Plan of Action—in and of itself therefore only had effects for the JCPOA, not Resolution 2231. On that date, the United States announced that it did not intend to provide Iran with relief from U.S. sanctions that had been lifted under the JCPOA, a political agreement, and

this announcement of U.S. non-performance of the political arrangement was simply that. Neither the U.S. President's announcement that day nor any associated documents mention or were addressed to any aspect of Resolution 2231. Nor was there any U.S. notification to the UN Security Council of the steps the United States was taking to re-impose nuclear-related sanctions on Iran. There is a straightforward reason for this: such a notification was not required by Resolution 2231, and the May 8, 2018 decision by the United States was not intended to, and, as a legal matter, could not, have any legal effect on the United States' independent legal rights and obligations under the resolution.

III. Conclusion

The plain text of Resolution 2231 establishes and fixes the United States' right to initiate the snapback of UN measures on Iran. As explained above, this is a straightforward and uncomplicated proposition, and arguments to the contrary would have the effect of supplanting the resolution's plain text with silent conditions to alter the rights created by the Council. Developments beyond the four corners of Resolution 2231 did not and could not change the United States' right to initiate snapback. In particular, the United States' decision to cease providing Iran relief from U.S. sanctions under the separate, non-binding political arrangement that is the JCPOA did not and could not alter Resolution 2231's text. Arguments that the United States has forfeited or waived its right to initiate snapback are unfounded. The resolution's text is clear: upon notification by a JCPOA participant State, including the United States, to the Security Council of significant non-performance of commitments under the JCPOA, the process set forth in OPs 11 and 12 of Resolution 2231 leading to the re-imposition of specified measures terminated under the resolution shall be initiated. If, following such notification by the United States, the Council does not adopt a resolution to continue in effect the terminations under Resolution 2231 (regardless of whether a resolution continuing relief is tabled—and vetoed), then effective midnight Greenwich Mean Time after the thirtieth day after such notification, such measures shall be re-applied.

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On September 19, 2020, Secretary Pompeo issued a press statement regarding the return of UN sanctions on Iran, which is available at <https://2017-2021.state.gov/the-return-of-un-sanctions-on-the-islamic-republic-of-iran/index.html>, and excerpted below.

* * * *

The ... United States welcomes the return of virtually all previously terminated UN sanctions on the Islamic Republic of Iran, the world's leading state sponsor of terror and anti-Semitism.

Sanctions are being re-imposed on Iran pursuant to the snapback process under UN Security Council resolution (UNSCR) 2231. On August 20, the United States notified the President of the Security Council of Iran's significant non-performance of its JCPOA commitments. This notification triggered the 30-day process leading to the snapback of previously terminated UN sanctions, which became effective at 8pm Eastern Daylight Time on September 19. This means that starting today, all of the provisions of UNSCRs 1696, 1737,

1747, 1803, 1835, and 1929 that were terminated by UNSCR 2231 are back in effect. Furthermore, the measures contained in paragraphs 7, 8, and 16 to 20 of UNSCR 2231 are now terminated.

The United States took this decisive action because, in addition to Iran's failure to perform its JCPOA commitments, the Security Council failed to extend the UN arms embargo on Iran, which had been in place for 13 years. The Security Council's inaction would have paved the way for Iran to buy all manner of conventional weapons on October 18. Fortunately for the world, the United States took responsible action to stop this from happening. In accordance with our rights under UNSCR 2231, we initiated the snapback process to restore virtually all previously terminated UN sanctions, including the arms embargo. The world will be safer as a result.

The United States expects all UN Member States to fully comply with their obligations to implement these measures. In addition to the arms embargo, this includes restrictions such as the ban on Iran engaging in enrichment and reprocessing-related activities, the prohibition on ballistic missile testing and development by Iran, and sanctions on the transfer of nuclear- and missile-related technologies to Iran, among others. If UN Member States fail to fulfill their obligations to implement these sanctions, the United States is prepared to use our domestic authorities to impose consequences for those failures and ensure that Iran does not reap the benefits of UN-prohibited activity.

The return of sanctions today is a step toward international peace and security. The 2015 nuclear deal did not induce Iran to join "the community of nations" as promised. Instead, the mullahs took their newfound wealth and used it to foment death and destruction from Yemen to Iraq to Lebanon and Syria – a predictable outcome. Were it not for U.S. action to restore UN measures, the Iranian regime would soon be able to buy and sell weapons more freely across the globe. Because of the failures of the JCPOA, Iran is nearly five years closer to the expiration of restrictions on Iran's uranium enrichment program and reprocessing-related activities, bringing it unacceptably close to a dangerous nuclear breakout capability. However, thanks to the snapback of UN sanctions, Iran is now obligated to suspend enrichment, reprocessing, and heavy-water-related activities. We will never let the world's leading state sponsor of terror obtain the world's most deadly weapon.

In the coming days, the United States will announce a range of additional measures to strengthen implementation of UN sanctions and hold violators accountable. Our maximum pressure campaign on the Iranian regime will continue until Iran reaches a comprehensive agreement with us to rein in its proliferation threats and stops spreading chaos, violence, and bloodshed.

* * * *

On September 21, 2020, Ambassador Craft conveyed the letter below to the president of the UN Security Council, providing notice of the re-imposition of sanctions measures relating to Iran. Also on September 21, 2020, Ambassador Craft delivered remarks at a State Department press briefing on the snapback of sanctions on Iran. Her remarks are available at <https://usun.usmission.gov/remarks-at-a-state-department-press-briefing-on-iran-snapback-sanctions/> and include the statement that,

“It is now our expectation that all UN Member States will fulfill their legal obligation and re-impose sanctions on Iran.”

* * * *

Pursuant to paragraph 11 of resolution 2231 (2015), on August 20 the United States notified the President of the Security Council of Iran’s significant non-performance of commitments under the Joint Comprehensive Plan of Action (JCPOA). Accordingly, pursuant to paragraph 12 of resolution 2231 (2015), since the Security Council has not adopted a resolution to continue in effect the terminations in paragraph 7(a) of resolution 2231 (2015), effective midnight ... (GMT) on September 20, 2020, all of the provisions of resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), and 1929 (2010) that were terminated by resolution 2231 (2015) apply in the same manner as they applied before the adoption of resolution 2231 (2015). In addition, the measures contained in paragraph 7, 8, and 16 to 20 of resolution 2231 (2015) are terminated.

As is clear from the text of paragraph 12 of resolution 2231 (2015), the provisions terminated by resolution 2231 (2015) shall be re-applied, and the relevant sections of resolution 2231 (2015) shall be terminated, if the Security Council does not adopt a resolution to continue in effect the terminations within the specific time period. Furthermore, the process established in paragraphs 11 through 15 of resolution 2231 (2015) at no point requires that there be consensus among Members of the Security Council for the re-imposition of the relevant measures to take effect. Thus, because the Security Council has not adopted a resolution to continue in effect the terminations, and irrespective of the fact that no such resolution was introduced or voted on, the relevant measures were re-imposed at midnight GMT on September 21. The measures include:

Nuclear-Related Measures

* * * *

Ballistic Missile-Related Measures

* * * *

Arms Embargo

* * * *

Targeted Sanctions on Individuals and Entities

* * * *

Other Provisions

* * * *

Since the Security Council did not adopt a resolution to the contrary, at midnight GMT on September 20, all Member States are obligated to implement the re-imposed measures, including those identified above, and the relevant provisions of resolution 2231 (2015) have been terminated. In addition, the Secretariat now must take the steps necessary to re-establish the 1737 Committee and its Panel of Experts.

* * * *

On October 18, 2020, the State Department issued a press statement by Secretary Pompeo on the status of the UN arms embargo on Iran. The statement, available at <https://2017-2021.state.gov/status-of-un-arms-embargo-on-iran/>, is excerpted below.

* * * *

On September 19, virtually all UN sanctions on Iran returned, including re-imposition of the UN arms embargo. Accordingly, the export of [certain conventional arms](#) to Iran is a violation of UN Security Council Resolution (UNSCR) 1929 and the procurement of any arms or related materiel from Iran is a violation of UNSCR 1747. The United States is prepared to use its domestic authorities to sanction any individual or entity that materially contributes to the supply, sale, or transfer of conventional arms to or from Iran, as well as those who provide technical training, financial support and services, and other assistance related to these arms.

Every nation that seeks peace and stability in the Middle East and supports the fight against terrorism should refrain from any arms transactions with Iran. Providing arms to Iran will only aggravate tensions in the region, put more dangerous weapons into the hands of terrorist groups and proxies, and risk increasing threats to the security of Israel and other peaceful nations. For the past 10 years, countries have refrained from selling weapons to Iran under various UN measures. Any country that now challenges this prohibition will be very clearly choosing to fuel conflict and tension over promoting peace and security.

Any nation that sells weapons to Iran is impoverishing the Iranian people by enabling the regime's diversion of funds away from the people and toward the regime's military aims. ...

* * * *

c. *U.S. sanctions and other controls*

Further information on Iran sanctions is available at <https://www.state.gov/iran-sanctions/> and <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/iran-sanctions>. In 2020, the President issued two new executive orders with respect to Iran: E.O. 13902 of January 10, 2020, "Imposing Sanctions with respect to Additional Sectors of Iran" (85 Fed. Reg. 2003 (Jan. 14, 2020)) and E.O. 13949 of September 21, 2020, "Blocking Property of Certain Persons with

Respect to the Conventional Arms Activities of Iran” (85 Fed. Reg. 60,043 (Sep. 23, 2020)).

(1) *E.O. 13902*

Section 1(a) of E.O. 13902 of January 10, 2020, 85 Fed. Reg. 2003 (Jan. 14, 2020), below, describes the persons potentially subject to the order as those determined:

(i) to operate in the construction, mining, manufacturing, or textiles sectors of the Iranian economy, or any other sector of the Iranian economy as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State;

(ii) to have knowingly engaged, on or after the date of this order, in a significant transaction for the sale, supply, or transfer to or from Iran of significant goods or services used in connection with a sector of the Iranian economy specified in, or determined by the Secretary of the Treasury, in consultation with the Secretary of State, pursuant to, subsection (a)(i) of this section;

(iii) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, 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.

On October 8, 2020, OFAC identified the financial sector of Iran as an additional sector subject to E.O. 13902 and designated the following under E.O. 13902: AMIN INVESTMENT BANK; BANK KESHAVARZI IRAN; BANK MASKAN; BANK REFAH KARGARAN; BANK-;E SHAHR; EGHTE SAD NOVIN BANK; GHARZOLHASANEH RESALAT BANK; HEKMAT IRANIAN BANK; IRAN ZAMIN BANK; ISLAMIC REGIONAL COOPERATION BANK; KARAFARIN BANK; KHAVARMIANEH BANK; MEHR IRAN CREDIT UNION BANK; PASARGAD BANK; SAMAN BANK; SARMAYEH BANK; TOSEE TAAVON BANK (a.k.a. BANK-E TOSE'E TA'AVON; a.k.a. COOPERATIVE DEVELOPMENT BANK; and TOURISM BANK. 85 Fed. Reg. 65138 (Oct. 14, 2020). On October 8, 2020, the State Department issued a press statement regarding the 13902 designations, available at <https://2017-2021.state.gov/sanctions-on-irans-financial-institutions/>, and excerpted below.

Today, the United States is identifying the Iranian financial sector as subject to the terms of Executive Order (E.O.) 13902 and sanctioning 18 major Iranian banks, further depriving the Islamic Republic of Iran of funds to carry out its support for terrorist activities and nuclear extortion ...

(2) *E.O. 13949*

E.O. 13949—aimed at countering conventional weapons transfers to and from Iran (and the reimposition, or “snapback,” of sanctions under UNSCR 2231, discussed *supra*)—is excerpted below. 85 Fed. Reg. 60,043 (Sep. 23, 2020).

* * * *

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:

(i) any person determined by the Secretary of State, in consultation with the Secretary of the Treasury, to engage in any activity that materially contributes to the supply, sale, or transfer, directly or indirectly, to or from Iran, or for the use in or benefit of Iran, of arms or related materiel, including spare parts;

(ii) any person determined by the Secretary of State, in consultation with the Secretary of the Treasury, to provide to Iran any technical training, financial resources or services, advice, other services, or assistance related to the supply, sale, transfer, manufacture, maintenance, or use of arms and related materiel described in subsection (a)(i) of this section;

(iii) any person determined by the Secretary of State, in consultation with the Secretary of the Treasury, to have engaged, or attempted to engage, in any activity that materially contributes to, or poses a risk of materially contributing to, the proliferation of arms or related materiel or items intended for military end-uses or military end-users, including any efforts to manufacture, acquire, possess, develop, transport, transfer, or use such items, by the Government of Iran (including persons owned or controlled by, or acting for or on behalf of the Government of Iran) or paramilitary organizations financially or militarily supported by the Government of Iran;

(iv) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any person whose property and interests in property are blocked pursuant to this order; or

(v) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, 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.

* * * *

On September 21, 2020, OFAC designated the following under E.O. 13949 after the Secretary of State identified them in a list submitted to Congress: Nicolas MADURO MOROS; Mehرداد Akhlaghi KETABACHI; DEFENSE INDUSTRIES ORGANIZATION; and MINISTRY OF DEFENSE AND ARMED FORCES LOGISTICS. 85 Fed. Reg. 65,137 (Oct. 14, 2020).

(3) *E.O. 13871*

On January 10, 2020, the State Department announced in a press statement available at <https://2017-2021.state.gov/intensified-sanctions-on-iran/> that the Department of the Treasury was sanctioning entities and vessels pursuant to E.O. 13871, for operating in the iron, steel, aluminum, or copper sectors of Iran, and related activities. 85 Fed. Reg. 2814 (Jan. 16, 2020). The designated entities are: ESFAHAN'S MOBARAKEH STEEL COMPANY; SABA STEEL; HORMOZGAN STEEL COMPANY; IRAN ALUMINUM COMPANY; KHALAGH TADBIR PARS CO., PAMCHEL TRADING BEIJING CO. LTD., POWER ANCHOR LIMITED, HONGYUAN MARINE CO LTD, SOUTH KAVEH STEEL COMPANY, OXIN STEEL COMPANY, ESFAHAN STEEL COMPANY (a.k.a. "ECISO"), KHORASAN STEEL COMPANY, ARFA IRON AND STEEL COMPANY, IRAN ALLOY STEEL COMPANY, KHOUZESTAN STEEL COMPANY, ALMAHDI ALUMINUM CO., NATIONAL IRANIAN COPPER INDUSTRIES COMPANY, GOLGOHAR MINING AND INDUSTRIAL COMPANY, IRANIAN GHADIR IRON & STEEL CO., REPUTABLE TRADING SOURCE LLC, and CHADORMALU MINING & INDUSTRIAL COMPANY.

On June 25, 2020, OFAC designated the following pursuant to E.O. 13871: TARA STEEL TRADING GMBH, METIL STEEL, PACIFIC STEEL FZE, BETTER FUTURE GENERAL TRADING CO LLC, TUKA METAL TRADING DMCC, SOUTH ALUMINUM COMPANY, SIRJAN JAHAN STEEL COMPLEX, and IRAN CENTRAL IRON ORE COMPANY. 85 Fed. Reg. 39,683 (July 1, 2020). The State Department press statement regarding the June 25, 2020 sanctions with respect to Iran's metal industry is available at <https://2017-2021.state.gov/the-united-states-imposes-sanctions-with-respect-to-irans-metal-industry/>, and explains that the "entities were designated for their affiliation to Iranian entity Mobarakeh Steel Company, whose property and interests in property are currently blocked pursuant to E.O. 13871, and/or for operating in the iron, steel, and aluminum sectors of Iran."

(4) *E.O. 13876*

As discussed in *Digest 2019* at 498, the President issued E.O. 13876, sanctioning the Supreme Leader of Iran and the Supreme Leader's Office, and authorizing sanctions on certain persons associated with it.

On January 10, 2020, the State Department announced sanctions pursuant to E.O. 13876 on eight senior Iranian leaders, including Ali Shamkhani, the Secretary of the Supreme National Security Council, Gholamreza Soleimani, the Commander of the Basij, and six other senior officials. See 85 Fed. Reg. 2814 (Jan. 16, 2020) (designations of Mohsen REZA'I, Mohsen QOMI, Mohammad Reza NAQDI, Gholamreza SOLEIMANI, Mohammad-Reza ASHTIANI, Ali ABDOLLAHI, Asghar MIR-HEJAZI, and Ali SHAMKHANI pursuant to E.O. 13876).

On February 20, 2020, the State Department announced the designation of five members of Iran's Guardian Council and its Elections Supervision Committee under E.O. 13876, in a press statement, available at <https://2017-2021.state.gov/the-iranian->

[people-deserve-free-and-fair-elections/](#). The press statement identifies the designations as follows:

Clerics like [Ahmad] Jannati [Secretary of the Guardian Council] have deprived the Iranian people of a real choice at the ballot box for the last 41 years. The officials designated today were appointed by or are associated with Iran's unelected Supreme Leader. They oversee an electoral process that silences the voices of the Iranian people and limits their political participation. In advance of Iran's upcoming parliamentary elections on February 21, the Guardian Council blocked more than 7,000 candidates from even running. Many of them were Iranians who questioned the Supreme Leader's policies. ...

Special Representative for Iran Brian Hook held a special briefing on the designations and the elections in Iran on February 20, 2020. The transcript of the briefing is excerpted below and available at <https://2017-2021.state.gov/briefing-with-special-representative-for-iran-and-senior-advisor-to-the-secretary-brian-hook/>.

* * * *

...the United States is sanctioning five senior regime officials under Executive Order 13876. The five officials being designated today have denied the Iranian people free and fair parliamentary elections. This includes Ahmad Jannati, the Secretary of the Guardian Council, as well as Mohammad Yazdi, a senior member of the council and former head of Iran's brutal judiciary. We are sanctioning three other officials who serve on the Guardian Council Central Committee for Election Supervision.

Together, these five officials oversee a process that silences the voice of the Iranian people, curtails their freedom, and limits their political participation. Any Iranian who wants to run for office must first be approved by the Guardian Council and its Committee for Election Supervision. The Guardian Council is led by a group of 12 unelected clerics and so-called legal experts. They decide who gets on the ballot. They are the ones who really get to vote in Iran.

For the elections tomorrow, the council denied more than 7,000 candidates the right to participate in the election. They also disqualified 90 sitting members of Iran's parliament for running for re-election. The chairman of the Guardian Council is Ahmad Jannati. He is a 92-year-old cleric. He joined the council in 1980 and became chairman in 1988. So for the last 40 years, he has been busy deciding whom Iranians get to vote for. And in 2010, when Iranians protested his sham election, Jannati praised the regime for executing protestors. He urged more executions until the protests stopped.

Jannati is also well known for wishing death to America and death to Israel whenever the occasion presents itself. ...

The Iranian people know that tomorrow's election is political theater. It is a republic in name only when the government disqualifies half of the candidates running for office. Millions of Iranians have decided to stay home. They know they don't have a genuine say in the process.

They are asking for a free and fair process where they can share their views openly without the fear of being marginalized or massacred.

The United States will continue to expose Iranian officials who use their authority to abuse the rights of the Iranian people and deny them their basic freedoms. This regime should respect the aspirations of its people for a representative government and give them a real choice at the ballot box.

... [A] few weeks ago, the United States Navy interdicted a large cache of Iranian weapons on a dhow headed to the Houthis in Yemen. The seizure included 150 Dehlahieh Iranian-made, anti-tank missiles as well as three Iranian-designed-and manufactured surface-to-air missiles. There were also Iranian-made thermal optical sights and components for the Houthis to assemble numerous waterborne improvised explosive devices. These weapons pose a very real threat to commercial navigation and freedom of navigation in the Red Sea.

This interdiction was preceded by another large interdiction in November, in which the U.S. Navy seized a shipment of advanced Iranian weapons and Iranian weapon components destined for the Houthis in Yemen, including the same types of anti-tank missiles and surface-to-air missiles that were seized just a few weeks ago. A United Nations report released in January examined these and other weapons seized in previous transfers to Yemen, and found that they were likely manufactured in Iran.

Iran's ongoing transfer of weapons to the Houthis violates multiple UN Security Council resolutions. These successful operations by the United States are exposing Iran's duplicity in Yemen. While the regime claims that it supports a diplomatic solution to the conflict, its actions prove otherwise. Guided missiles and improvised explosive devices are not the tools of diplomacy; they are the weapons of war and they are what Iran brings to the table.

The United States will continue to stand with our partners in the region to counter Iran's malign activity. ...

As we work closely with our partners in the region, we are also working with our allies around the world to counter Iranian arms shipments and missile proliferation. The international community should apply more pressure on Iran until it stops providing arms, training, and funding to proxy groups in the gray zone. This includes by acting to extend the UN arms embargo on Iran....

Lifting Security Council restrictions on Iran's ability to provide weapons to terrorist groups or militias will undermine peace in the region. It will embolden Iran, allow it to grow its arsenal even further, and deepen its role in ongoing conflicts.

* * * *

On March 26, 2020, OFAC identified Ali Hussein KHAMENEI pursuant to E.O. 13876. 85 Fed. Reg. 35,697 (June 11, 2020). On May 1, 2020, OFAC designated Mohammad Javad ZARIF pursuant to E.O. 13876 for having acted or purported to act for or on behalf of, directly or indirectly, the SUPREME LEADER OF IRAN. 85 Fed. Reg. 35,697 (June 11, 2020).

(5) *Section 1245 of NDAA and E.O. 13846*

On June 5, 2020, 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.” 85 Fed. Reg. 36,995 (June 19, 2020). 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.

On January 23, 2020, OFAC imposed sanctions on the following pursuant to E.O. 13846 for assisting or supporting the previously-sanctioned National Iranian Oil Company (“NIOC”): BENEATHCO DMCC; PEAKVIEW INDUSTRY CO., LIMITED; SAGE ENERGY HK LIMITED; and TRILLIANCE PETROCHEMICAL CO. LTD. 85 Fed. Reg. 17,943 (Mar. 31, 2020). Also on January 23, 2020, the State Department imposed sanctions on Chinese company Shandong Qiwangda Petrochemical Co. Ltd., Hong Kong-based Trilliance Petrochemical, and Hong Kong entity Jiaxiang Industry Hong Kong Limited for knowingly engaging in a significant transaction for the purchase, acquisition, sale, or transport of petrochemical products from Iran, pursuant to E.O. 13846. See State Department press statement, available at <https://2017-2021.state.gov/the-united-states-imposes-further-sanctions-on-irans-petrochemical-industry/>. Two company executives were also designated: Ali Bayandarian, managing director of Trilliance Petrochemical; and Zhiqing Wang, chairman and legal representative of Shandong Qiwangda Petrochemical Co., Ltd. *Id.*

The Secretary of State determined on January 31, 2020 that the sanctions imposed with respect to the following persons on September 25, 2019 pursuant to Executive Order 13846 were terminated as of January 31, 2020: COSCO Shipping Tanker (Dalian) Co. Ltd. and Yazhou Xu. 85 Fed. Reg. 81,261 (Dec. 15, 2020).

On March 18, 2020, in a fact sheet available at <https://2017-2021.state.gov/sanctions-on-entities-trading-in-or-transporting-iranian-petrochemicals/>, the Department of State announced E.O. 13846 sanctions, on the following seven entities for knowingly engaging in a significant transaction for the purchase, acquisition, sale, transport, or marketing of petrochemical products from Iran: South African company SPI International Proprietary Limited; Hong Kong-based companies McFly Plastic HK Limited, Saturn Oasis Co., Limited, and Sea Charming Shipping Company Limited; and Chinese companies Dalian Golden Sun Import & Export Co., Ltd., Tianyi International (Dalian) Co., Ltd., and Aoxing Ship Management (Shanghai) Ltd. The fact sheet also includes the Department of State sanctions, pursuant to E.O. 13846, on the following two entities, each of which owns or controls SPI International Proprietary Limited and had knowledge of its sanctionable activities: South African company Main Street 1095; and Iranian entity Armed Forces Social Security Investment Company. And the fact sheet lists the E.O. 13846 sanctions on three individuals who are executive officers of the above entities: Mohammad Hassan Toulai, Managing Director of Armed Forces Social Security Investment Company; Hossein Tavakkoli, Director of SPI International Proprietary Limited; and Reza Ebadzadeh Semnani, Director of Main Street 1095. In addition to the fact sheet, the State Department issued a March 18, 2020 statement by the Secretary, available at <https://2017-2021.state.gov/further-sanctions-on-entities-trading-in-or-transporting-iranian-petrochemicals/index.html>, regarding

these sanctions on nine entities for activity that “provides revenue to the regime that it may use to fund terror and other destabilizing activities,” and on three associated individuals.

On March 19, 2020, OFAC designated the following under E.O. 13846: SWISSOL TRADING DMCC, ALPHABET INTERNATIONAL DMCC, PETRO GRANDE FZE, and ALAM ALTHRWA GENERAL TRADING LLC. 85 Fed. Reg. 67,607 (Oct. 23, 2020).

On August 14, 2020, the State Department shared in a press statement, available at <https://2017-2021.state.gov/on-u-s-seizure-of-iranian-gasoline-intended-for-the-illegitimate-maduro-regime/>, that the U.S. government had seized over one million barrels of Iranian gasoline intended for the Maduro regime in Venezuela, the proceeds of which would allegedly have benefitted the IRGC. The Departments of State, Homeland Security, and Justice assisted in coordinating the seizure. The statement noted that if the forfeiture action for the cargo were successful, proceeds from a sale could be added to the U.S. Victims of State Sponsored Terrorism Fund.

The following entities were designated under E.O. 13846 on September 3, 2020: SINO ENERGY SHIPPING HONGKONG LIMITED, CHEMTRANS PETROCHEMICALS TRADING LLC, ABADAN OIL REFINING COMPANY, NEW FAR INTERNATIONAL LOGISTICS LIMITED, and ZHIHANG SHIP MANAGEMENT SHANGHAI CO LTD. 85 Fed. Reg. 60,282 (Sep. 24, 2020). The following individuals were also designated under E.O. 13846 on September 3, 2020: Zuoyou LIN, Alireza AMIN, and Min SHI. *Id.* Also on September 3, OFAC designated the following under E.O. 13846: ZAGROS PETROCHEMICAL, TRIO ENERGY DMCC, JINGHO TECHNOLOGY CO. LIMITED, DYNAPEX ENERGY LIMITED, PETROTECH FZE, and DINRIN LIMITED. 85 Fed. Reg. 60,518 (Sep. 25, 2020). The Secretary of State determined, pursuant to Section 3(a) (ii) of E.O. 13846, that, effective September 3, 2020, Abadan Refining Company, Zhihang Ship Management (Shanghai) Co Ltd, New Far International Logistics LLC, Chemtrans Petrochemicals Trading LLC, and Sino Energy Shipping (Hong Kong) Ltd, have knowingly, on or after November 5, 2018, engaged in a significant transaction for the purchase, acquisition, sale, transport, or marketing of petroleum products from Iran. 85 Fed. Reg. 81,262 (Dec. 15, 2020). The State Department issued a press statement on the September 3, 2020 E.O. 13846 sanctions on these entities for engaging in transactions with the Iranian petroleum and petrochemical industry, and on their principals, available at <https://2017-2021.state.gov/imposing-sanctions-on-entities-for-engaging-in-transactions-related-to-irans-petroleum-and-petrochemical-industry/>.

On October 19, 2020, the following were designated pursuant to E.O. 13846: individuals Eric CHEN and Daniel Y. HE; and entities DELIGHT SHIPPING COMPANY LIMITED, GRACIOUS SHIPPING COMPANY LIMITED, NOBLE SHIPPING COMPANY LIMITED, REACH HOLDING GROUP SHANGHAI CO., LTD., REACH SHIPPING LINES HONG KONG CO., LIMITED, and SUPREME SHIPPING COMPANY LIMITED. 85 Fed. Reg. 67,420 (Oct. 22, 2020).

The Secretary of State determined to apply certain sanctions pursuant to E.O. 13846, effective October 29, 2020 on Arya Sasol Polymer Company, Binrin Limited, Bakhtar Commercial Company, Kavian Petrochemical Company, and Strait Shipbrokers PTE. LTD, based on their significant transactions for the purchase, acquisition, sale,

transport, or marketing of petroleum products from Iran. 86 Fed. Reg. 672 (Jan. 6, 2021). On October 30, 2020, the State Department issued a press statement, available at <https://2017-2021.state.gov/united-states-sanctions-entities-related-to-irans-petroleum-industry/> regarding recent actions directed toward Iran's petroleum industry, including sanctions under E.O. 13846. Excerpts follow from the statement. The Treasury Department press release on these actions is available at <https://home.treasury.gov/news/press-releases/sm1168>. The Department of Justice release is available at <https://www.justice.gov/opa/pr/united-states-files-complaint-against-iranian-missiles-and-sells-previously-transferred>.

The Justice Department announced the filing of a complaint to seek the forfeiture of two shipments of Iranian missiles the U.S. Navy seized in transit from Iran's Islamic Revolutionary Guard Corps to militant groups in Yemen, as well as the sale of approximately 1.1 million barrels of Iranian petroleum the U.S. previously took custody of from four foreign-flagged oil tankers bound for Venezuela. These actions represent the U.S. government's largest-ever forfeiture actions for fuel and weapons shipments from Iran.

The State Department imposed sanctions on Arya Sasol Polymer Company, Binrin Limited, Bakhtar Commercial Company, Kavian Petrochemical Company, and Strait Shipbrokers PTE. LTD, pursuant to section 3(a)(ii) of Executive Order (E.O.) 13846. These entities based in Iran, China, and Singapore, have knowingly engaged in a significant transaction for the purchase, acquisition, sale, transport, or marketing of petroleum products from Iran. In addition, the State Department imposed sanctions on Amir Hossein Bahreini, Lin Na Wei, Murtuza Mustafamunir Basrai, Hosein Firouzi Arani, and Ramezan Oladi for being principal executive officer of the aforementioned entities, or performing similar functions and with similar authorities as a principal executive officer, for purposes of Section 5(a)(vii) of E.O.13846.

Moreover, the Department of the Treasury's Office of Foreign Assets Control designated eight entities related to involvement in the sale and purchase of Iranian petrochemical products brokered by Triliance Petrochemical Co. Ltd., a U.S.-designated entity, pursuant to E.O.13846.

On December 16, 2020, the State Department issued a press statement, available at <https://2017-2021.state.gov/sanctioning-supporters-of-irans-petroleum-and-petrochemical-sectors/>, announcing U.S. sanctions under E.O. 13846 on the following supporters of Iran's petroleum and petrochemical sectors:

Vietnam Gas and Chemicals Transportation Corporation, a vessel manager, ...the company's Managing Director, Vo Ngoc Phung, for serving as a principal executive officer of the company.

...China-based Donghai International Ship Management Limited and Petrochem South East Limited, as well as UAE-based Alpha Tech Trading FZE and Petroliance Trading FZE.

(6) *E.O. 13599*

E.O. 13599, entitled “Blocking Property of the Government of Iran and Iranian Financial Institutions” has been in effect since 2012. On June 24, 2020, OFAC identified the following individuals pursuant to E.O. 13599: Ali DANAEI KENARSARI, Mohsen GOHARDEHI, Alireza RAHNAVARD, Reza VAZIRI, and Hamidreza YAHYA ZADEH. 85 Fed. Reg. 39,040 (June 29, 2020). See also June 24, 2020 press statement, available at <https://2017-2021.state.gov/sanctions-on-iranian-tanker-captains-for-assistance-to-maduros-illegitimate-regime/> (those identified are Iranian ship captains, who delivered approximately 1.5 million barrels of Iranian gasoline and related components to Venezuela in support of the Maduro).

(7) *Nonproliferation sanctions*

(a) *E.O. 13382*

E.O. 13382, entitled “Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters,” authorizes sanctions on persons for their ties to, or support for persons previously designated for involvement in, Iran’s weapons of mass destruction (“WMD”) programs.

On January 21, 2020, the State Department published the designation of Mahan Air pursuant to E.O. 13382. 85 Fed. Reg. 3468 (Jan. 21, 2020). On January 30, 2020, the State Department designated the Atomic Energy Organization of Iran (“AEOI”) and its head, Ali Akbar Salehi, pursuant to E.O. 13382. 85 Fed. Reg. 12,958 (Mar. 5, 2020). The January 31, 2020 press statement announcing the designations, available at <https://2017-2021.state.gov/designation-of-the-atomic-energy-organization-of-iran-its-head-ali-akbar-salehi-and-renewing-nuclear-restrictions/>, explains:

AEOI has played a leading role in Iran’s nonperformance of its key nuclear commitments, such as exceeding the limits on its uranium stockpile and enrichment levels. Ali Akbar Salehi, the head of AEOI, personally inaugurated the installation of new, advanced centrifuges as part of Iran’s recent effort to expand its uranium enrichment capacity and chaired a ceremony at which Iran started injecting uranium gas into advanced IR-6 centrifuge machines.

On March 26, 2020, OFAC designated the following under E.O. 13382: Shaghayegh AKHAEI; Hadi DEGHAN; Hamed DEGHAN; Mahdi EBRAHIMZADEH; Seyed Hossein SHARIAT; ASRE SANAT ESHRAGH COMPANY; EBTEKAR SANAT ILYA LLC; GREEN INDUSTRIES HONG KONG LIMITED; PISHTAZAN KAVOSH GOSTAR BOSHRA, LLC; SHAFAGH SENOBAR YAZD COMPANY LIMITED. 85 Fed. Reg. 17,945 (Mar. 31, 2020).

On June 8, 2020, E.O. 13382 sanctions against the Islamic Republic of Iran Shipping Lines (“IRISL”) and its Shanghai-based subsidiary, E-Sail Shipping Company Ltd (“E-Sail”) took effect, 180 days after they were announced (to allow exporters of humanitarian items to find alternatives). See June 8, 2020 State Department press statement, available at <https://2017-2021.state.gov/united-states-designates-key-iranian-shipping-entities-under-proliferation-authority-as-tehran-continues-to-expand-proliferation-sensitive-activities/> (explaining that “IRISL has repeatedly transported items related to Iran’s ballistic missile and military programs and is also a longstanding carrier of other proliferation-sensitive items, including Nuclear Suppliers-Group controlled items.”).

On September 21, 2020, OFAC designated the following individuals and entities pursuant to E.O. 13382: Mohammed Reza DEZFULIAN, Asghar ESMA’ILPUR, Behzad Daniel FERDOWS, Mehrzad Manuel FERDOWS, Mohammad GHANNADI MARAGHEH, Mohammad GHOLAMI, Behrouz KAMALVANDI, Javad KARIMI SABET, Pezhman RAHIMIAN, ADVANCED TECHNOLOGIES COMPANY OF IRAN, MAMMUT DIESEL, MAMMUT INDUSTRIAL GROUP P.J.S., MESBAH ENERGY COMPANY, NUCLEAR SCIENCE AND TECHNOLOGY RESEARCH INSTITUTE. 85 Fed. Reg. 60,519 (Sep. 25, 2020). OFAC also designated Hamid Reza GHADIRIAN and Ahmad Asghari SHIVA’I pursuant to E.O. 13382 on September 21, 2020. 85 Fed. Reg. 60,518 (Sep. 25, 2020).

On October 8, 2020, OFAC designated HEKMAT IRANIAN BANK pursuant to E.O. 13382 for being owned or controlled by BANK SEPAH, a person whose property and interests in property are blocked pursuant to E.O. 13382. 85 Fed. Reg. 65,138 (Oct. 14, 2020).

On November 10, 2020, OFAC designated the following individuals and entities pursuant to E.O. 13382: Mohammad BANIHASHEMI, Chin-Hua HUANG, Mohammad SOLTANMOHAMMADI, Shih Mei SUN, ARTIN SANA’AT TABAAN COMPANY, DES INTERNATIONAL CO., LTD., HODA TRADING, NAZ TECHNOLOGY CO., LTD., PROMA INDUSTRY CO., LTD., SOLTECH INDUSTRY CO., LTD. 85 Fed. Reg. 73,131 (Nov. 16, 2020). See November 11, 2020 State Department press statement (announcing the designations of these six companies and four individuals comprising a procurement network for Iran Communications Industries (“ICI”), a sanctioned Iranian military firm) available at <https://2017-2021.state.gov/designation-of-iranian-procurement-networks/>.

On December 3, 2020, the State Department issued a press statement announcing E.O. 13382 designations of Iranian defense entity Shahid Meisami Group and its director, Mehran Babri. Excerpts follow from the press statement, which is available at <https://2017-2021.state.gov/sanctions-on-iranian-entities-involved-in-chemical-weapons-activities-of-concern/>.

Shahid Meisami Group was designated for being owned or controlled by the Iranian Organization of Defensive Innovation and Research (SPND), which was designated pursuant to E.O. 13382 in 2014. As a part of SPND, Shahid Meisami Group engaged in activities raising concerns regarding Iran's obligations under the Chemical Weapons Convention, including SPND projects for which it was responsible involving the testing and production of chemical agents for use as so-called incapacitation agents. Mehran Babri was designated today for acting on behalf of Shahid Meisami Group.

In addition to the freezing of any U.S. assets held by Shahid Meisami Group and Mehran Babri, both will be denied access to the U.S. financial system and listed online as WMD proliferators.

The United States is concerned about the regime's true intent with regard to the testing and production of these so-called chemical incapacitation agents, which could be used either to further oppress Iranian citizens or for offensive purposes. The United States remains firmly committed to countering the full range of the regime's malign activities and expects the international community to maintain vigilance against the regime's illicit capabilities and behavior.

* * * *

(b) Iran Freedom and Counter-Proliferation Act ("IFCA")

In a January 10, 2020 press statement, available at <https://2017-2021.state.gov/intensified-sanctions-on-iran/>, the Department of State announced sanctions on Pamchel Trading (Beijing) Co., Ltd. pursuant to section 1245 the Iran Freedom and Counter-Proliferation Act ("IFCA") for transferring 29,000 metric tons of steel from an Iranian firm that is a Specially Designated Global Terrorist.

Section 1245(d) describes "graphite, raw or semi-finished metals such as aluminum and steel, coal, and software for integrating industrial processes." On January 21, 2020, the Department of State provided notice in the Federal Register of a list of materials that constitute "raw or semi-finished metals" under IFCA 1245(d) for the purpose of implementing provisions of IFCA delegated to the Secretary of State, including Sections 1245(a)(1)(B), 1245(a)(1)(C), and 1245(e). 85 Fed. Reg. 3467 (Jan. 21, 2020).

In a June 25, 2020 press statement, available at <https://2017-2021.state.gov/the-united-states-imposes-sanctions-with-respect-to-irans-metal-industry/>, the State Department announced sanctions under section 1245 of IFCA on Global Industrial and Engineering Supply Ltd. As explained in the statement:

In 2019, Global Industrial and Engineering Supply Ltd., an entity [...] based in mainland China and Hong Kong, knowingly transferred 300 metric tons of graphite to the Islamic Republic of Iran Shipping Lines (IRISL), an Iranian entity on the SDN List, as a part of shipping this graphite to Iran. Graphite is a critical material for Iran's metals industry. ...

On July 30, 2020, the State Department provided to Congress the determination required under IFCA as to

(1) whether Iran is (A) using any of the materials described in subsection (d) of Section 1245 of IFCA as a medium for barter, swap, or any other exchange or transaction, or (B) listing any of such materials as assets of the Government of Iran for purposes of the national balance sheet of Iran; (2) which sectors of the economy of Iran are controlled directly or indirectly by Iran's Islamic Revolutionary Guard Corps (IRGC); and (3) which of the materials described in subsection (d) are used in connection with the nuclear, military, or ballistic missile programs of Iran. Materials described in subsection (d) of Section 1245 are graphite, raw or semi-finished metals such as aluminum and steel, coal, and software for integrating industrial processes.

85 Fed. Reg. 53,898 (Aug. 31, 2020). The Report states that: (1)(A) Iran is not using the materials described in Section 1245(d) as a medium for barter, swap, or any other exchange or transaction; (1)(B) Iran is listing gold as an asset of the Government of Iran for the purposes of the National Balance Sheet of Iran; (2) the construction sector of Iran is controlled directly or indirectly by the IRGC; and (3) certain types of materials are used in connection with the nuclear, military, or ballistic missile programs of Iran [specific materials are listed in the Federal Register]. *Id.*

On October 19, 2020, the State Department issued a press statement, available at <https://2017-2021.state.gov/the-united-states-imposes-sanctions-on-chinese-and-hong-kong-persons-for-activities-related-to-supporting-the-islamic-republic-of-iran-shipping-lines/>, announcing IFCA section 1244 sanctions on six entities for conduct related to IRISL and its subsidiary, Hafez Darya Arya Shipping Company ("HDASCO"), as well as two individuals, pursuant to the Iran Freedom and Counter-Proliferation Act Section 1244 (IFCA 1244). The entities include Reach Holding Group (Shanghai) Co. Ltd. and Reach Shipping Lines, which arranged for port berths for IRISL vessels at Chinese ports. Delight Shipping Co., Ltd.; Gracious Shipping Co. Ltd.; Noble Shipping Co. Ltd.; and Supreme Shipping Co. Ltd. are the other entities designated pursuant to IFCA Section 1244(d)(1)(A). The individuals designated (under section 6 of the Iran Sanctions Act) are: Eric Chen (Chen Guoping), Chief Executive Officer of Reach Holding Group (Shanghai) Company Ltd., and Daniel Y. He (He Yi), President of Reach Holding Group (Shanghai) Company Ltd.

- (8) *Human Rights, Cyber, and other sanctions programs (CISADA, TRA, E.O. 13553, E.O. 13606, E.O. 13608, and E.O. 13846, CAATSA)*

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”). E.O. 13606 of April 22, 2012, is entitled “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.”

On May 4, 2020, OFAC published the designations (from January 24, 2019) under E.O. 13553 of the following entities: ISLAMIC REVOLUTIONARY GUARD CORPS; FATEMIYOUN DIVISION (designated under E.O. 13224 as well); and ZAYNABIYOUN BRIGADE (designated under E.O. 13224 as well). 85 Fed. Reg. 26,520 (May 4, 2020).

On May 20, 2020, OFAC designated the following individuals and entity under E.O. 13553: Mohammad ALI NOORINAJAD, Hamidraza ASHRAQ, Hassan SHAHVARPOUR NAJAFABADI, Abdolreza RAHMANI FAZLI, Habil DARVISH, Mohsen FATHI ZADEH, Yahya MAHMOODZADEH, Hossein ASHTARI FARD, Ayoub SOLEIMANI, and LAW ENFORCEMENT FORCES OF THE ISLAMIC REPUBLIC OF IRAN COOPERATIVE. 85 Fed. Reg. 36,933 (June 18, 2020),

On September 17, 2020, OFAC designated the following under E.O. 13553: 45 individuals—Omid ABEDSHAHI, Seyed Hamid ABOUTORABI, Omid AKBARIANA, Amirhossein AZADKHANI, Reza Mohammadi AZIZABADI, Nematollah Hosein BABAIE, Abolfazl Hossein Pour DAVOODI, Alireza EMADODDIN, Payman Dehghanpour FARASHAH, Mansoor GASHASBI, Seyedmohammad GHAFARIANANBERAN, Hojjat GHOLIZADEH, Esmail HAMIDI, Mahdi HEJABI, Gholamreza Radmard IRANAGH, Abolfazl JABARI, Mohammadreza JAFARIBANDARABADI, Maysam JALALI, Seyed Mohammad KALAMI, Ali KAMALI, Omid Moosazadeh Hamzeh KANDI, Mohammad KHALILZADEH, Amin Hosseinzadeh KHANMIRI, Benham LOTFI, Shahriyar MADHI, Hassan Fazli MAGHSOUDI, Mohammad MAHMOUDI, Mahmoud MEHRI, Mohammad Hassan MEHRI, Mahdi MEHRI, Mohammad Ali MIRZAEI, Reza MIRZAEI, Mohsen Matloub MOGHADAM, Saeed MOSTAFAEI, Vali MOSTAFANEJAD, Mohsen Raeesi NAFTCHI, Hossein NAZARIKOLEHJOUB, Mohsen NOORI, Alireza OSTADAKBARI, Mohammadbagher RASOULI, Amirhossein SAFARI, Mostafa SEDAGHATI, Javad TAHERISHABAN, Ali Akbar Rezaei TAVANA, Salar Mahmoud ZADEH—and two entities—ADVANCED PERSISTENT THREAT 39 and RANA INTELLIGENCE COMPUTING COMPANY. 85 Fed. Reg. 59,602 (Sep. 22, 2020).

On June 15, 2020, OFAC issued blocking sanctions based on the State Department determination that the following persons meet the criteria of Section 106(a) of the Countering America’s Adversaries Through Sanctions Act (“CAATSA”) because either they are (1) responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed against individuals in Iran who seek (A) to expose illegal activity carried out by officials of the Government of Iran; or (B) to obtain, exercise, defend, or promote internationally recognized human rights and freedoms, such as the freedoms of religion, expression, association, and assembly, and the rights to a fair trial and democratic elections; or they (2) act as an agent of or on behalf of a foreign person in a matter relating to an activity described in (1) above: GREAT TEHRAN PENITENTIARY; and QARCHAK PRISON. 85 Fed. Reg. 36,934 (June 18, 2020).

On September 24, 2020, OFAC blocked the property of the following persons whom the Secretary of State identified pursuant to section 106(a) of CAATSA: four entities—ADEL ABAD PRISON; BRANCH 1 OF THE SHIRAZ REVOLUTIONARY COURT; ORUMIYEH PRISON; and VAKILABAD PRISON—and two individuals— Seyyed Mahmoud SADATI and Mohammad SOLTANI. 85 Fed. Reg. 84,113 (Dec. 23, 2020). The Secretary of State’s September 24, 2020 press statement on these CAATSA human rights-related sanctions is available at <https://2017-2021.state.gov/major-new-human-rights-related-listings-and-accompanying-sanctions-on-iran//index.html>, and includes the following:

Today, the United States sanctioned several Iranian officials and entities for gross violations of human rights. Pursuant to Section 106 of the Countering America’s Adversaries Through Sanctions Act of 2017 (CAATSA), I determined that Judge Seyyed Mahmoud Sadati, Judge Mohammad Soltani, Branch 1 of the Revolutionary Court of Shiraz, and Adelabad, Orumiyeh, and Vakilabad Prisons were responsible for certain gross violations of human rights. This includes prior incidence of torture or cruel, inhuman or degrading treatment or punishment, arbitrary detentions, and denials of the right to liberty of those seeking only to practice their faith, peacefully assemble, or to express themselves.

...

The United States also sanctioned Judge Mohammad Soltani of Iran’s Revolutionary Court system as well as Vakilabad Prison in Mashhad, Iran and Orumiyeh Prison in Orumiyeh City, Iran. Judge Soltani is responsible for sentencing Baha’is in Iran on dubious charges related to their exercise of freedom of expression or belief. Vakilabad Prison, which is where the wrongfully detained U.S. citizen Michael White was held, has also arbitrarily detained trade union activist and teacher Mohammad Hossein Sepehri for simply exercising his human rights. Orumiyeh Prison has subjected members of ethnic and religious minority groups and political prisoners to abuse, including beatings and floggings.

On September 17, 2020, the State Department issued a press statement announcing sanctions under E.O. 13553 on the Iranian cyber threat group Advanced Persistent Threat 39 (“APT39”), 45 individuals associated with the group, and one entity, Rana Intelligence Company (“Rana”), a front company for APT39. The press statement is excerpted below and available at <https://2017-2021.state.gov/the-united-states-sanctions-cyber-actors-backed-by-iranian-intelligence-ministry/>.

* * * *

...Together, these groups and individuals targeted at least 15 countries in the Middle East and North Africa, as well as hundreds of individuals and entities in 30 additional countries across Africa, Asia, Europe, and North America. We will continue to expose Iran’s nefarious behavior

and impose costs on the regime until they turn away from their destabilizing agenda. Iran's Ministry of Intelligence and Security (MOIS) tracks dissidents, journalists, and international companies for the regime. It has recruited cyber threat groups, front companies, and hackers, and has employed malware to target innocent civilians and companies, and advance the regime's malign agenda around the world. Cyber actors advance Iranian national security objectives and the strategic goals of MOIS by conducting computer attacks and malware campaigns against perceived adversaries, including foreign governments and other individuals the MOIS considers a threat.

Through Rana, and on behalf of the MOIS, the actors designated today use malicious cyber attack tools to target and monitor Iranian citizens, particularly dissidents, Iranian journalists, former government employees, environmentalists, refugees, university students and faculty, and employees at international nongovernmental organizations. Some of these individuals were subjected to arrest and physical and psychological intimidation by the MOIS. MOIS actors have also victimized Iranian private sector companies and domestic and international Persian language and cultural centers. Today's action is another reminder of the great risk that the Iranian regime poses to international cyber security as well as to the Iranian people, who face the continued threat of digital darkness and high-tech silencing. The United States will not relent in our efforts to expose these threats and protect our homeland and our friends and allies.

* * * *

On December 14, 2020, in a press statement available at <https://2017-2021.state.gov/sanctioning-iranian-intelligence-officers-involved-in-the-abduction-of-bob-levinson/>, the State Department announced sanctions under E.O. 13553 on two Iranian intelligence officers, for acting for or on behalf of, directly or indirectly, Iran's MOIS, which had been previously designated under E.O. 13553: Mohammad Baseri and Ahmad Khazai. These officers were believed to be involved in the disappearance of former FBI agent Robert A. "Bob" Levinson.

2. Iraq
a. Designations related to providing support to the IRGC-QF, while exploiting Iraq's economy

On March 26, 2020, the Treasury Department announced that 20 individuals and entities had been designated under counterterrorism sanctions authorities related to providing certain services or support to or acting for or on behalf of the Islamic Revolutionary Guards Corps-Qods Force ("IRGC-QF") as well as Kata'ib Hizballah ("KH") and Asa'ib Ahl al-Haq ("AAH"), all of which had previously been designated under such authorities. See Treasury Department press release, available at <https://home.treasury.gov/news/press-releases/sm957>. The State Department press statement, available at <https://2017-2021.state.gov/irgc-qf-sanctions-and-iraqs-electricity-waiver/>, identifies those designated as, "entities and individuals that exploit for the benefit of the IRGC-QF Iraq's dependence on Iranian electricity imports." Iraq may import electricity from Iran and make related payments pursuant to a sanctions waiver intended to help meet the immediate energy needs of the Iraqi people.

b. E.O. 13350

On December 23, 2020, OFAC determined that circumstances no longer warrant the inclusion of the following persons on the SDN List under E.O. 13350: Sabah AL-KHAFAJI, and BABIL INTERNATIONAL. 85 Fed. Reg. 86,651 (Dec. 30, 2020).

3. Syria and Syria-Related Executive Orders and the Caesar Act

E.O. 13894 of 2019 authorizes sanctions on persons involved in actions that endanger civilians or lead to further deterioration of the situation in northeast Syria. E.O. 13582 is entitled, “Blocking Property of the Government of Syria and Prohibiting Certain Transactions with Respect to Syria.” E.O. 13573 of 2011 is entitled, “Blocking Property of Senior Officials of the Government of Syria.” E.O. 13572 of 2011 is entitled, “Blocking Property of Certain Persons with Respect to Human Rights Abuses in Syria.” The Caesar Syria Civilian Protection Act of 2019 (“the Caesar Act”) also provides for sanctions and visa restrictions on those who provide various types of support to the Assad regime or foreign forces associated with it.

On March 17, 2020, the State Department announced in a press statement, available at <https://2017-2021.state.gov/the-state-department-imposes-sanctions-on-individual-responsible-for-the-violence-in-northern-syria/>, that the United States was designating Syrian Minister of Defense Lieutenant General Ali Abdullah Ayoub under E.O. 13894 due to his efforts to prevent a ceasefire in northern Syria. 85 Fed. Reg. 38,236 (June 25, 2020). Also on March 17, 2020, OFAC published the names of entities and persons previously designated under E.O. 13582 and 13608 because circumstances no longer warrant their inclusion on the SDN list. 85 Fed. Reg. 16,190 (Mar. 20, 2020). Entities no longer subject to E.O. 13582 include BLUEMARINE SA and SKIRRON HOLDING SA. *Id.* Individuals no longer subject to E.O. 13582 include Ioannis IOANNOU and Arkadiy VAINSHEIN. *Id.* BLUEMARINE SA was also removed from the E.O. 13608 list. *Id.*

On June 17, 2020, the State Department issued a fact sheet on the Caesar Act, coinciding with the first imposition of sanctions under the Act. The fact sheet is available at <https://2017-2021.state.gov/caesar-syria-civilian-protection-act/> and excerpted below.

Mandatory sanctions under the Caesar Act target foreign persons who facilitate the Assad regime’s acquisition of goods, services, or technologies that support the regime’s military activities as well as its aviation and oil and gas production industries.

The Caesar Act also mandates sanctions on those profiting off the Syrian conflict by engaging in reconstruction activities.

The June 17, 2020 State Department press statement announcing the first designations under the Caesar Act is available at <https://2017-2021.state.gov/syria->

[caesar-act-designations/](#) and excerpted below. The Caesar Act designations were effected using E.O. 13894. 85 Fed. Reg. 38,481 (June 26, 2020). Also on June 17, 2020, OFAC designated the following: Adel Anwar AL-OLABI under E.O. 13573; Nazir Ahmad Mohammed JAMALEDDINE under E.O. 13582; Khaled AL-ZUBAIDI under E.O. 13582; Nader KALAI under E.O. 13582; BUNYAN DAMASCUS PRIVATE JOINT STOCK COMPANY under E.O. 13573; DAMASCUS CHAM FOR MANAGEMENT under E.O. 13573; DAMASCUS CHAM HOLDING COMPANY under E.O. 13573; MIRZA COMPANY under E.O. 13573; AL-AMAR ONE-PERSON under E.O. 13582; APEX DEVELOPMENT AND PROJECTS LLC under E.O. 13582; RAMAK DEVELOPMENT AND HUMANITARIAN PROJECTS LLC under E.O. 13582; RAWAFED DAMASCUS PRIVATE JOINT STOCK COMPANY under E.O. 13582; TAMAYOZ LLC under E.O. 13582; TIMEET TRADING LLC under E.O. 13582; WINGS PRIVATE JSC under E.O. 13582; ART HOUSE GMBH under E.O. 13582; CASTLE HOLDING GMBH under E.O. 13582; CASTLE INVESTMENT HOLDING under E.O. 13582; EBLA HOTEL under E.O. 13582; GRAND TOWN TOURIST CITY under E.O. 13582; KALAI INDUSTRIES under E.O. 13582; TELEFOCUS CONSULTANTS INC under E.O. 13582; TELEFOCUS SAL OFFSHORE under E.O. 13582; and ZUBAIDI AND QALEI LLC under E.O. 13582. 85 Fed. Reg. 38,251 (June 25, 2020).

* * * *

More than six years ago, the brave photographer known as Caesar shocked the world by smuggling out of Syria the photographic proof that the Assad regime was torturing and executing many thousands of Syrians in the regime's prisons. This act of bravery is the inspiration behind the Caesar Syria Civilian Protection Act (the Caesar Act) ... Anyone doing business with the Assad regime, no matter where in the world they are, is potentially exposed to travel restrictions and financial sanctions.

Today, the Treasury Department and State Department are releasing 39 designations under the Caesar Act and Executive Order 13894 as the beginning of what will be a sustained campaign of economic and political pressure to deny the Assad regime revenue and support it uses to wage war and commit mass atrocities against the Syrian people.

We are designating the architect of this suffering Bashar Al-Assad and his wife Asma al-Assad pursuant to E.O. 13894 Section 2(a)(i)(A) and Section 2(a)(ii), respectively, as well as funder of these atrocities Mohammed Hamsho and Iranian militia Fatemiyoun Division pursuant to E.O. 13894 2(a)(i)(D). We are further designating Maher al-Assad, along with his Fourth Division of the Syrian Arab Army and its leadership Ghassan Ali Bilal and Samer al-Dana pursuant to E.O. 13894 Section 2(a)(i)(A). Lastly, we are designating Bushra al-Assad, Manal al-Assad, Ahmad Sabir Hamsho, Amr Hamsho, Ali Hamsho, Rania al-Dabbas, and Sumaia Hamcho under E.O. 13894 Section 2(a)(ii).

We will continue this campaign in the coming weeks and months to target individuals and businesses that support the Assad regime and obstruct a peaceful, political resolution of the conflict as called for by UNSCR 2254. We anticipate many more sanctions and we will not stop until Assad and his regime stop their needless, brutal war against the Syrian people and the Syrian government agrees to a political solution to the conflict as called for by UNSCR 2254. We will undertake our campaign of economic and political pressure in full cooperation

with other like-minded nations, especially our European partners, who only three weeks ago renewed their own sanctions against the Assad regime for precisely the same reasons.

Many of the dozens of people and companies the U.S. government is sanctioning today have played a key role in obstructing a peaceful political solution to the conflict. Others have aided and financed the Assad regime's atrocities against the Syrian people while enriching themselves and their families. I will make special note of the designation for the first time of Asma al-Assad, the wife of Bashar al-Assad, who with the support of her husband and members of her Akhras family has become one of Syria's most notorious war profiteers. Now anyone doing business with any of these persons or entities is at risk of sanctions.

For more than nine years, the Assad regime has waged a bloody war against the Syrian people and committed innumerable atrocities, some of which rise to the level of war crimes and crimes against humanity, including killings, torture, enforced disappearances, and the use of chemical weapons. Since the conflict began, more than half a million Syrians have died and eleven million people—half of Syria's pre-war population—have been displaced. Bashar al-Assad and his regime squander tens of millions of dollars each month to fund their needless war, destroying homes, schools, shops, and public markets. Their destructive war has exacerbated the humanitarian crisis, prevented life-saving assistance from reaching those in need, and brought misery to the Syrian people.

The United States remains committed to working with the UN and international partners to bring life-saving assistance to the Syrian people who continue to suffer at the hands of the Assad regime. ... The Caesar Act and other U.S. Syria sanctions do not target humanitarian assistance for the Syrian people or hinder our stabilization activities in northeast Syria. ...

* * * *

Also on June 17, 2020, Special Representative for Syria Engagement James F. Jeffrey provided a special briefing on the designations under the Caesar Act. The transcript of the briefing is available at <https://2017-2021.state.gov/special-representative-for-syria-engagement-james-jeffrey-on-syria-caesar-act-designations/>. The Treasury Department statement on the initial designations under the Caesar Act is available at <https://home.treasury.gov/news/press-releases/sm1037>.

On July 29, 2020, the State Department and Treasury Department made 14 designations under the Caesar Syria Civilian Protection Act and other authorities, calling this group "the Hama and Maarat Al-Numan sanctions." The State Department press statement, available at <https://2017-2021.state.gov/syria-sanctions-designations/>, explains:

These names are meant to memorialize the victims of two of the Assad regime's most notorious atrocities, both of which occurred in this week in 2011 and 2019. Nine years ago, Bashar al-Assad's troops carried out a brutal siege of the city of Hama, killing scores of peaceful protesters in a shocking sign of what was to come. One year ago, the Assad regime and its allies bombed a busy marketplace in Maarat Al-Numan, killing 42 innocent Syrians.

...We are designating Zuhair Tawfiq al-Assad and the First Division of the Syrian Arab Army pursuant to E.O. 13894 Section 2(a)(i)(A), in addition to

Zuhair Tawfiq al Assad's adult son, Karam al-Assad, under Section 2(a)(ii). Among today's actions, we are also designating Bashar al-Assad's adult son Hafez al-Assad pursuant to E.O. 13894 Section 2(a)(ii)....

Effective July 29, 2020, the Secretary of State designated the First Division of the Syrian Arab Army and Zuhair Tawfiq al-Assad under E.O. 13894 due to their involvement in the prevention of a ceasefire in northern Syria and also designated Karam al-Assad and Hafez al-Assad as adult family members of the persons designated under E.O. 13894. 85 Fed. Reg. 54,471 (Sep. 1, 2020). Also on July 29, 2020, OFAC designated the following individuals and entities under E.O. 13582: Wassim Anwar AL-QATTAN, ADAM TRADING AND INVESTMENT LLC, INTERSECTION LLC, MURUJ CHAM INVESTMENT AND TOURISM GROUP, WASSIM KATTAN LLC, LAROSA FURNITURE, AL-JALAA HOTEL, MASSA PLAZA MALL, QASIOUN MALL, and YALBAGHA COMPLEX. 85 Fed. Reg. 47,840 (Aug. 6, 2020). At the same time, OFAC designated Sumaia Saber HAMCHO PURSUANT TO E.O. 13894. *Id.*

On August 20, 2020, in a press statement, available at <https://2017-2021.state.gov/syria-sanctions-designations-2/>, the State Department announced sanctions against military, government, and financial supporters of the Assad regime under E.O. 13894, as well as OFAC sanctions under E.O. 13573. The statement characterizes the sanctions as further implementing the goals of the Caesar Syria Civilian Protection Act and commemorating the seventh anniversary of the regime's chemical weapons attack in Ghouta. On August 20, 2020, the State Department designated Yasser Ibrahim, under Executive Order 13894 section 2(a)(i)(D) for his efforts to prevent or obstruct a political solution to the Syrian conflict, as well as designating Fadi Saqr, Ghaith Dalah, and Samer Ismail pursuant to Executive Order 13894 section 2(a)(i)(A) for their efforts to prevent a ceasefire in Syria. 85 Fed. Reg. 80,214 (Dec. 11, 2020). OFAC designated the following two individuals pursuant to E.O. 13573 on August 20, 2020: Luna AL SHIBL and Mohamad Ammar SAATI BIN MOHAMAD. 85 Fed. Reg. 52,414 (Aug. 25, 2020). The Treasury Department's press release regarding the August 20, 2020 designations is available at <https://home.treasury.gov/news/press-releases/sm1100> and excerpted below.

Luna Al Shibl (Al Shibl) is a prominent member of Assad's inner circle. A former television news anchor, she is an advisor to Assad, his press officer, and one of the most senior press officials in the Syrian government. During Al Shibl's tenure with the Syrian Government, she has been instrumental in developing Assad's false narrative that he maintains control of the country and that the Syrian people flourish under his leadership. Despite countless Syrian civilians living under desperate siege in Syria's decade-long war, Al Shibl orchestrated photo ops for Assad among cheering Syrians. Al Shibl is being designated pursuant to E.O. 13573 for being a senior official of the Government of Syria.

OFAC also designated Mohamad Ammar Saati bin Mohamad Nawzad (Saati) today. Saati is a longtime leader within the Syrian Ba'ath Party, a former Syrian parliamentarian, and the husband of Al Shibl. Since the early 1990s, Saati

has held multiple official leadership positions within the Syrian Ba'ath Party, including his appointment to the Central Committee, a committee headed by Assad. Saati has served in high-ranking positions in both the Regional Command and Central Committee of the Syrian Ba'ath Party, which contain some of the highest-ranking members of the Assad regime and are instrumental in shaping the Syrian Government's brutal policies. Until recently, Saati was also the president of the National Union of Syrian Students (NUSS), an organization with branches inside and outside of Syria that are used to promote the Syrian Ba'ath Party. Saati is credited with the idea of creating the "Ba'ath Brigades," a group of student volunteer fighters that augmented the Syrian armed forces. The militia group fought under the Syrian military while also remaining under Ba'ath Party control. Under Saati's leadership, the NUSS recruited students and processed their applications for membership in the pro-Assad militia group. Saati is being designated pursuant to E.O. 13573 for being a senior official of the Government of Syria.

On September 30, 2020, OFAC designated the following individuals under Syria and Syria-related executive orders: Khodr Taher BIN ALI under E.O. 13582; Hazem Younes KARFOUL under E.O. 13573; Husam Muhammad LOUKA under E.O. 13572. 85 Fed. Reg. 62,806 (Oct. 5, 2020). At the same time, OFAC designated the following entities under E.O. 13582: AL ALI AND AL HAMZA LLC; CASTLE SECURITY AND PROTECTION LLC; ELLA MEDIA SERVICES LLC; ELLA TOURSIM COMPANY; EMMA LLC; EMMA TEL LLC; EMMA TEL PLUS LLC; GOLDEN STAR TRADING LLC; JASMINE CONTRACTING COMPANY; SYRIAN COMPANY FOR METALS AND INVESTMENTS LLC; SYRIAN HOTEL MANAGEMENT LLC; SYRIAN MINISTRY OF TOURISM; and SYRIAN TRANSPORT AND TOURISM COMPANY. *Id.* Also on September 30, 2020, in a press statement, available at <https://2017-2021-translations.state.gov/2020/09/30/syria-sanctions-designations-on-the-anniversary-of-assads-attack-against-the-people-of-armanaz-syria/index.html> and excerpted below, State announced the designations of three more individuals (their designations subsequently published in the Federal Register, 85 Fed. Reg. 80,215 (Dec. 11, 2020)):

[W]e are designating 5th Corps commander Milad Jedid pursuant to Executive Order (E.O.) 13894 for his involvement in the obstruction, disruption, or prevention of a ceasefire in Syria.

Furthermore, we are designating Nasreen Ibrahim and Rana Ibrahim, the adult sisters of Assad financier Yasser Ibrahim, pursuant to section 2(a)(ii) of E.O. 13894. The Ibrahim family, led by Yasser Ibrahim, acts as a front for Bashar al-Assad and his wife Asma al Akhras. While millions of Syrians face hunger, the Ibrahims are on a spending spree to expand Assad's and Akhras's personal stranglehold on the Syrian economy....

On November 9, 2020, OFAC designated the following under Syria executive orders as indicated: Nasr AL-ALI under E.O. 13572; Ghassan Jaoudat ISMAIL under E.O.

13572; Nabil TOUMEH BIN MOHAMMED under E.O. 13573; Hussam BIN AHMED RUSHDI AL-QATIRJI under E.O. 13573; Kamal IMAD AL-DIN AL-MADANI; Tariq IMAD AL-DIN AL-MADANI UNDER E.O. 13582; Amer Taysir KHITI under E.O. 13573; MILITARY CONSTRUCTION ESTABLISHMENT under E.O. 13573; PRODUCTIVE PROJECTS ADMINISTRATION under E.O. 13573; TOUMEH INTERNATIONAL GROUP under E.O. 13573; AL-RESAF REFINERY COMPANY PRIVATE JSC for being owned 50% or more by another blocked entity; ARFADA PETROLEUM PRIVATE JOINT STOCK COMPANY under E.O. 13582; COASTAL REFINERY COMPANY PRIVATE JSC for being owned 50% or more by another blocked entity; PUBLIC ESTABLISHMENT FOR REFINING AND DISTRIBUTION under E.O. 13582; SALLIZAR SHIPPING SAL under E.O. 13582; SYRIAN MINISTRY OF PETROLEUM AND MINERAL RESOURCES under E.O. 13582; and KHITI HOLDING GROUP under E.O. 13573. 85 Fed. Reg. 81,279 (Dec. 15, 2020).

On November 9, 2020, the State and Treasury Departments issued further sanctions designations under the Caesar Act and other authorities. See State Department press statement, available at <https://2017-2021.state.gov/syria-sanctions-designations-on-the-anniversary-of-assads-attack-against-the-people-of-douma-syria/>, which includes the following information on those designated:

...State is sanctioning the National Defense Forces, a pro-Assad, Iranian-affiliated militia, and one of its commanders, Saqr Rostom, pursuant to Executive Order 13894 for their efforts to obstruct a ceasefire in Syria.

The Administration's sanctions targeting military commanders, members of parliament, Government of Syria entities, and financiers, highlight how deeply the Assad regime has corrupted Syria's institutions. Treasury has sanctioned newly appointed members of parliament Nabil Toumeh Bin Mohammed, Amer Taysir Kheiti, and Hussam Bin Ahmed Rushdi Al-Qatirji. Many of Syria's parliamentary representatives are expanding their financial dealings on behalf of Bashar and Maher al-Assad rather than using their legislative positions to serve the Syrian people.

Along with Treasury's designations today of Syrian Air Force Intelligence Unit chief Ghassan Ismail and Syrian Political Security Directorate head Nasr al-Ali, the Department of State will continue to hold Assad and his supporters responsible for perpetuating the Syrian conflict...

On December 22, 2020, the fifth anniversary of the adoption of UNSCR 2254, the State Department announced several designations under Syria-related executive orders in a press statement, available at <https://2017-2021.state.gov/syria-sanctions-designations-on-the-anniversary-of-un-security-council-resolution-2254/>. The State Department designations include: Asma al-Assad, the wife of Bashar al-Assad, under E.O. 13894 Section 2(a)(i)(D); members of Asma al-Assad's immediate family, including Fawaz Akhras, Sahar Otri Akhras, Firas al Akhras, and Eyad Akhras in accordance with EO 13894 Section 2(a)(ii). The press statement notes the one-year anniversary of the signing into law of the Caesar Syria Civilian Protection Act of 2019, and concurrent actions under that Act and E.O. 13894 against Syria's Military Intelligence ("SMI")

organization by designating SMI commander, General Kifah Moulhem. *Id.* The press statement also announces OFAC designations of the Central Bank of Syria; Lina al-Kinayeh, one of Assad's key advisers; her husband, Syrian parliamentarian Mohammed Masouti; and businesses affiliated with the Assad regime.

4. China

a. Relating to human rights abuses, including in Xinjiang

See discussion in Section 12, *infra*, regarding designations under E.O. 13818 and Section 7031(c) related to human rights abuses in Xinjiang.

On July 15, 2020, the State Department announced visa restrictions on employees of Chinese technology companies that provide material support to regimes engaging in human rights abuses around the world, such as Huawei. The press statement is available at <https://2017-2021.state.gov/u-s-imposes-visa-restrictions-on-certain-employees-of-chinese-technology-companies-that-abuse-human-rights/>, and explains further:

Companies impacted by today's action include Huawei, an arm of the CCP's surveillance state that censors political dissidents and enables mass internment camps in Xinjiang and the indentured servitude of its population shipped all over China. Certain Huawei employees provide material support to the CCP regime that commits human rights abuses.

See also section B.1, *infra*, for discussion of Commerce Department measures directed at Huawei.

On December 4, 2020, in a press statement available at <https://2017-2021.state.gov/u-s-imposes-sanctions-on-peoples-republic-of-china-officials-engaged-in-coercive-influence-activities/>, the State Department announced visa restrictions on officials of the PRC, the Chinese Communist Party ("CCP"), and CCP's United Front Work Department engaged in coercive influence activities intended to spread propaganda and coerce opponents of Beijing's policies, including using the tactic of "doxing," or releasing personal details of targets and their family members as a means of intimidation. The press statement includes the following:

Today, I am exercising my authority under Section 212(a)(3)(C) of the Immigration and Nationality Act to impose visa restrictions on PRC and CCP officials, or individuals active in United Front Work Department activities, who have engaged in the use or threat of physical violence, theft and release of private information, espionage, sabotage, or malicious interference in domestic political affairs, academic freedom, personal privacy, or business activity. These malign activities are intended to co-opt and coerce sub-national leaders, overseas Chinese communities, academia, and other civil society groups both in

the United States and other countries in furtherance of the CCP's authoritarian narratives and policy preferences. I will continue to implement such visa restrictions to make clear that those responsible for actions that contravene the rules-based international order are not welcome in the United States.

The United States calls on the PRC to end its use of coercion and intimidation tactics to suppress freedom of expression. The United States will continue to review its authorities to respond to these concerns.

On December 21, 2020, in a press statement by Secretary Pompeo, the State Department announced additional visa restrictions on PRC officials believed to be responsible for, or complicit in, policies or actions aimed at repressing religious and spiritual practitioners, members of ethnic minority groups, dissidents, human rights defenders, journalists, labor organizers, civil society organizers, and peaceful protestors. The press statement is available at <https://2017-2021.state.gov/additional-restrictions-on-the-issuance-of-visas-for-peoples-republic-of-china-officials-engaged-in-human-rights-abuses/> and excerpted below.

Today, I am announcing the imposition of additional restrictions under Section 212(a)(3)(C) of the Immigration and Nationality Act on the issuance of visas for Chinese officials who are believed to be responsible for, or complicit in, policies or actions aimed at repressing religious and spiritual practitioners, members of ethnic minority groups, dissidents, human rights defenders, journalists, labor organizers, civil society organizers, and peaceful protestors. Family members of such persons may also be subject to these additional restrictions.

This action demonstrates the U.S. government's resolve to hold the Chinese Communist Party (CCP) accountable for its increasing repression against the Chinese people. This year, the United States has imposed visa restrictions and financial sanctions on CCP officials involved in the horrific abuses taking place in Xinjiang, restrictions on access to Tibet, and the destruction of Hong Kong's promised autonomy. Today's action creates additional restrictions applicable to all CCP officials engaged in such repressive activities, no matter their location.

b. Relating to Hong Kong

On June 26, 2020, the State Department announced in a press statement, available at <https://2017-2021.state.gov/u-s-department-of-state-imposes-visa-restrictions-on-chinese-communist-party-officials-for-undermining-hong-kongs-high-degree-of-autonomy-and-restricting-human-rights/>, that it was imposing visa restrictions on Chinese Communist Party ("CCP") officials for undermining Hong Kong's high degree of autonomy or undermining the enjoyment of human rights and fundamental freedoms.

On July 14, 2020, the President issued E.O. 13936, relating to Hong Kong. 85 Fed. Reg. 43,413 (July 17, 2020). Excerpts below relate to sanctions authorized under the new order. See Chapter 9 for discussion of other sections of the order. See section B.1,

infra, for discussion of amendments to the Export Administration Regulations (EAR) to implement E.O. 13936.

* * * *

Sec. 4. 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:

(a) Any foreign person determined by the Secretary of State, in consultation with the Secretary of the Treasury, or the Secretary of the Treasury, in consultation with the Secretary of State:

(i) to be or have been involved, directly or indirectly, in the coercing, arresting, detaining, or imprisoning of individuals under the authority of, or to be or have been responsible for or involved in developing, adopting, or implementing, the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Administrative Region;

(ii) to be responsible for or complicit in, or to have engaged in, directly or indirectly, any of the following:

(A) actions or policies that undermine democratic processes or institutions in Hong Kong;

(B) actions or policies that threaten the peace, security, stability, or autonomy of Hong Kong;

(C) censorship or other activities with respect to Hong Kong that prohibit, limit, or penalize the exercise of freedom of expression or assembly by citizens of Hong Kong, or that limit access to free and independent print, online or broadcast media; or

(D) the extrajudicial rendition, arbitrary detention, or torture of any person in Hong Kong or other gross violations of internationally recognized human rights or serious human rights abuse in Hong Kong;

(iii) to be or have been a leader or official of:

(A) an entity, including any government entity, that has engaged in, or whose members have engaged in, any of the activities described in subsections (a)(i), (a)(ii)(A), (a)(ii)(B), or (a)(ii)(C) of this section; or

(B) an entity whose property and interests in property are blocked pursuant to this order.

(iv) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any person whose property and interests in property are blocked pursuant to this section;

(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 section; or

(vi) to be a member of the board of directors or a senior executive officer of any person whose property and interests in property are blocked pursuant to this section

* * * *

Sec. 7. The unrestricted immigrant and nonimmigrant entry into the United States of aliens determined to meet one or more of the criteria in section 4(a) of this order, as well as

immediate family members of such aliens, or aliens determined by the Secretary of State to be employed by, or acting as an agent of, such aliens, would be detrimental to the interest of the United States, and the entry of such persons into the United States, as immigrants and nonimmigrants, is 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). The Secretary of State shall have the responsibility of implementing this section pursuant to such conditions and procedures as the Secretary has established or may establish pursuant to Proclamation 8693.

* * * *

On August 7, 2020, OFAC designated the following individuals under E.O. 13936: Carrie LAM; Chis TANG; Stephen LO; John Ka-chiu LEE; Teresa CHENG; Erick TSANG; Eric CHAN; Huining LUO; Baolong XIA; Xiaoming ZHANG; and Yanxiong ZHENG. 85 Fed. Reg. 55,073 (Sep. 3, 2020). The State Department issued a press statement on August 7, 2020 relating to the designations, which is available at <https://2017-2021.state.gov/the-united-states-designates-individuals-in-hong-kong-for-curtailling-promised-freedoms/>. The U.S. Department of the Treasury's press release is available at <https://home.treasury.gov/news/press-releases/sm1088>.

On November 9, 2020, the Department of State announced designations under E.O. 13936 in a press statement, available at <https://2017-2021.state.gov/designations-of-four-prc-and-hong-kong-officials-threatening-the-peace-security-and-autonomy-of-hong-kong/>, excerpted below:

The Department of State is designating Li Jiangzhou, Edwina Lau, and Steve Li Kwai-Wah as having been leaders or officials of entities, including any government entity, that have engaged in, or whose members have engaged in, developing, adopting, or implementing the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (NSL). Li Jiangzhou is the Deputy Director of the Office for Safeguarding National Security, which was established under the NSL. Edwina Lau is the head of the National Security Division of the Hong Kong Police Force and Steve Li Kwai-Wah is the Senior Superintendent.

Additionally, this action designates Deng Zhonghua, the Deputy Director of the Hong Kong & Macau Affairs Office (HKMAO). The HKMAO – one of the central government's primary offices on Hong Kong policy – has taken several actions to interfere in Hong Kong affairs and crack down on protestors.

On December 7, 2020, the State Department announced additional designations in a press statement, available at <https://2017-2021.state.gov/designations-of-national-peoples-congress-officials-undermining-the-autonomy-of-hong-kong/>, excerpted below:

...We are designating 14 Vice-Chairpersons of the NPCSC in connection with developing, adopting, or implementing the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region. ...

These 14 individuals are Wang Chen, Cao Jianming, Zhang Chunxian, Shen Yueyue, Ji Bingxuan, Arken Imirbaki, Wan Exiang, Chen Zhu, Wang Dongming, Padma Choling, Ding Zhongli, Hao Mingjin, Cai Dafeng, and Wu Weihua.

c. *Relating to activities in the South China Sea*

On August 26, 2020, the State Department provided an on-background conference call with State and Commerce officials on U.S. visa restrictions and Commerce's entity listing for PRC companies and individuals tied to malign activities by the PRC in the South China Sea. A transcript of the briefing is available at <https://2017-2021.state.gov/briefing-with-senior-state-department-and-commerce-officials-on-state-department-visa-restrictions-placed-on-individuals-from-the-peoples-republic-of-china-and-commerce-department-restri/> and excerpted below. See also section B.1, *infra*, for discussion of Commerce Department measures directed at PRC companies for their activities in the South China Sea.

* * * *

[T]he Commerce Department announced that it has added 24 of Beijing's state-owned enterprises, including subsidiaries of the China Communications Construction Company—CCCC—to the entity list for their role in these South China Sea activities... Secretary Pompeo announced the imposition of visa restrictions on PRC nationals, including executives of state-owned enterprises, responsible for Beijing's reclamation, construction, or militarization of disputed outposts and coercion of Southeast Asian claimants.

...[P]redatory Chinese state-owned enterprises that we've identified here, to include China Communications Construction Company and its subsidiaries [...] have been so central to the militarization and coercion in the South China Sea. CCCC, which led on the dredging, is also one of the leading contractors used by Beijing in its global "One Belt One Road" strategy. The company and its subsidiaries have engaged in corruption, predatory financing, environmental destruction, and other abuses in countries all around the world. It is frankly a long and diverse and colorful and very unfortunate record in a long list of countries.

To give just a few examples: In 2009, CCCC was blacklisted by the World Bank for fraudulent bidding practices on a highway contract in the Philippines. In Malaysia, we've seen over the years major controversy over CCCC's rail projects and corruption allegations and suspicions, and a very prominent renegotiation of that CCCC Belt and Road arrangement in the last few years. In Bangladesh, the CCCC subsidiary China Harbor Engineering corp was blacklisted from projects after bribing an official, according to the Bangladesh Government. Also in Bangladesh court nine years ago the China Harbor Engineering Company was found to have paid bribes to the son of a Bangladeshi prime minister who was later sentenced to prison. In Sri Lanka, there have been longstanding accusations of corruption and bribery involving China

Harbor Engineering corp and the Hambantota Port project, which is very well known in the Belt and Road story.

And perhaps to end here, in Kenya, we've seen many illustrations of unfortunate practices by the CCCC subsidiary China Road and Bridge Corp, to include the guilty plea of China Road and Bridge officials for bribery and a range of other concerns about this major railway project, to include labor abuse concerns, basic quality and viability concerns, as well as others. These are companies that are acting in this fashion and also doing so in very close cooperation with the Chinese military, as seen in the South China Sea, as seen in the Djibouti port and elsewhere.

* * * *

[W]e are not able to, because of the nature of the specific statutory authority, so-called 3(c) under the...INA, we can't make public the names, but as our statement this morning says, we have imposed visa restrictions on PRC individuals, including certain executives of state-owned enterprises who are responsible for or complicit in either the large-scale reclamation, construction, or militarization of disputed outposts in the South China Sea, or the PRC's use of coercion against Southeast Asian claimants to inhibit their access to offshore resources. And those visa ineligibilities took effect this morning.

* * * *

On August 26, 2020, the State Department issued a press statement announcing visa restrictions on PRC individuals for activities in the South China Sea. The press statement is available at <https://2017-2021.state.gov/u-s-imposes-restrictions-on-certain-prc-state-owned-enterprises-and-executives-for-malign-activities-in-the-south-china-sea/> and excerpted below.

* * * *

The United States supports a free and open South China Sea. We respect the sovereign rights of all nations, regardless of size, and seek to preserve peace and uphold freedom of the seas in a manner consistent with international law. In July, I announced an updated policy regarding Beijing's unlawful maritime claims in the South China Sea and emphasized that the United States was prepared to take firm action to oppose Beijing's campaign of bullying.

Today, the Department of State will begin imposing visa restrictions on People's Republic of China (PRC) individuals responsible for, or complicit in, either the large-scale reclamation, construction, or militarization of disputed outposts in the South China Sea, or the PRC's use of coercion against Southeast Asian claimants to inhibit their access to offshore resources. These individuals will now be inadmissible into the United States, and their immediate family members may be subject to these visa restrictions as well. In addition, the Department of Commerce has added 24 PRC state-owned enterprises to the Entity List, including several subsidiaries of China Communications Construction Company (CCCC).

Since 2013, the PRC has used its state-owned enterprises to dredge and reclaim more than 3,000 acres on disputed features in the South China Sea, destabilizing the region, trampling on the sovereign rights of its neighbors, and causing untold environmental devastation. CCCC

led the destructive dredging of the PRC's South China Sea outposts and is also one of the leading contractors used by Beijing in its global "One Belt One Road" strategy. CCCC and its subsidiaries have engaged in corruption, predatory financing, environmental destruction, and other abuses across the world.

The PRC must not be allowed to use CCCC and other state-owned enterprises as weapons to impose an expansionist agenda. The United States will act until we see Beijing discontinue its coercive behavior in the South China Sea, and we will continue to stand with allies and partners in resisting this destabilizing activity.

* * * *

d. Relating to "securities investments that finance Chinese military companies"

On November 12, 2020, President Trump issued E.O. 13959, "Addressing the Threat from Securities Investments that Finance Communist Chinese Military Companies." 85 Fed. Reg. 73,185 (Nov. 17, 2020). Excerpts follow from the order.

* * * *

Key to the development of the PRC's military, intelligence, and other security apparatuses is the country's large, ostensibly private economy. Through the national strategy of Military-Civil Fusion, the PRC increases the size of the country's military-industrial complex by compelling civilian Chinese companies to support its military and intelligence activities. Those companies, though remaining ostensibly private and civilian, directly support the PRC's military, intelligence, and security apparatuses and aid in their development and modernization.

At the same time, those companies raise capital by selling securities to United States investors that trade on public exchanges both here and abroad, lobbying United States index providers and funds to include these securities in market offerings, and engaging in other acts to ensure access to United States capital. In that way, the PRC exploits United States investors to finance the development and modernization of its military.

I therefore further find that the PRC's military-industrial complex, by directly supporting the efforts of the PRC's military, intelligence, and other security apparatuses, constitutes an unusual and extraordinary threat, which has its source in substantial part outside the United States, to the national security, foreign policy, and economy of the United States. To protect the United States homeland and the American people, I hereby declare a national emergency with respect to this threat.

Accordingly, I hereby order:

Section 1. (a) The following actions are prohibited:

(i) beginning 9:30 a.m. eastern standard time on January 11, 2021, any transaction in publicly traded securities, or any securities that are derivative of, or are designed to provide investment exposure to such securities, of any Communist Chinese military company as defined in section 4(a)(i) of this order, by any United States person; and

(ii) beginning 9:30 a.m. eastern standard time on the date that is 60 days after a person is determined to be a Communist Chinese military company pursuant to section (4)(a)(ii) or (iii) of this order, any transaction in publicly traded securities, or any securities that are derivative of, or

are designed to provide investment exposure to such securities, of that person, by any United States person.

(b) Notwithstanding subsection (a)(i) of this section, purchases for value or sales made on or before 11:59 p.m. eastern standard time on November 11, 2021, solely to divest, in whole or in part, from securities that any United States person held as of 9:30 a.m. eastern standard time on January 11, 2021, in a Communist Chinese military company as defined in section 4(a)(i) of this order, are permitted.

(c) Notwithstanding subsection (a)(ii) of this section, for a person determined to be a Communist Chinese military company pursuant to section 4(a)(ii) or (iii) of this order, purchases for value or sales made on or before 365 days from the date of such determination, solely to divest, in whole or in part, from securities that any United States person held in such person, as of the date 60 days from the date of such determination, are permitted.

(d) 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 date of this order.

Sec. 2. (a) 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 set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

* * * *

5. Venezuela

a. General background

For information on Venezuela-related sanctions, see <https://www.state.gov/venezuela-related-sanctions/> and <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/venezuela-related-sanctions>.

Executive Order 13692 was issued in 2015. See *Digest 2015* at 669-72. Executive Order 13808 was issued in 2017. See *Digest 2017* at 626-27. The President issued three additional executive orders relating to 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. See *Digest 2018* at 548-53. E.O. 13857 and E.O. 13884 relating to Venezuela were issued in 2019. See *Digest 2019* at 518-20.

On July 28, 2020, Special Representative for Venezuela Elliott Abrams provided a special briefing on recent developments in U.S. policy regarding Venezuela. The transcript of the briefing is available at <https://2017-2021.state.gov/special-representative-for-venezuela-elliott-abrams-on-recent-developments-in-u-s-venezuela-policy/>, and includes the following regarding sanctions:

...One way we are attempting to counter this downward spiral in Venezuela is by naming and sanctioning the individuals most responsible for it. You may have

seen we sanctioned two more individuals this morning. The Secretary, several days ago, announced sanctions against the head of the Venezuelan Supreme Court, Maikel Moreno, due to his involvement in significant corruption. And we are offering a reward of up to \$5 million for information leading to his arrest or conviction. Most of you know that Moreno was charged with conspiracy to commit money laundering and bribery, among other crimes. Simply put, he takes money to fix cases and he uses the office to keep the regime in power.

b. E.O. 13692

Executive Order 13692 of March 11, 2015 is entitled, “Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela.”

In a January 13, 2020 press statement from Secretary Pompeo, the State Department announced sanctions under E.O. 13692, as amended, on seven current or former officials of the former Maduro regime involved in attempting “to siege the National Assembly palace and hold a non-constitutionally sanctioned election to prevent a majority of legitimate Venezuelan legislators from voting.” Press statement, available at <https://2017-2021.state.gov/the-united-states-takes-action-against-officials-of-the-former-maduro-regime-involved-in-obstructing-the-venezuelan-national-assembly/>. The Treasury Department press release on the January 13, 2020 actions is available at <https://home.treasury.gov/news/press-releases/sm871>. The seven designated by OFAC under E.O. 13692 are: Jose Gregorio NORIEGA FIGUEROA, Luis Eduardo PARRA RIVERO, Jose Dionisio BRITO RODRIGUEZ, Franklyn Leonardo DUARTE, Negal Manuel MORALES LLOVERA, Conrado Antonio PEREZ LINARES, Adolfo Ramon SUPERLANO. 85 Fed. Reg. 2814 (Jan. 16, 2020).

On July 23, 2020, OFAC designated Santiago Jose MORON HERNANDEZ and Ricardo Jose MORON HERNANDEZ pursuant to E.O. 13692 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of Nicolas Ernesto Maduro Guerra or those supporting Nicolas Maduro. 85 Fed. Reg. 45,469 (July 28, 2020).

On September 4, 2020, OFAC designated the following individuals under E.O. 13692: David Eugenio DE LIMA SALAS; Indira Maira ALFONZO IZAGUIRRE; Jose Luis GUTIERREZ PARRA; and Reinaldo Enrique MUÑOZ PEDROZA. 85 Fed. Reg. 57,934 (Sep. 16, 2020). The September 4, 2020 State Department press statement regarding the OFAC-imposed sanctions under E.O. 13692, available at <https://2017-2021.state.gov/the-united-states-responds-to-the-maduro-regimes-attempts-to-corrupt-democratic-elections-in-venezuela/>, notes the designations are based on the individuals’ “involvement in Maduro’s efforts to manipulate the Venezuelan National Assembly and restructure the National Electoral Council...”

On September 22, 2020, OFAC announced its September 18, 2020 sanctions determinations under E.O. 13692, as amended by E.O. 13857. Press release, available at <https://home.treasury.gov/news/press-releases/sm1132>. Those designated are: Williams Jose BENAVIDES RONDON; Chaim Jose BUCARAN PARAGUAN; Jose Bernabe

GUTIERREZ PARRA, Guillermo Antonio LUCES OSORIO; and Miguel Antonio Jose PONENTE PARRA. 85 Fed. Reg. 62,811 (Oct. 5, 2020).

On November 30, 2020, OFAC designated the entity CEIEC under E.O. 13692. 85 Fed. Reg. 79,076 (Dec. 8, 2020).

On December 18, 2020, OFAC designated the following under E.O. 13692: EX-CLE SOLUCIONES BIOMETRICAS C.A.; Guillermo Carlos SAN AGUSTIN; and Marcos Javier MACHADO REQUENA. 85 Fed. Reg. 85,862 (Dec. 29, 2020). See also December 18, 2020 State Department press statement, available at <https://2017-2021.state.gov/the-united-states-takes-actions-against-supporters-of-the-illegitimate-maduro-regimes-fraudulent-elections//index.html> (Ex-Cle C.A. had millions of dollars of contracts with the Maduro regime, providing electoral hardware and software and was involved in the regime's efforts to rig the fraudulent December 6 elections).

On December 30, 2020, OFAC designated two individuals under E.O. 13692—Lorena Carolina CORNIELLES RUIZ and Ramon Antonio TORRES ESPINOZA. 86 Fed. Reg. 6416 (Jan. 21, 2021). The December 30, 2020 State Department press statement regarding these sanctions, available at <https://2017-2021.state.gov/the-united-states-sanctions-venezuelan-officials-involved-in-unjust-sentencing-of-the-citgo-6/>, includes the following:

The United States is designating the Venezuelan judge and prosecutor who presided over and prosecuted the November 2020 trial and sentencing of six U.S. persons known as the “Citgo 6.” These Americans have been unjustly imprisoned in Venezuela since November 2017 after being lured to Caracas under false pretenses.

c. *E.O. 13850, as amended by E.O. 13857*

On February 18, 2020, OFAC designated one entity, ROSNEFT TRADING S.A., and one individual, Didier CASIMIRO, pursuant to E.O. 13850 (“Blocking Property of Additional Persons Contributing to the Situation in Venezuela,” as amended by E.O. 13857 of January 25, 2019, “Taking Additional Steps to Address the National Emergency with respect to Venezuela”). 85 Fed. Reg. 10,262 (Feb. 21, 2020). See also February 18, 2020 State Department press statement, available at <https://2017-2021.state.gov/the-united-states-sanctions-rosneft-trading-s-a-to-secure-venezuelas-natural-resources/> (Rosneft Trading S.A., a Swiss-incorporated, Russian-owned oil brokerage firm, operating in Venezuela's oil sector as the primary broker for Venezuela's crude oil, has helped prop up Maduro). And see transcript of February 18, 2020 briefing by Special Representative Abrams on the sanctions against Rosneft, available at <https://2017-2021.state.gov/special-representative-for-venezuela-elliott-abrams-5/>.

On March 12, 2020, OFAC designated TNK TRADING INTERNATIONAL S.A. under E.O. 13850, as amended by E.O. 13857, in addition to designating the same entity as subject to the prohibitions of Directive 2 (as amended) and Directive 4 of September 12, 2014, pursuant to Executive Order 13662 of March 20, 2014, “Blocking Property of Additional Persons Contributing to the Situation in Ukraine” (E.O. 13662). 85 Fed. Reg.

39,683 (July 1, 2020). See also March 12, 2020 State Department press statement, available at <https://2017-2021.state.gov/the-united-states-increases-pressure-on-illegitimate-former-maduro-regime-with-designation-of-tnk-trading-international-s-a/> (TNK was involved in helping Rosneft Trading evade U.S. sanctions by making crude oil purchases from Petroleos de Venezuela).

On June 2, 2020 and June 18, 2020, OFAC determined that the persons listed below met one or more of the criteria under E.O. 13850, as amended by E.O. 13857 and also identified four vessels as blocked property pursuant to E.O. 13850: Afranav Maritime Ltd, Seacomber Ltd, Adamant Maritime Ltd, and Sanibel Shiptrade Ltd. On July 02, 2020, OFAC removed the following entities and associated property from the SDN List under E.O. 13850: SANIBEL SHIPTRADE LTD, ROMINA MARITIME CO INC, DELOS VOYAGER SHIPPING LTD, ADAMANT MARITIME LTD. 85 Fed. Reg. 41,096 (July 8, 2020).

On June 18, 2020, OFAC designated the following under E.O. 13850: three individuals—Veronica ESPARZA GARCIA, Joaquin LEAL JIMENEZ, and Olga Maria ZEPEDA ESPARZA—and eight entities—DELOS VOYAGER SHIPPING LTD, ROMINA MARITIME CO INC, ALEL TECHNOLOGIES LLC, COSMO RESOURCES PTE. LTD., LIBRE ABORDO, S.A. DE C.V., LUZY TECHNOLOGIES LLC, SCHLAGER BUSINESS GROUP S. DE R.L. DE C.V., and WASHINGTON TRADING LTD. 85 Fed. Reg. 38,018 (June 24, 2020). See also Treasury Department press release, available at <https://home.treasury.gov/news/press-releases/sm1038>, and State Department press statement, available at <https://2017-2021.state.gov/the-united-states-targets-network-supporting-corrupt-venezuelan-actors-attempting-to-evade-sanctions/> (the June 18 measures target a network supporting evasion of Venezuela oil sector sanctions).

OFAC determined that circumstances no longer warrant the inclusion of the following on the SDN List under E.O. 13850: AFRANAV MARITIME LTD, and SEACOMBER LTD. 85 Fed. Reg. 38,020 (June 24, 2020).

d. E.O. 13884

On January 21, 2020, the United States identified 15 aircraft as blocked property of Petroleos de Venezuela, S.A. (“PDVSA”) pursuant to E.O. 13884. The State Department press statement regarding the action, available at <https://2017-2021.state.gov/the-united-states-continues-to-support-a-peaceful-democratic-transition-in-venezuela/>, states:

Several of these aircraft have been involved in the harassment of U.S. military flights in Caribbean airspace or have been used to transport senior members of the illegitimate former Maduro regime, which continues to subject the people of Venezuela to brutal and dictatorial practices. ...

OFAC identifications of several individuals and entities pursuant to E.O. 13884 on November 5, 2019 were published in the Federal Register on July 6, 2020 (Nestor Neptali BLANCO HURTADO; Remigio CEBALLOS ICHASO; Pedro Miguel CARRENO

ESCOBAR; Jose Adelino ORENLAS FERREIRA; and Carlos Alberto CALDERON CHIRINOS). 85 Fed. Reg. 40,382 (July 6, 2020).

On February 7, 2020, OFAC identified one entity, CONSORCIO VENEZOLANO DE INDUSTRIAS AERONAUTICAS Y SERVICIOS AEREOS, S.A., pursuant to E.O. 13884 and also identified 40 aircraft as blocked property. 85 Fed. Reg. 69,684 (Nov. 3, 2020). See also State Department press statement, available at <https://2017-2021.state.gov/the-united-states-takes-action-against-maduros-improper-use-of-the-venezuelan-peoples-air-carrier/> (“this airline is being used to ferry Maduro and his inner circle to confer with dictators, authoritarian regimes, and other criminals around the world”).

6. Democratic People’s Republic of Korea

a. General

As explained in a Treasury Department notice in the Federal Register, published on October 20, 2020:

On April 10, 2020 OFAC amended the North Korea Sanctions Regulations, 31 CFR part 510, to implement the Treasury-administered provisions of the North Korea Sanctions and Policy Enhancement Act of 2016, as amended by the Countering America’s Adversaries Through Sanctions Act and the National Defense Authorization Act for Fiscal Year 2020. Specifically, OFAC added a new prohibition to the regulations that is applicable to persons that are owned or controlled by a U.S. financial institution and established or maintained outside of the United States. OFAC has reviewed the individuals and entities on its Specially Designated Nationals and Blocked Persons List (SDN List) for North-Korea related activities and determined that 490 of these SDN List entries should also contain the information about the new regulatory prohibition. Accordingly, OFAC has added the reference “Transactions Prohibited For Persons Owned or Controlled By U.S. Financial Institutions: North Korea Sanctions Regulations section 510.214” to the SDN List entries for the 490 persons listed below.

85 Fed. Reg. 66,684 (Oct. 20, 2020).

On January 14, 2020, OFAC designated the following pursuant to E.O. 13722: KOREA NAMGANG TRADING CORPORATION and BEIJING SUKBAKSO. 85 Fed. Reg. 3485 (Jan. 21, 2020). On March 2, 2020, OFAC designated two individuals under both E.O. 13694 and E.O. 13722: Jiadong LI and Yinyin TIAN. 85 Fed. Reg. 12,971 (Mar. 5, 2020).

On December 8, 2020, OFAC designated the following entities pursuant to E.O. 13810: THINH CUONG COMPANY LIMITED; ALWAYS SMOOTH LTD; GOOD SIBLINGS, LTD; SILVER BRIDGE SHIPPING CO-HKG (along with identifying associated vessels). 85 Fed. Reg. 80,891 (Dec. 14, 2020).

b. Nonproliferation**(1) UN sanctions**

On March 19, 2020, the United States submitted its report on operative paragraph 8 of Security Council resolution 2397 (2017), regarding the obligation to repatriate DPRK nationals earning income overseas, subject to limited exceptions. The report, available at <https://www.un.org/securitycouncil/sanctions/1718/implementation-reports>, represented that:

...no national of the Democratic People's Republic of Korea has been issued a visa in a work-authorized classification covered under the present report and valid from 23 December 2018 to 22 December 2019.

In addition, from 23 December 2018 to 22 December 2019, there have been no nationals of the Democratic People's Republic of Korea present in the United States who: (a) were granted work authorized visas prior to 23 December 2018 but stayed later than that date; (b) switched visa categories after entering the United States on a visa that was not work-authorized; (c) were paroled in without a visa but later acquired work-authorized status; (d) otherwise acquired employment authorization; or (e) would fall under any other category that would require repatriation under paragraph 8 of resolution 2397 (2017).

Accordingly, the United States continues to have no repatriation obligation under paragraph 8 of Security Council resolution 2397 (2017). Its national authorities will continue to ensure that the United States remains in compliance with paragraph 8 of the resolution.

(2) U.S. sanctions

See *Digest 2015* at 645 for background on Executive Order 13687, "Imposing Additional Sanctions With Respect To North Korea." 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." See *Digest 2017* at 643-44 for background on Executive Order 13810, "Imposing Additional Sanctions With Respect to North Korea."

On March 2, 2020, OFAC unblocked the following entities which had been on the SDN List under the DPRK sanctions regulations: AO NNK-PRIMORNEFTEPRODUCT and INDEPENDENT PETROLEUM COMPANY. 85 Fed. Reg. 12,970 (Mar. 5, 2020).

On September 1, 2020, the U.S. Departments of State, Treasury, and Commerce issued an advisory on North Korea's ballistic missile procurement activities. The State Department media note on the advisory, available at <https://2017-2021.state.gov/industry-advisory-on-north-korea-ballistic-missile-procurement/>, explains:

The advisory identifies key procurement entities and deceptive techniques used by North Korea's missile program, provides an overview of relevant provisions under U.S. law, including sanctions authorities, related to DPRK proliferation activities, and lists relevant resources. The advisory also contains annexes listing key items used in North Korea's ballistic missile program, as well as DPRK persons and entities currently subject to sanctions by the U.S. Government.

7. Sudan

On August 13, 2020, the State Department announced the implementation of visa restrictions under INA § 212(a)(3)(C) on "individuals residing both inside and outside Sudan who are believed to be responsible for or complicit in, or to have engaged, directly or indirectly, in undermining Sudan's civilian-led transitional government's efforts to implement the July 17, 2019 Political Agreement and August 17, 2019 Constitutional Declaration." August 13, 2020 State Department press statement, available at <https://2017-2021.state.gov/the-united-states-imposes-visa-restrictions-on-multiple-individuals-undermining-sudans-civilian-led-transitional-government/index.html>. The visa restrictions could include immediate family members of the individuals, whose names were not publicly identified.

On October 26, 2020, the President issued a "Certification of Rescission of the Determination regarding the Government of Sudan," consistent with sections 1754(c) and 1768(c) of the National Defense Authorization Act for Fiscal Year 2019 (50 U.S.C. 4813(c) and 4826(c)), and in satisfaction of section 620A(c)(2) of the Foreign Assistance Act of 1961 (22 U.S.C. 2371(c)(2)), section 40(f)(1)(B) of the Arms Export Control Act (22 U.S.C. 2780(f)(1)(B)), and, to the extent applicable, section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), as continued in effect by Executive Order 13222 of August 17, 2001. The certification, which in accordance with relevant statutory requirements was transmitted, together with a memorandum of justification, to Congress at least 45 days before the rescission took effect, available at <https://trumpwhitehouse.archives.gov/presidential-actions/certification-rescission-determination-regarding-government-sudan/>, specifies that:

- (i) the Government of Sudan has not provided any support for acts of international terrorism during the preceding 6-month period; and
- (ii) the Government of Sudan has provided assurances that it will not support acts of international terrorism in the future.

See also statement of the White House press secretary on Sudan of October 23, 2020, available at <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-sudan/> (the President informed Congress of his intent to rescind the state sponsor of terrorism or "SST" designation of Sudan after an agreement was reached with Sudan to resolve certain claims of United States victims of terror and their

families and the transitional government of Sudan transferred \$335 million into an escrow account).

Effective December 14, 2020, the Secretary of State rescinded the SST designation of Sudan. The State Department December 14, 2020 press statement announcing the rescission, available at <https://2017-2021-translations.state.gov/2020/12/14/sudans-state-sponsor-of-terrorism-designation-rescinded/index.html>, states:

This represents a fundamental change in our bilateral relationship toward greater collaboration and support for Sudan’s historic democratic transition. This achievement was made possible by the efforts of Sudan’s civilian-led transitional government to chart a bold new course away from the legacy of the Bashir regime and, in particular, to meet the statutory and policy criteria for rescission.

On December 15, 2020, Secretary of State Pompeo determined that it was no longer necessary to suspend the entry into the United States of officials of the Government of Sudan and members of the armed forces of Sudan, which had been imposed under Presidential Proclamation No. 6958, of November 22, 1996. The termination of these U.S. measures accords with the termination of measures imposed under UN Security Council Resolution 1054 and its successor resolution UNSCR 1070, and the shift in U.S. foreign relations with Sudan after the installation of the new Sudanese Civilian-Led Transitional Government. 85 Fed. Reg. 84,092 (Dec. 23, 2020).^{**}

8. Russia

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, 2020, OFAC designated one individual—Alexander Nikolaevich GANOV—and one entity—GRAND SERVICE EXPRESS—under E.O. 13685 and the following seven individuals under E.O. 13660: Ekaterina Borisovna ALTABAEVA; Lidia

^{**} Editor’s note: Effective January 14, 2021, the Department of Commerce Bureau of Industry and Security (“BIS”) amended the Export Administration Regulations (“EAR”) to implement the rescission of Sudan’s designation as an SST by removing Anti-Terrorism controls on Sudan and removing it from the list of terrorist-supporting countries. 86 Fed. Reg. 4929 (Jan. 19, 2021).

Aleksandrovna BASOVA; Sergei Andreevich DANILENKO; Yuri Mikhailovich GOTSANYUK; Vladimir Vladimirovich NEMTSEV; Ekaterina Eduardovna PYRKOVA; Mikhail Vladimirovich RAZVOZHAEV. 85 Fed. Reg. 6016 (Feb. 3, 2020).

See 11.a., *infra*, for discussion of the U.S. condemnation of a Russian cyber attack against the country of Georgia.

On July 15, 2020 the State Department updated published guidance regarding CAATSA section 232 to extend its application to Russian energy export pipelines, specifically the Nord Stream 2 and the second line of TurkStream. 85 Fed. Reg. 44,561 (July 23, 2020). Previous guidance limited application of section 232 to Russian energy export pipeline projects for which a contract was signed on or after August 2, 2017. *Id.* In a July 15, 2020 media note, available at <https://2017-2021.state.gov/updated-public-guidance-for-section-232-of-the-countering-americas-adversaries-through-sanctions-act-caatsa/>, the State Department explained:

By updating the public guidance, the Department of State intends to clarify that our implementation of Section 232 will now include investments or other activities related to a broader scope of Russian energy export pipelines, including Nord Stream 2 and the second line of TurkStream. Persons making such investments or engaging in such activities, including but not limited to financing partners, as well as pipe-laying vessels and related engineering service providers engaging in the deployment of the pipelines, may be subject to sanctions pursuant to Section 232. The updated public guidance can be found at www.state.gov/caatsa-creea-section-232-public-guidance.

The Department of State is making this update to the public guidance for Section 232 in order to address certain threats to U.S. national security and foreign policy interests, in particular Nord Stream 2. If completed, these projects would undermine European security and strengthen Russia's ability to use its energy resources to coerce our European partners and allies. The projects would hinder the process of European energy diversification. These projects could also severely limit gas transit through Ukraine, depriving the Ukrainian government of significant transit revenues and reducing a large deterrent against further Russian aggression against Ukraine.

On October 23, 2020, OFAC designated the STATE RESEARCH CENTER OF THE RUSSIAN FEDERATION FGUP CENTRAL SCIENTIFIC RESEARCH INSTITUTE OF CHEMISTRY AND MECHANICS pursuant to section 224 of CAATSA for activities undermining cybersecurity on behalf of the Russian Federation. 85 Fed. Reg. 68,624 (Oct. 29, 2020). The State Department issued a press statement, available at <https://2017-2021.state.gov/united-states-sanctions-russian-government-research-institution/>, which includes the following background on the sanctioned entity:

Today's designation of the State Research Center of the Russian Federation FGUP Central Scientific Research Institute of Chemistry and Mechanics (TsNIIKhM), a Russian government-controlled research institution responsible for

building customized tools that enable Triton malware attacks, highlights the threat the Russian government poses to cybersecurity and critical infrastructure. In 2017, a cyber-attack using Triton malware disrupted operations at a petrochemical plant in the Middle East. Additionally, the actors behind the malware have reportedly scanned and probed U.S. facilities.

On December 14, 2020, the Secretary of State announced in a press statement, available at <https://2017-2021.state.gov/the-united-states-sanctions-turkey-under-caatsa-231/>, that the United States was imposing sanctions under section 231 of CAATSA in response to the Republic of Turkey's Presidency of Defense Industries ("SSB") procurement from Rosoboronexport, the Russian government's arms export entity, of the S-400 surface-to-air missile system. On the same day that the sanctions were announced, Assistant Secretary of State for International Security and Nonproliferation Dr. Christopher Ford delivered a statement at a special briefing on the CAATSA section 231 sanctions on Turkey. Excerpts follow from the briefing, which is available in full at <https://2017-2021.state.gov/assistant-secretary-for-international-security-and-nonproliferation-dr-christopher-ford-and-deputy-assistant-secretary-for-european-affairs-matthew-palmer-on-the-imposition-of-sanctions-on-turkey-und/>.

* * * *

...Congress passed the so-called CAATSA statute—the Countering America's Adversaries Through Sanctions Act—in the summer of 2017, after a series of ... outrages by the Russian Federation that ... included invasions of its neighbors and interference in the electoral processes of other countries, including the United States itself.

... [M]y bureau at the Department of State has had the privilege of implementing one of its important pieces, the mandatory sanctions proscribed in Section 231 of CAATSA against anyone determined to have engaged in a significant transaction with certain listed elements of Russia's defense or intelligence sectors.

Now, as I explained to the Senate Banking Committee in August of 2018, we've been very pleased to have the tools that we're provided by CAATSA's Section 231, for we see those sanctions as an important way to push back against Russia's malign[] behavior.

And over the last three years, we've used the threat of such sanctions to deprive the Russian arms industry of would-be overseas customers. The Kremlin's foreign arms trade provides Russia with funds it uses to pay for the weapons with which it postures against the United States and our allies and with which it can support malign activities in occupied portions of Ukraine and Georgia, for instance in Moscow's atrocity-committing client state of Syria and elsewhere. This arms trade also helps Russia create relationships with foreign clients that it thereafter uses and manipulates for strategic advantage.

So we've been happy to have the ability to use Section 231 sanctions to deter those kinds of transactions. And we've had a good track record in doing so – to the tune of many billions of dollars in announced or expected Russian arms transactions that have quietly been abandoned as a result of our diplomatic outreach under Section 231. That's billions of dollars that Putin's war

machine will not get, and through which the Kremlin's malign influence will not spread. And that's also a slew of strategic relationships between the Kremlin and overseas partners that will not broaden and deepen. And so as I told the Senate back a couple of years ago, we are very proud of this record, and we are working hard to strengthen that record.

But – and here of course we're getting to today's announcement – if someone goes forward and procures dangerous new equipment from the Kremlin anyway, U.S. law does require the imposition of sanctions. These are mandatory penalties rather than discretionary ones. Accordingly, for example, in 2019 we sanctioned the military procurement entity of the People's Republic of China, an institution known as EDD, and its director, a fellow by the name of Li Shangfu, for their involvement in China's procurement of S-400 surface-to-air missiles from Russia.

And now today, unfortunately, we have to impose CAATSA Section 231 sanctions in response to Turkey's acquisition of the S-400 system from Russia as well.

The United States has made clear to Turkey at the highest levels and on numerous occasions that its purchase of the S-400 system would endanger the security of U.S. military technology and personnel, and would provide substantial funds to Russia's defense sector as well as Russian access to the Turkish armed forces and defense industry. We also repeatedly made clear that such a purchase could expose Turkey to mandatory sanctions under Section 231 of the CAATSA statute.

Yet Turkey decided to move ahead with the procurement and testing of the S-400. It did this despite the risk of such sanctions and despite the availability of alternative NATO-interoperable systems to meet Turkey's defense requirements which we have repeatedly offered to Turkey, and it has equally repeatedly refused. So this decision left us no alternative but to act.

Turkey's acquisition of the S-400 has already resulted in Turkey's suspension and pending removal from the global F-35 Joint Strike Fighter partnership. Today, we are furthermore implementing Section 231 sanctions against Turkey's Presidency of Defense Industries organization – or "SSB," in its Turkish acronym – which is the country's military and procurement agency. Specifically, we are imposing the following penalties upon SSB:

First, a prohibition on granting specific U.S. export licenses and authorizations for any goods or technology.

Second, a prohibition on loans or credits by U.S. financial institutions totaling more than \$10 million in any 12-month period.

Third, a ban on U.S. Export-Import Bank assistance for exports.

And fourth, a requirement for the U.S. to oppose loans by international financial institutions to SSB.

In addition to those penalties on SSB the organization, we are imposing full blocking sanctions and visa restrictions on SSB President Dr. Ismail Demir as well as upon three other SSB officials, specifically Vice President Faruk Yigit, Air Defense and Space Department head Serhat Gencoglu ... and Program Manager for Regional Air Defense Systems Mustafa Alper Deniz. The Treasury Department's Office of Foreign Assets Control, or OFAC, is adding all four of those men to its ... SDN list. As a result, all of their property and interests within the United States jurisdiction are blocked, and U.S. persons are generally prohibited from transacting with them.

Now, Turkey is a NATO ally, of course, and is – and a close security partner of ours, and we remain committed to that relationship. But Ankara's acquisition of the S-400 is unacceptable. Since the Secretary of State has determined that this acquisition, a \$2.5 billion

contract for advanced missiles from Rosoboronexport, Russia's main arms export entity ... was a significant transaction with the arms sector of the Russian Federation, sanctions under CAATSA Section 231 are mandatory.

We very much regret that this has been necessary, and we very much hope that Turkey will work with us to resolve the S-400 problem as quickly as possible. We hope that other countries around the world will also take note that the United States will fully implement CAATSA Section 231 sanctions, and that they should avoid further acquisitions of Russian equipment, especially those that could trigger sanctions.

* * * *

9. 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")

The Iran, North Korea, and Syria Nonproliferation Act ("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. The sanctions include restrictions on U.S. government procurement, U.S. government assistance, and exports, for a period of two years.

On February 3, 2020, the United States imposed INKSNA sanctions on the following entities and individuals (and their successors, or sub-units, and/or subsidiaries): Baoding Shimaotong Enterprises Services Company Limited (China); Dandong Zhensheng Trade Co., Ltd. (China); Gaobeidian Kaituo Precise Instrument Co. Ltd (China); Luo Dingwen (Chinese individual); Shenzhen Tojoin Communications Technology Co. Ltd (China); Shenzhen Xiangui High-Tech Co., Ltd (China); Wong Myong Son (individual in China); Wuhan Sanjiang Import and Export Co., Ltd (China); Kata'ib Sayyid al-Shuhada (KSS) (Iraq); Kumertau Aviation Production Enterprise (Russia); Instrument Building Design Bureau (KBP) Tula (Russia); Scientific Production Association Mashinostroyeniya (NPOM) (Russia); Eren Carbon Graphite Industrial Trading Company, Ltd. (Turkey). 85 Fed. Reg. 8618 (Feb. 14, 2020). See also February 25, 2020 State Department press statement, available at <https://2017-2021.state.gov/new-sanctions-under-the-iran-north-korea-and-syria-nonproliferation-act-inksna/>.

On September 23, 2020, the U.S. Government imposed INKSNA sanctions on the following foreign persons (and any successors, sub-units, or subsidiaries): Gaobeidian

Kaituo Precise Instrument Co. Ltd (China); Luo Dingwen (Chinese individual); Raybeam Optronics Co. Ltd. (China); Tungsten Online (Xiamen) Manu and Sales Corp. (China); Islamic Revolutionary Guard Corps (IRGC) (Iran); Asa'ib Ahl al-Haq (AAH) (Iraq); Rosoboronexport (Russia); Al Jaysh al Sha'bi (Syria); Fifth Border Guard Regiment (Syria); Lebanese Hizballah (Syria); Scientific Studies and Research Center (SSRC) (Syria); and Syrian Army (Syria). 85 Fed. Reg. 62,781 (Oct. 5, 2020).

On November 6, 2020, the U.S. government imposed INKSNA sanctions on the following foreign persons (and any successors, sub-units, or subsidiaries): Chengdu Best New Materials Co Ltd. (China); Zibo Elim Trade Company, Ltd. (China); Aviazapchast (Russia); Joint Stock Company Elecon (Russia); Nilco Group (aka Nil Fam Khazar Company; aka SanTERS Holding) (Russia). 85 Fed. Reg. 75,393 (Nov. 25, 2020).

10. Terrorism

a. 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. Among the resolutions for 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). For background on E.O. 13224, see 66 Fed. Reg. 49,079 (Sept. 25, 2001); see also *Digest 2001* at 881–93 and *Digest 2007* at 155–58.

On February 26, 2020, the State Department issued a press statement, available at <https://2017-2021.state.gov/united-nations-1267-sanctions-committee-designation-of-isis-west-africa-and-isis-greater-sahara/>, welcoming the addition on February 23 of ISIS-West Africa (ISIS-WA) and ISIS-Greater Sahara (ISIS-GS) to the UN's 1267 ISIL and al-Qaida Sanctions List. The press statement goes on to say:

The United States designated ISIS-WA and ISIS-GS as Foreign Terrorist Organizations under Section 219 of the Immigration and Nationality Act and Specially Designated Global Terrorists under Executive Order 13224 on May 23, 2018 and February 28, 2018, respectively. ISIS-GS and ISIS-WA are the second and third ISIS affiliate designated by the UN. ISIS-Khorasan was the first listed at the UN in May 2019.

ISIS-WA is responsible for killing hundreds of innocent civilians in dozens of attacks since its inception in 2015. ISIS-GS has also carried out numerous attacks since its formation in 2015, including the October 2017 attack that killed four U.S. soldiers in Niger. This UN designation obligates all member states to implement an arms embargo, a global travel ban, and asset freeze on ISIS-WA and ISIS-GS, actions that will cut the groups off from the resources they need to continue their terrorist activities.

In addition to ISIS-WA and ISIS-GS, the UN 1267 Sanctions Committee added several other designations to the ISIL and Al-Qaida sanctions list in 2020, all of whom had also been designated by the United States.

On July 15, 2020, the State Department issued a press statement announcing that the seven member states of the Terrorist Financing Targeting Center (“TFTC”) had designated six individuals and entities affiliated with the Islamic State of Iraq and Syria (“ISIS”) for measures that interrupt the flow funds to support ISIS operations, including funds for ISIS leaders in Syria and Iraq. The statement is available at <https://2017-2021.state.gov/the-united-states-and-six-member-states-of-tftc-target-isis-linked-financial-network/>, and further explains:

These sanctions impact three Syria-based money services businesses—al Haram Exchange, Tawasul Company, and al-Khalidi Exchange—along with a senior ISIS financial facilitator, Abd-al-Rahman Ali Husayn al-Ahmad al-Rawi, and Afghanistan-based Nejaat Social Welfare Organization and its director, Sayed Habib Ahmad Khan. These individuals and entities were previously designated by the United States under Executive Order 13224.

The actions taken today serve as a further warning to individuals and businesses who provide financial support or material assistance to terrorist organizations. The TFTC is a vital organization that coordinates and shares financial intelligence information to target activities that pose a threat to the national security of its members, which include the Kingdom of Saudi Arabia, the Kingdom of Bahrain, the State of Kuwait, the Sultanate of Oman, the State of Qatar, the United Arab Emirates, and the United States. Our work continues.

b. U.S. targeted financial sanctions

(1) Department of State designations

In 2020, numerous entities and individuals (including their known aliases) were designated pursuant to State Department authorities in E.O. 13224 as amended by E.O. 13886. For an up-to-date list of State Department terrorism designations, see <https://www.state.gov/terrorist-designations-and-state-sponsors-of-terrorism/>.

On January 2, 2020, the State Department made three designations under E.O. 13224: Laith al-Khazali; Qays al-Khazali; and Asa’ib Ahi al-Haq. 85 Fed. Reg. 1370 (Jan. 10, 2020).

On February 14, 2020, the Secretary of State designated Ahmad al-Hamidawi under E.O. 13224. 85 Fed. Reg. 13,969 (Mar. 10, 2020). The February 26, 2020 State Department media note announcing the designation, available at <https://2017-2021.state.gov/state-department-terrorist-designation-of-ahmad-al-hamidawi/>, provides the following background:

Ahmad al-Hamidawi is the Secretary General of Kata’ib Hizballah (KH), an Iran-

backed terrorist group active in Iraq and Syria, which the Department of State designated as a Foreign Terrorist Organization and SDGT in July 2009. KH has claimed responsibility for numerous terrorist attacks against U.S. and Coalition Forces in Iraq, including IED attacks, rocket-propelled grenade attacks, and sniper operations. Most recently, on December 27, 2019, KH launched a rocket attack against an Iraqi military base near Kirkuk, killing Nawres Hamid, an American civilian contractor, and injuring four U.S. service members and two members of the Iraqi Security Forces. In addition, in October 2019, KH was reportedly involved in sniper attacks on peaceful protesters in Baghdad, which killed more than 100 people and injured another 6,000.

On March 2, 2020, the State Department designated Amir Muhammad Sa'id Abdal-Rahman al-Mawla under E.O. 13224. 85 Fed. Reg. 16,723 (Mar. 24, 2020). See also the March 17, 2020 State Department media note announcing the designation of Mawla, the new leader of ISIS, available at <https://2017-2021.state.gov/terrorist-designation-of-isis-leader-amir-muhammad-said-abdal-rahman-al-mawla/>, which explains:

Following the death of former ISIS leader Abu Bakr al-Baghdadi, Amir Muhammad Sa'id Abdal-Rahman al-Mawla succeeded him to become the leader of ISIS. Al-Mawla was active in ISIS's predecessor organization, al-Qai'da in Iraq, and steadily rose through the ranks of ISIS to become the Deputy Amir. Al-Mawla helped drive and attempt to justify the abduction, slaughter, and trafficking of Yazidi religious minorities in northwest Iraq and oversees the group's global operations.

On March 27, 2020, the State Department designated the Russian Imperial Movement ("RIM") pursuant to E.O. 13224 related to participating in training to commit acts of terrorism. 85 Fed. Reg. 20,804 (Apr. 14, 2020). The Department also designated pursuant to E.O. 13224 RIM leaders Denis Valiullovič Gariyev, 85 Fed. Reg. 20,803 (Apr. 14, 2020), Nikolay Nikolayevich Trushchalov, 85 Fed. Reg. 20,803 (Apr. 14, 2020), and Stanislav Anatolyevich Vorobyev, 85 Fed. Reg. 20,804 (Apr. 14, 2020).

U.S. Coordinator for Counterterrorism Nathan A. Sales delivered remarks on the designations of RIM and these three leaders on April 6, 2020. The remarks are available at <https://2017-2021.state.gov/designation-of-the-russian-imperial-movement/> and excerpted below. Ambassador Sales also provided a special briefing on the designations, which is available at <https://2017-2021.state.gov/briefing-with-coordinator-for-counterterrorism-ambassador-nathan-a-sales-on-the-united-states-designation-of-the-russian-imperial-movement-and-its-leaders-as-global-terrorists/> (not excerpted herein). Secretary Pompeo also issued a statement on the designations, available at <https://2017-2021.state.gov/united-states-designates-russian-imperial-movement-and-leaders-as-global-terrorists/> (not excerpted herein).

* * * *

These designations are unprecedented. This is the first time the United States has ever designated white supremacist terrorists, illustrating how seriously this administration takes the threat. We are taking actions no previous administration has taken to counter this threat.

RIM is a terrorist group that provides paramilitary-style training to neo-Nazis and white supremacists, and it plays a prominent role in trying to rally like-minded Europeans and Americans into a common front against their perceived enemies. RIM has two training facilities in St. Petersburg, which likely are being used for woodland and urban assault, tactical weapons, and hand-to-hand combat training.

This group has innocent blood on its hands. In August 2016, two Swedish men traveled to St. Petersburg and underwent 11 days of paramilitary-style training provided by RIM.

A few months later, these men and another person conducted a series of terrorist attacks in the Swedish city of Gothenburg. In November 2016, they detonated a bomb outside a café. Two months later, they bombed a migrant center, gravely injuring one person. And three weeks after that, they placed another bomb at a campsite used to house refugees. Thankfully, that device failed to detonate.

Swedish authorities were able to arrest the attackers, and they've now been tried and convicted for their crimes. The prosecutor who handled their case blamed RIM for radicalizing them and providing the training that enabled the attacks.

These historic designations are just one part of the Administration's broader efforts to counter white supremacist terrorism abroad. We're bringing all of our counterterrorism tools to this fight—information sharing, countermessaging, combatting terrorist travel, engaging with tech companies, and building partner capacity to protect soft targets like synagogues and mosques.

* * * *

On September 9, 2020, the Department of State designated Abdullahi Osman Mohamed and Maalim Ayman, leaders of al-Shabaab, under E.O. 13224. 85 Fed. Reg. 75,104 (Nov. 24, 2020). In a November 17, 2020 press statement, available at <https://2017-2021.state.gov/state-department-designates-two-senior-al-shabaab-leaders-as-terrorists/>, Secretary Pompeo stated:

Abdullahi Osman Mohamed, a senior al-Shabaab official also known as “Engineer Ismail,” is the terrorist group’s senior explosives expert responsible for the overall management of al-Shabaab’s explosives operations and manufacturing. He is also a special adviser to the so-called “emir” of al-Shabaab and is the leader of al-Shabaab’s media wing, al-Kataib. Maalim Ayman is the leader of Jaysh Ayman, an al-Shabaab unit conducting terrorist attacks and operations in Kenya and Somalia. Ayman was responsible for preparing the January 2020 attack on Camp Simba in Manda Bay, Kenya, that killed one U.S. military service member and two American contractors.

Al-Shabaab, which the Department of State designated as a Foreign

Terrorist Organization and SDGT in March 2008, is one of al-Qa'ida's most dangerous affiliates. It continues to threaten the peace, security, and stability of Somalia, as well as Kenya. ...

On December 9, 2020, the State Department designated Saraya al-Mukhtar under E.O. 13224. 85 Fed. Reg. 82,564 (Dec. 18, 2020); see also State Department press statement, available at <https://2017-2021.state.gov/state-department-terrorist-designation-of-saraya-al-mukhtar/> ("Saraya al-Mukhtar is an Iran-backed terrorist organization based in Bahrain, reportedly receiving...support from [the IRGC]. Saraya al-Mukhtar's self-described goal is to depose the Bahraini government ...").

On December 11, 2020, the State Department issued a media note, available at <https://2017-2021.state.gov/state-department-terrorist-designation-of-ashraf-al-qizani/>, announcing the designation of Ashraf al-Qizani under E.O. 13224.

Ashraf al-Qizani, also known as Abu 'Ubaydah al-Kafi, serves as the emir of Jund al-Khilafah in Tunisia (JAK-T), an ISIS affiliate in Tunisia. Al-Qizani became the emir of JAK-T after the death of former JAK-T emir Yunus Abu-Muslim in 2019. Under al-Qizani's leadership, JAK-T has carried out numerous attacks in Tunisia. Prior to his appointment as leader of JAK-T, al-Qizani had previously been a member of the Shura Council and served as a sergeant for each of the three companies in JAK-T.

(2) *OFAC designations*

OFAC designated numerous individuals (including their known aliases) and entities pursuant to Executive Order 13224 during 2020. The individuals and entities designated by OFAC are typically 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 Specially Designated Global Terrorists pursuant to the order.

In the first quarter of 2020, OFAC designated several individuals and entities pursuant to E.O. 13224, including Sheikh Yusuf AASI, Jawad NUR-AL-DIN, and Kassem Mohamad Ali BAZZI, as well as AL KAWTHAR, AMANA FUEL CO., AMANA PLUS S.A.L., AMANA SANITARY AND PAINTS COMPANY L.T.D. (a.k.a. "APSCO"), ATLAS HOLDING, CAPITAL S.A.L., CITY PHARMA SARL, GLOBAL TOURISTIC SERVICES SAL, MEDICAL EQUIPMENT AND DRUGS INTERNATIONAL CORPORATION, MIRATH S.A.L., SANOVERA PHARM COMPANY SARL, and SHAHED PHARM. 85 Fed. Reg. 13,704 (Mar. 9, 2020). See also February 26, 2020 State Department press statement, available at <https://2017-2021.state.gov/united-states-designates-hizballah-affiliated-companies-and-officials-as-global-terrorists/> (regarding OFAC designations of Hizballah-affiliated Atlas Holding and 10 of its subsidiaries owned or controlled by the Martyrs Foundation, along with Atlas Holding's senior executive Kassem Mohamad Ali Bazzi, two leaders or officials of the Martyrs Foundation, Jawad Nur-al-Din and Sheikh Yusuf Aasi, and an affiliated company).

In the second quarter of 2020, OFAC designated several individuals and entities pursuant to E.O. 13224, including the following: Mohammed Saeed Odhafa AL BEHADILI; Muhammad AL-GHORAYFI; Shaykh 'Adnan AL-HAMIDAWI; Ali Hussein Falih AL-MANSOORI; Ali Farhan ASADI; Mashallah BAKHTIARI; Alireza FADAKAR; Mehdi GHASEMZADEH; Vali GHOLIZADEH; Mohammad JALAL MAAB; Sayyed Reza MUSAVIFAR; Sayyed Yaser MUSAVIR; Hassan PELARAK; Hasan SABURINEZHAD; Madoud SHOUSHTARIPOUSTI and Al Khamael Maritime Services; Bahjat Al Kawthar Company for Construction and Trading Ltd.; Mada'in Novin Traders; Middle East Saman Chemical Company; Reconstruction Organization of Holy Shrines in Iraq). 85 Fed. Reg. 35,691 (June 11, 2020). During the second quarter, OFAC also designated pursuant to E.O. 13224: FATEMIYOUN DIVISION; ZAYNABIYOUN BRIGADE; QESHM FARS AIR; and FLIGHT TRAVEL LLC, and OFAC identified two associated aircraft as blocked property. 85 Fed. Reg. 26,520 (May 4, 2020).

In the third quarter of 2020, OFAC designated additional entities and individuals under E.O. 13224, including the following: two individuals linked to ISIL—Adnan Muhammad Amin AL—RAWI and Faruq HAMUD, 85 Fed. Reg. 55,934 (Sep. 10, 2020); see also July 28, 2020 State Department press statement, available at <https://2017-2021.state.gov/the-united-states-designates-two-isis-facilitators/> (Rawi and Hamud are ISIS facilitators). OFAC also designated two entities related to Mahan Air: PARTHIA CARGO LLC, and DELTA PARTS SUPPLY FZC; and one individual, Amin MAHDAVI. 85 Fed. Reg. 52,191 (Aug. 24, 2020); see also August 19, 2020 State Department press statement, available at <https://2017-2021.state.gov/the-united-states-designates-mahan-air-facilitators/>, and Treasury Department press release, available at <https://home.treasury.gov/news/press-releases/sm1098>. On September 8, 2020, OFAC designated two former Lebanese ministers, Yusuf Finyanus and Ali Hassan Khalil, for providing material support to Hizballah. 85 Fed. Reg. 56,290 (Sep. 11, 2020); see also September 8, 2020 State Department press statement, available at <https://2017-2021.state.gov/the-united-states-designates-former-lebanese-government-ministers/> (those designated directed “political and economic favors to Hizballah, including ensuring Hizballah-owned companies won government contracts worth millions of dollars and moving money from government ministries to Hizballah-associated institutions.”); 85 Fed. Reg. 59,601 (Sep. 22, 2020) (OFAC also designated Sultan Khalifah AS'AD, Arch Consulting, and Meamar Sarl; see also State Department press statement, available at <https://2017-2021.state.gov/the-united-states-designates-hizballah-companies-and-official/> (Arch Consulting and Meamar Construction are owned, controlled, or directed by Hizballah, and Sultan Khalifa As'ad is a leader or an official of Hizballah).

OFAC designated additional individuals and entities pursuant to E.O. 13224 in the fourth quarter of 2020. See, e.g., 85 Fed. Reg. 67,420 (Oct. 22, 2020) (one individual, Ahmed Luqman TALIB, and one entity, TALIB AND SONS PTY LTD); see also State Department press statement, available at <https://2017-2021.state.gov/the-united-states-designates-al-qaida-financial-facilitator/>, describing Talib and the company he owns as financial facilitators for Al Qa-ida; 85 Fed. Reg. 69,385 (Nov. 2, 2020) (October 22, 2020 designations of two Hizballah officials, Nabil Qaouk and Hassan Al-Baghdadi);

see also State Department press statement, available at <https://2017-2021.state.gov/united-states-sanctions-two-hizballah-officials/>, and Treasury press release, available at <https://home.treasury.gov/news/press-releases/sm1161>, for background on Qaouk and Al-Baghdadi, members of Hizballah's Central Council). Also on October 22, 2020, OFAC designated Iraj Masjedi, a general in Iran's Islamic Revolutionary Guard Corps-Qods Force (IRGC-QF) and Iran's Ambassador to Iraq, for acting for or on behalf of the IRGC-QF. See State Department press statement, available at <https://2017-2021.state.gov/united-states-designates-senior-iranian-official-in-iraq/>, and Treasury Department press release, available at <https://home.treasury.gov/news/press-releases/sm1159>. On October 26, 2020, OFAC designated the Iranian Ministry of Petroleum, the National Iranian Oil Company ("NIOC"), and the National Iranian Tanker Company ("NITC") pursuant to E.O. 13224 for their financial support to Iran's Islamic Revolutionary Guard Corps-Qods Force ("IRGC-QF"). See Treasury Department press release, available at <https://home.treasury.gov/news/press-releases/sm1165>. OFAC also designated multiple entities and individuals associated with the Ministry of Petroleum, NIOC, and NITC, including front companies, subsidiaries, and senior executives pursuant to E.O. 13224 at the same time. *Id.*

(3) *OFAC removals*

On February 12, 2020, the Director of OFAC, in consultation with the Secretary of State, determined that the following individuals and entities are no longer subject to the blocking provisions of E.O. 13224, as amended: two individuals—Abdullahi Hussein KAHIE and Hussein Mahamud ABDULLKADIR—and 27 entities—AL BARAKA EXCHANGE LLC, AL-BARAKAAT, AL-BARAKAAT BANK, AL-BARAKAAT BANK OF SOMALIA, AL-BARAKAAT GROUP OF COMPANIES SOMALIA LIMITED, AL-BARAKAT FINANCE GROUP, AL-BARAKAT FINANCIAL HOLDING COMPANY, AL-BARAKAT GLOBAL TELECOMMUNICATIONS, AL-BARAKAT INTERNATIONAL (a.k.a. BARACO CO.), AL-BARAKAT INVESTMENTS, BARAKA TRADING COMPANY, BARAKAAT GROUP OF COMPANIES, BARAKAAT INTERNATIONAL COMPANIES, BARAKAAT NORTH AMERICA, INC., BARAKAAT RED SEA TELECOMMUNICATIONS, BARAKAAT TELECOMMUNICATIONS COMPANY LIMITED, BARAKAAT TELECOMMUNICATIONS COMPANY SOMALIA, LIMITED, BARAKAT BANK AND REMITTANCES, BARAKAT COMPUTER CONSULTING, BARAKAT CONSULTING GROUP (a.k.a. "BCG"), BARAKAT GLOBAL TELEPHONE COMPANY, BARAKAT POST EXPRESS (a.k.a. "BPE"), BARAKAT REFRESHMENT COMPANY, BARAKO TRADING COMPANY LLC, HEYATUL ULYA, RED SEA BARAKAT COMPANY LIMITED, SOMALI INTERNET COMPANY. 85 Fed. Reg. 9520 (Feb. 19, 2020).

c. ***Annual certification regarding cooperation in U.S. antiterrorism efforts***

See Chapter 3 for discussion of the Secretary of State's 2019 determination regarding countries not cooperating fully with U.S. antiterrorism efforts.

11. 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. Executive Order 13757 of December 28, 2016, “Taking Additional Steps to Address the National Emergency With Respect to Significant Malicious Cyber-Enabled Activities,” amended E.O. 13694.

On February 20, 2020, the United States condemned the Russian cyberattack against the country of Georgia in a press statement from Secretary Pompeo, available at <https://2017-2021.state.gov/the-united-states-condemns-russian-cyber-attack-against-the-country-of-georgia/>. Excerpts follow from the press statement.

On October 28, 2019, the Russian General Staff Main Intelligence Directorate (GRU) Main Center for Special Technologies (GTsST, also known as Unit 74455 and Sandworm) carried out a widespread disruptive cyber attack against the country of Georgia. The incident, which directly affected the Georgian population, disrupted operations of several thousand Georgian government and privately-run websites and interrupted the broadcast of at least two major television stations. This action contradicts Russia’s attempts to claim it is a responsible actor in cyberspace and demonstrates a continuing pattern of reckless Russian GRU cyber operations against a number of countries. These operations aim to sow division, create insecurity, and undermine democratic institutions.

The United States calls on Russia to cease this behavior in Georgia and elsewhere. The stability of cyberspace depends on the responsible behavior of nations. We, together with the international community, will continue our efforts to uphold an international framework of responsible state behavior in cyberspace.

We also pledge our support to Georgia and its people in enhancing their cybersecurity and countering malicious cyber actors. We will offer additional capacity building and technical assistance to help strengthen Georgia’s public institutions and improve its ability to protect itself from these kinds of activities.

On March 2, 2020, OFAC designated two individuals under both E.O. 13694 and E.O. 13722): Jiadong LI and Yinyin TIAN. 85 Fed. Reg. 12,971 (Mar. 5, 2020).

On June 16, 2020, OFAC designated the following individuals pursuant to E.O. 13694, as amended: Nnamdi Orson BENSON, Abiola Ayorinde KAYODE, Alex Afolabi OGUNSHAKIN, Felix Osilama OKPOH, Micheal OLORUNYOMI, and Richard Izuchukwu UZUH. 85 Fed. Reg. 37,155 (June 19, 2020). See also June 16, 2020 State Department press statement, available at <https://2017-2021.state.gov/u-s-sanctions-nigerian-cyber-actors-for-targeting-u-s-businesses-and-individuals/>, announcing OFAC sanctions on six

Nigerian nationals (coordinated with the U.S. Department of Justice), pursuant to E.O. 13694 as amended, for an online scheme to steal more than \$6 million from victims across the United States.

On July 30, 2020, the State Department issued a press statement in which Secretary Pompeo welcomed the European Union's first designations under its cyber sanctions framework. The press statement is available at <https://2017-2021.state.gov/the-united-states-applauds-the-eus-action-on-cyber-sanctions/> and includes the following:

The United States and the EU share a vision for an open, interoperable, reliable and secure cyberspace, and for responsible behavior on the international stage. Destructive, disruptive, or otherwise destabilizing activities in cyberspace threaten this vision. The United States supports efforts to promote accountability for bad actors' malicious cyber activities, and the EU's actions today are an important milestone.

We continue to work with the EU, its member states, and many likeminded countries to promote a framework of responsible state behavior in cyberspace, underpinned by the applicability of international law, adherence to non-binding peacetime norms, and the development and implementation of practical confidence building measures.

On September 16, 2020, the State Department issued a press statement announcing a coordinated interagency U.S. response against two Russian nationals for a phishing attack in 2017 and 2018 on U.S. cryptocurrency exchanges. The press statement, available at <https://2017-2021.state.gov/the-united-states-sanctions-russian-nationals-for-phishing-campaign/>, identifies the two designated under E.O. 13694, as amended by E.O. 13757, Danil Potekhin and Dmitrii Karasavidi, and notes that their scheme resulted in losses of at least \$16.89 million. Potekhin and Karasavidi are also the subjects of an indictment unsealed on September 16, 2020 by the Department of Justice.

On September 23, 2020, OFAC designated the following individuals pursuant to E.O. 13694, as amended: Boris Aleksandrovich GAYKOVICH, Elena Nikolaevna IVANOVA, Nadezhda Leonidovna KUCHUMOVA, Vladislav Yuryevich ZANIN, Nikita Gennadievitch KOVALEVSKU, 85 Fed. Reg. 60,874 (Sep. 28, 2020). OFAC also designated the following entities pursuant to E.O. 13694 at the same time: NPP PT OKEANOS, AO; ACEX OY; GCH FINLAND OY; OPTIMA FREIGHT OY; UNICUM TRADE OY. *Id.*

Several persons have been designated simultaneously under both E.O. 13694 and E.O. 13848, discussed *infra*.

b. Election Interference

E.O. 13848 of 2018, entitled "Imposing Certain Sanctions in the Event of Foreign Interference in a United States Election," authorizes certain sanctions and has been

used to designate multiple individuals and entities linked to the Internet Research Agency. On July 13, 2020, OFAC designated the following pursuant to E.O. 13848 as well as E.O. 13694 and E.O. 13661 (relating to the situation in Ukraine): Igor Valerievich LAVRENKOV, Andrei Sergeevich MANDEL, Mikhail Sergeyevich POTEPKIN, SHEN YANG JING CHENG MACHINERY IMP&EXP. CO., LIMITED, SHINE DRAGON GROUP LIMITED, ZHEJIANG JIAYI SMALL COMMODITIES TRADE COMPANY LIMITED, M INVEST, OOO, and MEROE GOLD CO. LTD. 85 Fed. Reg. 45,733 (July 29, 2020).

On September 10, 2020, OFAC designated Anton Nikolaevich ANDREYEV, Darya Dmitriyevna ASLANOVA, and Artem Mikhaylovich LIFSHITS pursuant to E.O. 13694, as well as E.O. 13848, based on their connection to the Internet Research Agency. 85 Fed. Reg. 57,293 (Sep. 15, 2020). OFAC designated Andrii Leonidovych DERKACH at the same time pursuant only to E.O. 13848. *Id.* The State Department September 10, 2020 press statement on these designations, available at <https://2017-2021.state.gov/united-states-sanctions-russian-actors-and-proxies-for-efforts-to-interfere-in-elections/>, includes the following:

...Derkach maintains close ties to Russian intelligence and sought to influence the views of American voters through a Russian-directed covert influence campaign centered on manipulating the American political process to advance Russia's malign interests in Ukraine. This operation was designed to culminate prior to Election Day.

Treasury also designated three Russian nationals linked to the troll farm Internet Research Agency (also known as Lakhta Internet Research), owned and operated by Kremlin-linked oligarch Yevgeniy Prigozhin. Artem Lifshits, Anton Andreyev, and Darya Aslanova supported the Internet Research Agency's cryptocurrency accounts, facilitating the Internet Research Agency's malign influence campaigns targeting the American people.

On September 23, 2020, OFAC designated Yevgeny KHODOTOV, Aleksandr Yuryevich KUZIN, and Dmitry Sergeevich SYTII pursuant to E.O. 13694, E.O. 13848, and E.O. 13661 (relating to the situation in Ukraine). 85 Fed. Reg. 60,874 (Sep. 28, 2020). Also on September 23, 2020, OFAC designated the following entities pursuant to E.O. 13694, E.O. 13848, and E.O. 13661: LOBAYE INVEST and M FINANS. *Id.*

On October 22, 2020, OFAC designated the following pursuant to E.O. 13848: BAYAN RASANEH GOSTAR INSTITUTE; INTERNATIONAL UNION OF VIRTUAL MEDIA; ISLAMIC RADIO AND TELEVISION UNION; ISLAMIC REVOLUTIONARY GUARD CORPS; and ISLAMIC REVOLUTIONARY GUARD CORPS (IRGC)-QODS FORCE. 85 Fed. Reg. 68,412 (Oct. 28, 2020). See also October 23, 2020 State Department press statement, available at <https://2017-2021.state.gov/united-states-sanctions-five-iranian-entities-and-watchlists-irgc-cyber-actors-for-interfering-in-our-elections/> ("Bayan Gostar, a front company for IRGC-QF propaganda efforts, has actively planned influence operations involving U.S. elections. IRTVU and IUVM appear to be propaganda arms of the Iranian regime that assisted in these efforts.").

12. The Global Magnitsky Sanctions Program and Other Measures Aimed at Corruption and Human Rights Violations and Abuses

a. *The Global Magnitsky Sanctions Program*

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 United States welcomed the establishment by the United Kingdom of a global human rights sanctions program in a July 6, 2020 press statement, available at <https://2017-2021.state.gov/on-the-united-kingdoms-establishment-of-a-global-human-rights-sanctions-regime/>. The press statement notes that the UK joins the United States and Canada in denying access to the international financial system for those who commit human rights abuses.

Further background on the following E.O. 13818 designations published in the Federal Register can be found, *infra*, in the December 23, 2020 annual report. On January 8, 2020, OFAC designated Taban DENG GAI under E.O. 13818 for serious human rights abuse. 85 Fed. Reg. 3487 (Jan. 21, 2020); see also January 8, 2020 State Department press statement, available at <https://2017-2021.state.gov/treasury-sanctions-first-vice-president-of-south-sudan-taban-deng-gai/>.

On July 9, 2020, OFAC designated Liujun HUO, Mingshan WANG, Quanguo CHEN, Hailun ZHU, and the entity XINJIANG PUBLIC SECURITY BUREAU, pursuant to E.O. 13818. 85 Fed. Reg. 42,981 (July 15, 2020). On July 31, 2020, OFAC designated the following under E.O. 13818: Jinlong SUN, Jiarui PENG, and XINJIANG PRODUCTION AND CONSTRUCTION CORPS. 85 Fed. Reg. 47,838 (Aug. 6, 2020). See also July 31, 2020 State Department press statement available at <https://2017-2021.state.gov/on-sanctioning-human-rights-abusers-in-xinjiang-china/>, and Treasury Department press release, available at <https://home.treasury.gov/news/press-releases/sm1073>.

On August 17, 2020, OFAC designated several individuals from Uganda under E.O. 13818 for corruption: Patrick ECOBU, Dorah MIREMBE, Moses MUKIIBI, and Wilson Masalu MUSENE. 85 Fed. Reg. 51,553 (Aug. 20, 2020).

On September 15, 2020, OFAC designated the former first lady of The Gambia, Zineb Souma Yahya Jammeh, as well as the entity Nabah, Ltd. under E.O. 13818. 85 Fed. Reg. 58,427 (Sep. 18, 2020); see also State Department press statement regarding Nabah, available at <https://2017-2021.state.gov/sanctions-on-nabah-ltd-owned-or-controlled-by-corrupt-businessman-ashraf-al-cardinal/>, and State Department press statement on Zineb Jammeh, available at <https://2017-2021.state.gov/former-first-lady->

[of-the-gambia-sanctioned-for-supporting-the-former-presidents-corruption/](#), and Department of the Treasury's press release on Zineb Jammeh, available at <https://home.treasury.gov/news/press-releases/sm1122>. Also on September 15, 2020, OFAC designated the entity UNION DEVELOPMENT GROUP CO., LTD. under E.O. 13818. 85 Fed. Reg. 58,427 (Sep. 18, 2020).

On November 6, 2020, OFAC designated Gibran Bassil, the leader of the Lebanese Free Patriotic Movement and a former Lebanese cabinet official, under E.O. 13818 for his role in corruption. 85 Fed. Reg. 72,751 (Nov. 13, 2020); see also Treasury Department press release, available at <https://home.treasury.gov/news/press-releases/sm1177>, and November 6, 2020 State Department press statement, available at <https://2017-2021.state.gov/the-united-states-designates-corrupt-lebanese-political-leader-gibran-bassil/>.

On November 25, 2020, OFAC designated the following pursuant to the Global Magnitsky program and E.O. 13818: Mohamed AL-KANI, and the KANIYAT MILITIA. 85 Fed. Reg. 77,338 (Dec. 1, 2020); see also press statement, available at <https://ly.usembassy.gov/the-united-states-sanctions-libyan-individual-and-militia-connected-to-serious-human-rights-abuse-in-libya/>.

On December 9, 2020, OFAC designated the following under E.O. 13818 for corruption: three individuals—Harry Varney Gboto-Nambi SHERMAN, Raimbek MATRAIMOV, and Wan Kuok KOI—and entities—DONGMEI INVESTMENT GROUP CO., LIMITED; PALAU CHINA HUNG-MUN CULTURAL ASSOCIATION; and WORLD HONGMEN HISTORY AND CULTURE ASSOCIATION. 85 Fed. Reg. 80,889 (Dec. 14, 2020).

OFAC designated the following under E.O. 13818 on December 10, 2020: Jimmy CHERIZIER; Joseph DUPLAN; Fednel MONCHERY; Timur DUGAZAEV; Ramzan Akhmatovich KADYROV; Daniil Vasilievich MARTYNOV; Ziyad SABSABI; Satish SEEMAR; Vakhit USMAYEV; Abdul Hakim AL-KHAIWANI; Abdul Qader AL-SHAMI; Sultan ZABIN (also designated pursuant to E.O. 13611n); Motlaq Amer AL-MARRANI; Abdul Rahab JARFAN; ABSOLUTE CHAMPIONSHIP AKHMAT; AKHMAT KADYROV FOUNDATION; AKHMAT MMA; CHCHEN MINERAL WATERS LTD; FC AKHMAT GROZNY; and MEGASTROYINVEST LTD. 85 Fed. Reg. 83154 (Dec. 21, 2020); see also December 10, 2020 State Department press statement, available at <https://2017-2021.state.gov/united-states-and-partners-promote-accountability-for-corruption-and-human-rights-abuse/> (recognizing International Human Rights Day on December 10 and International Anticorruption Day on December 9; noting the UK took similar actions on those two dates; and welcoming the EU's adoption of its own global human rights sanctions framework).

On December 23, 2020, the State Department submitted the annual report required under the Global Magnitsky Act. 86 Fed. Reg. 174 (Jan. 4, 2021). Excerpts follow from the 2020 report.

* * * *

In 2020, the United States took significant action under the Global Magnitsky sanctions program

("Global Magnitsky"). As of December 10, 2020, the United States has designated 243 foreign persons (individuals and entities) pursuant to E.O. 13818. This sanctions program, which targets serious human rights abusers, corrupt actors, and their enablers, represents the best of the United States' values by taking impactful steps to protect and promote human rights and combat corruption around the world. Through the Act and E.O. 13818, the United States has sought to disrupt and deter serious human rights abuse and corruption abroad; promote accountability for those who act with impunity; and protect, promote, and enforce longstanding international norms alongside our partners and allies.

* * * *

... These actions targeted, among other things, serious human rights abusers affecting millions of members of Muslim minority groups in northwest China's Xinjiang province; corrupt actors in South Sudan involved in draining the country of critical resources; and Ugandan officials engaged in an adoption scam that victimized Ugandan-born children. ...

When considering economic 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 and 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, all property and interests in property of the sanctioned persons that are in the United States or in the possession or control of U.S. persons, are blocked and must be reported to OFAC. Unless authorized by a general or specific license issued by OFAC or otherwise exempt, OFAC's regulations generally prohibit all transactions by U.S. persons or within (or transiting) the United States that involve any property or interests in property of designated or otherwise blocked persons. The prohibitions include the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any blocked person or the receipt of any contribution or provision of funds, goods or services from any such person.

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 E.O. 13818:

1. *Taban Deng Gai: Deng Gai was designated on January 8, 2020, for his link to serious human rights abuse, including disappearances and killings. As First Vice President of South Sudan, Deng reportedly arranged and directed the disappearance and deaths of human rights lawyer Samuel Dong Luak and Sudan People's Liberation Movement-In Opposition (SPLM-IO) member Aggrey Idry. Deng directed these actions in order to solidify his position within President Kiir's government and to intimidate members of the SPLM-IO.*

2. *Xinjiang Public Security Bureau (XPSB): The XPSB was designated on July 9, 2020 for its involvement in serious human rights abuse, which reportedly includes mass arbitrary detention and severe physical abuse, among other serious abuses targeting Uyghurs, a Turkic Muslim population indigenous to Xinjiang, and members of other religious and ethnic minority groups in the region. The XPSB, through the Integrated Joint Operations Platform (IJOP), uses digital surveillance systems to track Uyghurs' movements and activities, to include surveilling who they interact with and what they read. In turn, IJOP uses this data to determine which persons could be potential threats; according to reports, some of these individuals are subsequently detained and sent to detention camps, being held indefinitely without charges or*

trial.

3. *Chen Quanguo*: Chen was designated on July 9, 2020 for his connection to serious human rights abuse against members of religious and ethnic minority groups in Xinjiang. Chen is the Party Secretary of the Xinjiang Uyghur Autonomous Region, a position he was appointed to in 2016, following Chen's notorious history of intensifying security operations in the Tibetan Autonomous Region to tighten control over the Tibetan ethnic minorities.

4. *Huo Liujun*: Huo was designated on July 9, 2020 for his connection to serious human rights abuse against members of religious and ethnic minority groups in Xinjiang. Huo was the former Party Secretary of the XPSB from at least March 2017 to 2018.

5. *Wang Mingshan*: Wang was designated on July 9, 2020 for his connection to serious human rights abuse against members of religious and ethnic minority groups in Xinjiang. Wang has been the leader of the XPSB since at least May 2018.

6. *Zhu Hailun*: Zhu was designated on July 9, 2020 for his connection to serious human rights abuse against members of religious and ethnic minority groups in Xinjiang. Zhu, former Deputy Party Secretary of the Xinjiang Uyghur Autonomous Region (XUAR), held several positions in the Chinese Communist Party, prior to holding the position of Party Secretary of the Xinjiang Political and Legal Committee (XPLC) from 2016 to 2019. In this role, Zhu was responsible for maintaining internal security and law enforcement in the XUAR; while Zhu left this role in 2019, he still currently serves as the Deputy Secretary of Xinjiang's People's Congress, a regional legislative body.

7. *Xinjiang Production and Construction Corps (XPCC)*: The XPCC was designated on July 31, 2020 for its connection to serious human rights abuse against members of religious and ethnic minority groups in Xinjiang. The XPCC is a paramilitary organization in the XUAR that is subordinate to the Chinese Communist Party. The XPCC enhances internal control over the region by advancing China's vision of economic development in the XUAR that emphasizes subordination to central planning and resource extraction. *Chen Quanguo* is the First Political Commissar of the XPCC, a role in which he has exercised control over the entity.

8. *Sun Jinlong*: Sun was designated on July 31, 2020 in connection with serious human rights abuse against members of religious and ethnic minority groups in Xinjiang. Sun is the former Party Secretary of the XPCC.

9. *Peng Jiarui*: Peng was designated on July 31, 2020 in connection with serious human rights abuse against members of religious and ethnic minority groups in Xinjiang. Peng is the Deputy Party Secretary and Commander of the XPCC.

10. *Moses Mukiibi*: Mukiibi was designated on August 17, 2020 for his involvement in corruption in Uganda. Mukiibi, a Ugandan judge, participated in a scheme whereby, in certain instances, young children were removed from Ugandan families under promises for "special education" programs and study in the United States, and were subsequently offered to U.S. families for adoption. Members of this scheme facilitated multiple bribes to Ugandan judge Mukiibi, and other Ugandan government officials, either directly or through an interlocutor.

11. *Wilson Musalu Musene*: Musene was designated on August 17, 2020 for his involvement in corruption in Uganda. Musene, a Ugandan judge, participated in a scheme whereby, in certain instances, young children were removed from Ugandan families under promises for "special education" programs and study in the United States, and were subsequently offered to U.S. families for adoption. Members of this scheme negotiated with Musene a flat fee for processing adoption cases. In at least one case, a member of the scheme met directly with Musene to arrange an additional amount of money required for Musene to

expedite the date of a pending adoption case on Musene's court calendar.

12. Dorah Mirembe: Mirembe was designated on August 17, 2020 for her role in providing support to corruption. Mirembe, a Ugandan lawyer, participated in a scheme whereby, in certain instances, young children were removed from Ugandan families under promises for "special education" programs and study in the United States, and were subsequently offered to U.S. families for adoption. The adoption agency organizing the scheme used Mirembe's law firm to handle the legal aspects of the adoptions, in some cases through the manipulation or falsification of court documents.

13. Patrick Ecobu: Ecobu was designated on August 17, 2020 for his role in providing support to corruption. Ecobu, the husband of Mirembe, participated in a scheme whereby, in certain instances, young children were removed from Ugandan families under promises for "special education" programs and study in the United States, and were subsequently offered to U.S. families for adoption. In order to arrange the adoption of the children, Ecobu assisted Mirembe in facilitating multiple bribes to Ugandan judges Mukiibi, Musene, and other Ugandan government officials, either directly or through an interlocutor.

14. Union Development Group (UDG): UDG was designated on September 15, 2020 for its involvement in corruption in Cambodia. UDG is a PRC state-owned entity acting for or on behalf of a PRC official that, on May 9, 2008, was granted a 99-year lease with the Cambodian government for 36,000 hectares (approximately 90,000 acres) of land in the Koh Kong province of Cambodia. Following the approved lease, UDG began to develop the \$3.8 billion Dara Sakor project, ostensibly to be used as a tourism development. UDG, through Kun Kim, a senior Cambodian general previously designated under E.O. 13818, used Cambodian military forces to intimidate local villagers and to clear out land necessary for UDG to build the Dara Sakor project. Kim was instrumental in the UDG development and reaped significant financial benefit from his relationships with UDG.

15. Nabah Ltd: Nabah was designated on September 15, 2020 for its role in providing support to Ashraf Seed Ahmed Al-Cardinal, who was previously designated on October 11, 2019, for his involvement in bribery, kickbacks and procurement fraud with senior government officials. Nabah is owned or controlled by Al-Cardinal. Al-Cardinal himself was part of a sanctions evasion scheme in which a senior South Sudanese official used a bank account in the name of one of Al-Cardinal's companies to store his personal funds in an attempt to avoid the effects of U.S. sanctions.

16. Zineb Souma Yahya Jammeh: Zineb was designated on September 15, 2020 for her role in providing support to Yahya Jammeh, the former President of The Gambia who was sanctioned on December 21, 2017 for his long history of engaging in human rights abuses and corruption. Zineb is the former First Lady of The Gambia and the current wife of Jammeh. Zineb has reportedly been instrumental in aiding and abetting Jammeh's economic crimes against The Gambia. She is also believed to be in charge of most of Jammeh's assets around the world, and utilized a charitable foundation as cover to facilitate the illicit transfer of funds to her husband.

17. Gibran Bassil: Bassil was designated on November 6, 2020 for his involvement in corruption in Lebanon. Bassil has held several high-level posts in the Lebanese government, including serving as the Minister of Telecommunications, the Minister of Energy and Water, and the Minister of Foreign Affairs and Emigrants, and Bassil has been marked by significant allegations of corruption. In 2017, Bassil strengthened his political base by appointing friends to positions and purchasing other forms of influence within Lebanese political circles. In 2014, while Minister of Energy, Bassil was involved in approving several projects that would have

steered Lebanese government funds to individuals close to him through a group of front companies.

18. *Mohamed al-Kani: Al-Kani was designated on November 25, 2020 for being the leader of the Kaniyat Militia in Libya, which over several years gained control over the city of Tarhouna, Libya, while detaining, torturing, and murdering civilians. In April 2019, the Kaniyat militia changed allegiances from Libya's recognized Government of National Accord (GNA), to the self-styled Libyan National Army (LNA), providing the LNA a foothold near Tripoli during its offensive against the Libyan capital. In June 2020, following a de facto truce, GNA-aligned forces re-entered Tarhouna and discovered at least 11 mass graves containing the bodies of civilians previously detained by the Kaniyat militia, including women, children, and elderly. Some of the deceased appeared to have been tortured, burned, or buried alive. The Kaniyat militia is also responsible for hundreds of summary executions at Tarhouna prison, numerous forced disappearances, and the displacement of entire families from Tarhouna. OFAC also designated the Kaniyat Militia for being responsible for or complicit in, or for having directly or indirectly engaged in, serious human rights abuse.*

19. *Harry Varney Gboto-Nambi Sherman: Sherman was designated on December 9, 2020 for his involvement in corruption in Liberia. A prominent lawyer, Liberian senator, and Chair of the Liberian Senate Judiciary Committee, Sherman was indicted in 2016 by the Liberian government, along with several other government officials, for his involvement in a bribery scheme. Sherman offered bribes to multiple judges associated with his trial, has routinely paid judges to decide cases in his favor, and has allegedly facilitated payments to Liberian politicians to support impeachment of a judge who has ruled against him. Sherman's acts of bribery demonstrate a larger pattern of behavior to exercise influence over the Liberian judiciary and the Ministry of Justice.*

20. *Raimbek Matraimov: Matraimov was designated on December 9, 2020 for his involvement in corruption in the Kyrgyz Republic. A former deputy of the Kyrgyz Customs Service, Matraimov was involved in a customs scheme in which at least USD 700 million was laundered from the Kyrgyz Republic. The scheme involved a company and their evasion of customs fees. Matraimov used his position to ensure that the company's goods would be able to seamlessly pass through the borders of the Kyrgyz Republic and was in charge of collecting and distributing bribes that came from this company, among other things. Matraimov, utilizing his former position as deputy of the Kyrgyz Customs Service, made hundreds of millions of dollars as a result of his involvement in the customs scheme.*

21. *Wan Kuok Koi: Koi was designated on December 9, 2020 for his involvement in corruption in Southeast Asia. Koi is a member of the Communist Party of China's (CCP) Chinese People's Political Consultative Conference, and is a leader of the 14K Triad, one of the largest Chinese organized criminal organizations in the world that engages in drug trafficking, illegal gambling, racketeering, human trafficking, and a range of other criminal activities. In addition to bribery, corruption and graft, the 14K Triad has engaged in similar illicit activities in Palau. OFAC also designated three entities that are owned or controlled by Koi.*

22. *Jimmy Cherizier: Cherizier was designated on December 10, 2020 for his involvement in serious human rights abuse in Haiti. While serving as an officer in the Haitian National Police (HNP), Cherizier planned and participated in the November 2018 deadly attack against civilians in a Port-au-Prince neighborhood known as La Saline. During this attack, at least 71 people were killed, over 400 houses were destroyed, and at least seven women were raped by armed gangs. Throughout 2018 and 2019, Cherizier led armed groups in coordinated,*

brutal attacks in Port-au-Prince neighborhoods. Most recently, in May 2020, Cherizier led armed gangs in a five-day attack in multiple Port-au-Prince neighborhoods in which civilians were killed and houses were set on fire. Cherizier is now one of Haiti's most influential gang leaders and leads an alliance of nine Haitian gangs known as the "G9 alliance."

23. Fednel Monchery: Monchery was designated on December 10, 2020 for his involvement in serious human rights abuse in Haiti. Monchery was the Director General of the Ministry of the Interior and Local Authorities and, while serving in this role, participated in the planning of La Saline. Monchery supplied weapons and state vehicles to members of armed gangs who perpetrated the attack. Monchery also attended a meeting during which La Saline was planned and where weapons were distributed to the perpetrators of the attack.

24. Joseph Pierre Richard Duplan: Duplan was designated on December 10, 2020 for his involvement in serious human rights abuse in Haiti. Duplan, who was Haitian President Jovenal Moïse's Departmental Delegate at the time of La Saline, is accused of being the "intellectual architect" and was seen discussing the attack with armed gang members in the La Saline neighborhood during the violence. Duplan provided firearms and HNP uniforms to armed gang members who participated in the killings.

25. Sultan Zabin: Zabin was designated on December 10, 2020 for his involvement in serious human rights abuse in Yemen. As the current Director of the Sana'a-based Houthi-controlled "Criminal Investigation Department" (CID), Zabin and his CID officers have arrested, detained, and tortured women under the pretense of a policy designed to curb prostitution and organized crime. In reality, this policy was used to target politically active women who opposed the Houthis, and resulted in numerous reported cases of illegal arrest, arbitrary detention, enforced disappearance, sexual violence, rape, torture, and other cruel treatment utilized by the Sana'a CID against these women.

26. Abdul-Hakim Al-Khaiwani: Khaiwani was designated on December 10, 2020 for his involvement in serious human rights abuse in Yemen. As a Houthi member and Houthi "Deputy Minister of the Interior,[""] Khaiwani was responsible for many detention facilities and security forces, including the Sana'a CID. The illegal arrest, detention, and torture of women conducted by the CID was done so under the ultimate authority of the [Houthi-controlled] [""]Ministry of Interior.[""] Khaiwani currently serves as the [Houthi] [""]Director of the Security and Intelligence Service[""]....

27. Abdul Rahab Jarfan: Jarfan was designated on December 10, 2020 for his involvement in serious human rights abuse in Yemen. Jarfan is a Houthi member and the former Head of ...[the Houthi-controlled] [""]National Security Bureau[""] (NSB). Under Jarfan, the NSB systematically engaged in torture and abusive detention of Yemeni citizens.

28. Motlaq Amer al-Marrani: Al- Marrani was designated on December 10, 2020 for his involvement in serious human rights abuse in Yemen. During his tenure as a leader or official of the NSB, Marrani oversaw detainees of the NSB, who were reportedly subjected to torture and other mistreatment by members of the NSB while detained. In addition, Marrani played a significant role in the arrest, detention, and ill treatment of humanitarian workers and other authorities working on humanitarian assistance and was also found to have abused his... influence over humanitarian access as leverage to generate personal profit.

29. Qader al-Shami: Shami was designated on December 10, 2020 for his involvement in serious human rights abuse in Yemen. Shami is the former director of ...[the Houthi-controlled] [""]Political Security Organization[""] (PSO). Since late 2014, the PSO has been responsible for the regular practice of illegal detention and torture of prisoners, including children. [Persons

affiliated with the PSO]... were found to have been keeping detainees in undisclosed locations, subjecting them to torture, and not allowing them to communicate with their families, depriving them of their fundamental liberties. Al-Shami currently serves as the Deputy Director of the [Houthi-controlled] [“]Security and Intelligence Bureau,[”] a role he has occupied since the organization’s inception in September 2019.

30. Ramzan Kadyrov: Kadyrov was designated on December 10, 2020 for his involvement in serious human rights abuse in Russia. Kadyrov is the Head of the Chechen Republic and the leader of an organization, the Kadyrovtsy, that has engaged in, or whose members have engaged in, serious human rights abuses. Kadyrov and the forces he commands, commonly known as the Kadyrovtsy, are implicated in the murder of Boris Nemtsov, an opposition politician to Russian President Vladimir Putin, and other serious violations of human rights. In addition to Kadyrov, OFAC is designating six companies registered in Russia that continue to provide Kadyrov pride and significant profit.

31. Vakhit Usmayev: Usmayev was designated on December 10, 2020 for his involvement in serious human rights abuse in Russia. Usmayev, the Deputy Prime Minister of Chechnya, has acted or purported to act for or on behalf of, directly or indirectly, Kadyrov.

32. Timur Dugazaev: Dugazaev was designated on December 10, 2020 for his involvement in serious human rights abuse in Russia. A representative of Kadyrov in Europe, Dugazaev has acted or purported to act for or on behalf of, directly or indirectly, Kadyrov.

33. Ziyad Sabsabi: Sabsabi was designated on December 10, 2020 for his involvement in serious human rights abuse in Russia. A representative of Kadyrov, Sabsabi has acted or purported to act for or on behalf of, directly or indirectly, Kadyrov.

34. Daniil Vasilievich Martynov: Martynov was designated on December 10, 2020 for his involvement in serious human rights abuse in Russia. A personal security advisor for Kadyrov, Martynov has acted or purported to act for or on behalf of, directly or indirectly, Kadyrov.

35. Satish Seemar: Seemar was designated on December 10, 2020 for his involvement in serious human rights abuse in Russia. A horse trainer for Kadyrov, Seemar has materially assisted, sponsored, or provided financial, material, or technological support for, or goods and services to or in support of, Kadyrov.

Visa Restrictions Imposed

Although no visa restrictions were imposed under the Act during 2020, 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 2020, the State Department also applied, when appropriate, visa restrictions on foreign persons involved in significant corruption or gross violation of human rights under other authorities, reported to Congress through other means. As appropriate, the Department of State will take additional action to impose visa restrictions on those responsible for certain human rights violations and significant corruption pursuant to other authorities, including Presidential Proclamations 7750 and 8697, and Section 7031(c) of the FY2020 Department of State, Foreign Operations, and Related Programs, as carried forward by the FY2021 Continuing Appropriations Act, 2021. 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.

Efforts To Encourage Governments of Other Countries To Impose Sanctions Similar to Those Authorized by the Act

In 2020, the Administration continued its successful outreach campaign to international partners regarding the expansion of domestic and multilateral anticorruption and human rights sanctions regimes. Following support by the Departments of State and the Treasury over the course of 2018-2019 to deliver expertise on the underpinnings of the Global Magnitsky sanctions program, the United Kingdom established a Global Human Rights (GHR) sanctions regime pursuant to its Sanctions and Anti-Money Laundering Act 2018 on July 6, 2020. In February 2020, the Departments of State and the Treasury formed a technical delegation to brief Australian partners at the invitation of Parliament, which initiated an inquiry into whether Australia should adopt a human rights-based sanctions regime. The Administration also welcomed the European Union's adoption of its global human rights sanctions framework on December 7, 2020. Over the last year, the Administration has worked closely with the Canadian and British governments in pursuing coordinated actions against human rights abusers and corrupt actors. Throughout this and future outreach, the Administration has identified champions, partners, and potential spoilers of the objectives established by Congress within the Act. The Departments of State and the Treasury have, over the last year, shared information, coordinated messaging, and provided technical assistance to this end. The Administration will continue to seek out additional allies and partners to jointly leverage all tools at our disposal to deny access to the U.S. and international financial systems to all those who engage in serious human rights abuses and corruption.

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b. Designations under Section 7031(c) of the Annual Consolidated Appropriations Act

The Department of State acts pursuant to Section 7031(c) of the Department of State's annual appropriations act (the original provision having been enacted in the Fiscal Year 2008 appropriations act and continued and expanded in subsequent appropriations acts) to designate foreign government officials involved in gross violations of human rights ("GVHRs") or significant corruption, and their immediate family members. Officials and their immediate family members designated under Section 7031(c) are ineligible for entry into the United States. The following summarizes public designations by the Secretary of State in 2020 pursuant to 7031(c). See Chapter 1 of this *Digest* for discussion of litigation challenging designations under 7031(c).

On January 2, 2020, the State Department announced the designation of Leopoldo Cintra Frias, Minister of the Revolutionary Armed Forces of Cuba ("MINFAR"), under Section 7031(c), due to his involvement, by command responsibility, in gross violations of human rights. See press statement, available at <https://2017-2021.state.gov/public-designation-of-leopoldo-cintra-frias-due-to-involvement-in-gross-violations-of-human-rights/>. The Department also designated his children, Deborah Cintra Gonzalez and Leopoldo Cintra Gonzalez. The press statement elaborates:

As Minister of the Revolutionary Armed Forces of Cuba, Cintra Frias bears responsibility for Cuba's actions to prop up the former Maduro regime in Venezuela. Alongside Maduro's military and intelligence officers, MINFAR has been involved in gross human rights violations and abuses in Venezuela,

including torturing or subjecting Venezuelans to cruel, inhumane, or degrading treatment or punishment for their anti-Maduro stances. Dismantling Venezuela's democracy by terrifying Venezuelans into submission is the goal of MINFAR and the Cuban regime.

On January 13, 2020, the State Department designated former Moldovan official and oligarch Vladimir Plahotniuc due to his involvement in significant corruption under section 7031(c). The State Department press statement announcing the designation, available at <https://2017-2021.state.gov/public-designation-due-to-involvement-in-significant-corruption-of-former-moldovan-official-plahotniuc/>, adds that the following immediate family members are also designated: his wife, Oxana Childescu; his son, Timofei Plahotniuc; and his minor child.

On January 17, 2020, the State Department announced, at a briefing by Special Representative for Iran Brian Hook, the designation of IRGC Brigadier General Hassan Shahvarpour under Section 7031(c). The briefing, available at <https://2017-2021.state.gov/special-representative-for-iran-brian-hook/index.html>, further explains:

General Shahvarpour ...oversaw the massacre of 148 helpless Iranians in the Mahshahr region last November.

General Shahvarpour was in command of units responsible for the violent crackdown and lethal repression around Mahshahr. This is the first designation on an Iranian regime official being taken under the State Department authority from section 7031(c) authorities.

The State Department also issued a press statement on January 18, 2020 on the 7031(c) designation of Shahvarpour, which is available at <https://2017-2021.state.gov/designation-of-irgc-commander-shahvarpour-for-gross-human-rights-violations-during-protests/>.

On January 29, 2020, the State Department announced the designation of 13 individuals under Section 7031(c) due to their involvement in gross violations of human rights in El Salvador. The press statement announcing the designations is available at <https://2017-2021.state.gov/public-designation-of-thirteen-former-salvadoran-military-officials-due-to-involvement-in-gross-violations-of-human-rights/> and identifies the designated persons:

Juan Rafael Bustillo, Juan Orlando Zepeda, Inocente Orlando Montano Morales, Francisco Elena Fuentes, Guillermo Alfredo Benavides Moreno, Yushy René Mendoza Vallecillos, José Ricardo Espinoza Guerra, Gonzalo Guevara Cerritos, Carlos Camilo Hernández Barahona, Oscar Mariano Amaya Grimaldi, Antonio Ramiro Avalos Vargas, Angel Pérez Vásquez, and José Alberto Sierra Ascencio. These 13 former Salvadoran military personnel, ranging in rank from general to private, were involved in the planning and execution of the extrajudicial killings of six Jesuit priests and two others taking refuge at the Jesuit

pastoral center on November 16, 1989 on the campus of Central American University in El Salvador.

On January 31, 2020, in a press statement available at <https://2017-2021.state.gov/public-designation-due-to-gross-violations-of-human-rights-of-paul-christian-makonda-of-tanzania/>, the State Department announced the designation of Paul Christian Makonda of Tanzania pursuant to Section 7031(c) due to his involvement in gross violations of human rights in his capacity as the Regional Commissioner of Dar es Salaam. The Department also designated his spouse, Mary Felix Massenge.

On February 5, 2020, the State Department announced the designation under Section 7031(c) of Bulgarian Specialized Criminal Court Judge Andon Mitalov due to his involvement in significant corruption. See press statement, available at <https://2017-2021.state.gov/public-designation-due-to-involvement-in-significant-corruption-of-bulgarian-judge-andon-mitalov/>. The Secretary of State also designating his wife, Kornelia Stoykova-Mitalova, and his daughter, Gergana Mitalova.

On February 14, 2020, the State Department announced the designation under Section 7031(c) of Shavendra Silva of Sri Lanka, due to GVHR. See press statement, available at <https://2017-2021.state.gov/public-designation-due-to-gross-violations-of-human-rights-of-shavendra-silva-of-sri-lanka-under-section-7031c-of-the-department-of-state-foreign-operations-and-related-programs-appropriations-a/>. The press statement explains that Lieutenant General Shavendra Silva is current Commander of the Sri Lanka Army and Acting Chief of Defense Staff, and has been involved, “through command responsibility, in gross violations of human rights, namely extrajudicial killings, by the 58th Division of the Sri Lanka Army during the final phase of Sri Lanka’s Civil War in 2009.” The Department also designated Silva’s immediate family members.

On May 20, 2020, the Secretary of State announced the Section 7031(c) designation of Iran’s Minister of Interior, Abdolreza Rahmani Fazli, and former head of Iran’s intelligence service (“MOIS”) Ali Fallahian, for gross violations of human rights. See May 20, 2020 press statement, available at <https://2017-2021.state.gov/standing-with-the-iranian-people/>. Their immediate family members were also subject to the measures.

On May 28, 2020, the Secretary of State announced the 7031(c) designation of Amir Zukic of Bosnia and Herzegovina due to his involvement in significant corruption. See press statement, available at <https://2017-2021.state.gov/public-designation-of-former-representative-amir-zukic-of-bosnia-and-herzegovina-due-to-involvement-in-significant-corruption/>. The press statement includes the following about Zukic:

In his official capacity as a Member of the House of Representatives in the Federation of Bosnia and Herzegovina (FBiH) and as the General Secretary of the Party of Democratic Action (SDA), Zukic was involved in corrupt acts that undermined the rule of law in Bosnia and Herzegovina.

On June 8, 2020, the Secretary of State announced the 7031(c) designation of former Guatemalan Presidential Chief of Staff Gustavo Adolfo Alejos Cambara due to his involvement in significant corruption. See press statement, available at <https://2017-2021.state.gov/public-designation-of-gustavo-adolfo-alejos-cambara-of-guatemala-due-to-involvement-in-significant-corruption/>. The Department also designated Alejos's spouse, Beatriz Jansa Bianchi; his son, Jose Javier Alejos Jansa; his son, Gustavo Andres Alejos Jansa; and his minor daughter.

In a July 9, 2020 press statement, available at <https://2017-2021.state.gov/the-united-states-imposes-sanctions-and-visa-restrictions-in-response-to-the-ongoing-human-rights-violations-and-abuses-in-xinjiang/>, the State Department announced designations under Section 7031(c) of Chen Quanguo, Zhu Hailun, and Wang Mingshan, for their involvement in GVHR in Xinjiang as well as visa restrictions under INA section 212(a)(3)(C) on other PRC and CCP officials believed to be responsible for, or complicit in, unjust detention or abuse of Uighurs, Kazakhs, or members of other Muslim minority groups in Xinjiang. The State Department press statement also references OFAC designations of the same officials for their roles in human rights abuses pursuant to E.O. 13818.

On July 20, 2020, the Department announced the 7031(c) designation of Ramzan Kadyrov, head of the Chechen Republic of the Russian Federation, due to his involvement in GVHR in the Chechen Republic, including torture and extrajudicial killings. See press statement, available at <https://2017-2021.state.gov/public-designation-of-russian-national-ramzan-kadyrov-due-to-involvement-in-gross-violations-of-human-rights/index.html>. The action also affects his immediate family members: his spouse, Medni Kadyrova, and his daughters Aishat Kadyrova and Karina (aka Khadizhat) Kadyrova.

On July 28, 2020, the State Department announced the designation of Luis Alfredo Motta Dominguez (former Venezuelan minister of electric power and president of Corpoelec) and Eustiquio Jose Lugo Gomez (former Venezuelan deputy minister of finance, investment, and strategic alliances for the ministry of electric power and director of procurement of Corpoelec). The press statement announcing the designations, available at <https://2017-2021.state.gov/public-designation-of-former-officials-of-the-illegitimate-maduro-regime-due-to-involvement-in-significant-corruption/>, says that:

They have been designated for accepting monetary benefits, including bribes and kickbacks, in exchange for awarding lucrative supply equipment contracts for Venezuela's state-owned electricity company, Corpoelec, and for misappropriating public funds for their own self-enrichment.

The designations also extend to the following family members of Motta's immediate family: Karina Isabel Carpio Bejarano, Luis Alfredo Motta Carpio, and Nakary Marialy Motta Carpio; and the following members of Lugo's immediate family: Yomaira Isabela Lugo de Lugo, Virginia Del Valle Lugo Lugo, Victor Jesus Lugo Lugo, and Jose Lugo Lugo.

On August 21, 2020, the U.S. Department of State announced visa restrictions on 14 Iranian individuals for their involvement in gross violations of human rights on behalf of the Iranian regime, under Section 7031(c). See August 25, 2020 State Department fact sheet, available at <https://2017-2021.state.gov/designations-of-iranian-human-rights-violators/>. The designations include Hojatollah Khodaei Sourì, the director of Iran's notorious Evin Prison, and 13 officials who posed as Iranian diplomats to carry out the killing of an Iranian dissident in Switzerland in 1990 under the orders of their government: Sadegh Baba'ie; Ali Reza Bayani Hamadani; Said Danesh; Ali Hadavi; Saeed Hemati; Mohammad Reza Jazayeri; Moshen Sharif Esfahani; Ali Moslehiaraghi; Naser Pourmirzai; Mohsen Pourshafiee; Mohammad Said Rezvani; Mahmoud Sajadian; and Yadollah Samadi.

On September 10, 2020, the Secretary of State announced the designation under 7031(c) of Andrew Wonplo, the former director of passport and visas at the Liberian Ministry of Foreign Affairs, due to his involvement in significant corruption (passport fraud). See press statement, available at <https://2017-2021.state.gov/public-designation-of-andrew-wonplo-due-to-involvement-in-significant-corruption/>. His spouse, Dennice Wonplo, and their minor children, are also included in the designation.

On November 18, 2020, the State Department announced in a press statement, available at <https://2017-2021.state.gov/commemoration-of-the-massacre-of-mahshahr-and-designation-of-iranian-officials-due-to-involvement-in-gross-violations-of-human-rights/index.html>, the designation of Islamic Revolutionary Guard Corps ("IRGC") Brigadier General Heidar Abbaszadeh and IRGC Colonel Reza Papi pursuant to section 7031(c) for their involvement in GVHR in connection with the violent suppression of protests by security forces in November 2019 in Khuzestan province. The designation also extends to their immediate family members.

On December 10, 2020, the State Department announced 17 designations under Section 7031(c) in a press statement marking Human Rights Day, available at <https://2017-2021.state.gov/public-designations-of-current-and-former-government-officials-under-section-7031c-of-the-department-of-state-foreign-operations-and-related-programs-appropriations-act-due-to-involvement-in-gross/>. The designations are described in the press statement, as follows:

The Department of State is designating José Antonio Almendáriz Rivas for his involvement in a gross violation of human rights, namely, the extrajudicial killing of Spanish national Dr. Begoña García de Arandigoyen on September 10, 1990 in El Salvador. This action also applies to his immediate family members. ...

The State Department is also designating Devon Orlando Bernard, Reneto DeCordiva Adams, Patrick Anthony Coke, Shayne St Aubyn Lyons, Leford Gordon, and Roderick Anthony Collier for their involvement in gross violations in human rights in Jamaica. In their capacity as officers in the Jamaican Constabulary Force Crime Management Unit, these individuals were involved in the extrajudicial killings of four people on May 7, 2003. Immediate family members of these officers are also covered by this designation. ...

Finally, the State Department is designating Chief Huang Yuanxiong of the Xiamen Public Security Bureau Wucun Police Station for his involvement in gross violations of human rights in Xiamen, China. Huang is associated with particularly severe violations of religious freedom of Falun Gong practitioners, namely his involvement in the detention and interrogation of Falun Gong practitioners for practicing their beliefs. Today's action also applies to Mr. Huang's spouse. ...

13. Other Visa Restrictions, Sanctions, and Measures

a. Cuba

On June 3, 2020, the State Department announced, in a press statement, available at <https://2017-2021.state.gov/additions-to-the-cuba-restricted-list/>, the addition of seven subentities to the Cuba Restricted List. The State Department's updated Cuba Restricted list was published in the Federal Register on June 12, 2020, and is available at <https://2017-2021.state.gov/cuba-sanctions/cuba-restricted-list/>. 85 Fed. Reg. 35,972 (June 12, 2020); see also 85 Fed. Reg. 37,146 (June 19, 2020) (correcting the omission of one entity from the list published June 12). The June 3, 2020 press statement includes the following:

These seven subentities disproportionately benefit the Castro dictatorship...

Among the seven subentities are one military-controlled financial institution, three military-owned hotels, two military-owned scuba diving centers, and one military-owned marine park for tourists. In particular, the addition of financial institution FINCIMEX to the Cuba Restricted List will help address the regime's attempts to control the flow of hard currency that belongs to the Cuban people. ...

The bulk of Cuba's tourism industry is owned and operated by the Cuban military. We urge anyone who would visit the island to be a responsible consumer and avoid providing additional funds to the repressive and abusive Castro regime. Instead, we urge that visitors to Cuba support the Cuban small business owners who struggle to succeed despite the heavy restrictions placed upon them by the regime.

OFAC amended the Cuba Assets Control Regulations ("CACR") on September 23, 2020 (85 Fed. Reg. 60,068 (Sep. 24, 2020)) and again on October 26, 2020 (85 Fed. Reg. 67,988 (Oct. 27, 2020)). The State Department updated the Cuba Restricted List again on September 29, 2020 (adding one subentity). 85 Fed. Reg. 61,079 (Sep. 29, 2020).

On September 30, 2020, OFAC designated Luis Alberto RODRIGUEZ LOPEZ—CALLEJA, pursuant to the CACR. 85 Fed. Reg. 62,811 (Oct. 5, 2020).

On October 24, 2020, the State Department issued a press statement regarding amendments by OFAC to the CACR intended to remove Cuba's military from the process of sending remittances to Cuba. The press statement, available at <https://2017-2021.state.gov/removing-cubas-military-from-the-remittance-process/>, includes the following:

The United States supports the principle that Cubans should be able to prosper and support their families without the Cuban military utilizing their hard currency earnings as it wishes. The Cuban government and military have created a system that seizes hard currency through military-operated financial mechanisms, such as FINCIMEX and AIS, and takes a cut from the remittances ordinary Cubans receive from abroad, including from the United States. Cuba is the only country in the hemisphere where the military takes a cut of remittances. Furthermore, the Cuban regime forces ordinary Cubans to use the remittances they have remaining to buy goods at marked-up prices from government-controlled stores.

On December 28, 2020, OFAC published identifying information for three entities added to the SDN List based on December 17, 2020 determinations pursuant to the CACR: KAVE COFFEE S.A.; FINANCIERA CIMEX S.A.; and GRUPO DE ADMINISTRACION EMPRESARIAL S.A. 85 Fed. Reg. 84,468 (Dec. 28, 2020). The Treasury Department issued a press statement on these measures on December 21, 2020, which is available at <https://home.treasury.gov/news/press-releases/sm1217>. The December 21, 2020 State Department press statement regarding the entities is available at <https://2017-2021.state.gov/additions-of-cuban-military-owned-companies-to-the-specially-designated-nationals-and-blocked-persons-list/> and includes the following:

The companies are Grupo de Administración Empresarial SA (GAESA), FINCIMEX, and Kave Coffee S.A. GAESA is the Cuban military's largest company, which controls large portions of Cuba's economy for the military's benefit. Cuban military-controlled FINCIMEX funnels remittances through channels that disproportionately benefit the Cuban military. Kave Coffee S.A., a coffee company domiciled in Havana and incorporated in Panama, is part of an international network of Cuban-owned companies maintained by the Cuban military and used to evade the U.S. embargo.

b. *South Sudan*

On February 26, 2020, OFAC determined that the following individual and entities previously designated under E.O. 13664 of 2014 ("Blocking Property of Certain Persons with Respect to South Sudan") should be removed from the SDN List and no longer subject to blocking provisions: Israel ZIV, GLOBAL IZ GROUP LTD, GLOBAL LAW ENFORCEMENT AND SECURITY LTD, and GLOBAL N.T.M LTD. 85 Fed. Reg. 13,237 (Mar. 6, 2020).

On May 29, 2020, the United States provided its explanation of vote on the resolution renewing the UN Security Council sanctions regime for South Sudan. The EOV is available at <https://usun.usmission.gov/explanation-of-vote-on-the-resolution-regarding-the-un-security-council-sanctions-regime-for-south-sudan/> and excerpted below.

* * * *

The United States thanks members of the Security Council for their constructive engagement on the resolution to renew the UN sanctions regime for South Sudan, to include an arms embargo and targeted measures, and the mandate of the Panel of Experts.

This resolution recognizes positive steps taken by South Sudan's leaders to advance the peace process. It states clearly that the Security Council will review sanctions measures based on progress achieved by South Sudan on implementing its peace agreement. The United States believes this resolution will encourage South Sudan's leaders to continue prioritizing peace over conflict and to make decisions in the best interest of their people, who have suffered so much from this conflict.

Challenges and risks remain on South Sudan's path to peace and the situation on the ground is volatile, with key elements of the peace agreement still awaiting implementation. Lifting sanctions measures at this sensitive turning point would have removed an important incentive for the formerly warring parties to refrain from leading the country back into widespread conflict.

The United States credits progress in South Sudan's peace process to the dedicated diplomacy of the region. The role of the African Union, IGAD, and other regional players has been and will remain essential. Nevertheless, we believe the UN sanctions measures renewed today create space for peace to thrive in South Sudan by reducing the flow of weapons to one of Africa's deadliest conflicts and encouraging critical reforms outlined in the peace agreement.

We urge South Sudan's leaders to remain focused on addressing the urgent humanitarian needs of their people, respecting human rights, and ensuring accountability, including for sexual and gender-based violence. Too many people – especially women and children – have lived in fear through this conflict. This resolution works to safeguard their rights, as we retain the ability to designate individuals and entities for human rights violations and abuses and to deter efforts of spoilers to the peace process.

The United States stands ready to work closely with South Sudan's new transitional government as it continues to implement its peace agreement. We reiterate that the United States is prepared to advocate for further adjustments to this sanctions regime in response to tangible progress in the peace process.

* * * *

c. Guyana

On July 15, 2020, the Secretary of State announced visa restrictions on individuals undermining democracy in Guyana. As explained in the July 15, 2020 press statement on the sanctions, available at <https://2017-2021.state.gov/u-s-department-of-state-imposes-visa-restrictions-on-guyanese-individuals-undermining-democracy/>:

On March 2 the Co-Operative Republic of Guyana held national elections, but it has still not declared a winner. All international observers of the vote count agreed that the manner in which votes were tabulated departed from established procedures. They unanimously agreed that a result based on these

procedures would not be credible. The Organization of American States and Caribbean Community concluded that the recount of votes, which concluded on June 7 and showed a victory for the opposition, reflected the will of the Guyanese people. Unfortunately, Guyana's leaders have refused to accept this result.

d. Yemen

On February 25, 2020, Rodney Hunter of the U.S. Mission to the UN delivered the U.S. explanation of vote on a UN Security Council resolution extending sanctions against the Houthis and others responsible for the conflict in Yemen. The U.S. explanation of vote is excerpted below and available at <https://usun.usmission.gov/explanation-of-vote-on-a-un-security-council-resolution-extending-yemen-sanctions/>.

* * * *

The United States voted today in favor of the resolution to extend the Council's sanctions against the Houthis and others responsible for the conflict in Yemen. These sanctions support the UN's efforts to find a political solution to this war, and they help us hold spoilers accountable. All Member States have an obligation to implement these sanctions in full. However, Mr. President, the reality is that one Member State continues to blatantly defy their obligations under this sanctions regime. In their recent annual report, the Yemen Panel of Experts concluded that the Houthis continue to receive weapons that have quote "characteristics similar to arms manufactured in the Islamic Republic of Iran" end quote.

This is not a new finding. For years, the Yemen Panel, together with the UN team monitoring UN Security Council Resolution 2231, has reported on the Houthis launching ballistic missiles and unmanned aerial vehicles that are Iranian-designed. The Houthis did not just conjure up the ability to launch advanced weapons hundreds of kilometers into Saudi Arabia and other neighboring states. Iran has smuggled these weapons to the Houthis, and in the process, Iran has violated this Council's targeted arms embargo on the Houthis, as well as the Council's arms embargo on Iran.

And Iran's violations continue. Last week, we discussed how the U.S. Navy interdicted additional 358 Iranian-made missiles and other weapons components likely on their way to the Houthis. This shipment was yet another example of attempts to smuggle a new Iranian surface-to-air missile system that the Panel of Experts reported on for the first time in its Final Report in January. So not only does Iran continue supplying weapons to the Houthis, but they are also increasing the sophistication of these weapons. Iranian weapons are deeply undermining the prospects for peace, and we must call them out for it.

This resolution also requests that the Panel of Experts prepare information on commercially-available goods that find their way into ballistic missiles, UAVs, explosive boats, and other weapons. We hope this information will help Member States and private companies exercise greater vigilance over the transfer of these items to Yemen. We also call on all Member States to help the Panel in collecting this information, which could ultimately bolster sanctions

implementation. The resolution also rightly calls out abuses by the Houthis against the Yemeni people. The Panel of Experts has reported on a horrific campaign of sexual violence against women orchestrated by the Houthis. Today's resolution condemns these crimes.

The Council also once again demands that the Houthis stop interfering with the work of the UN and other aid organizations, whose work is vital to keeping Yemenis alive. By mixing their own interests with humanitarian aid, the Houthis are putting the lives of the Yemeni people at risk. And for the first time, the Council has mentioned the Safer oil tanker in a Security Council resolution. This addition reflects the international community's deep concern about the chance that this tanker could rupture, causing an environmental catastrophe in the Red Sea. The UN has teams ready to inspect the tanker and help repair it, but the Houthis have not provided access to the vessel. Today's resolution makes clear that the UN needs access and needs it now.

And finally, Mr. President, the United States stands by the UN's efforts to provide assistance in Yemen. We encourage relevant entities to utilize the sanctions exemption in the provision, as appropriate, to ensure that their important work is carried out in compliance with the Security Council's efforts to promote an end to this conflict. So once again, the United States reiterates our strong support for the efforts of UN Special Envoy Martin Griffiths in helping reach a political solution to the conflict, and we call on the parties to exercise restraint and work to de-escalate tensions, so we can maintain prospects for peace.

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e. *Nicaragua*

On November 27, 2018, the President issued E.O. 13851, "Blocking Property of Certain Persons Contributing to the Situation in Nicaragua."

On March 5, 2020, OFAC designated the following under E.O. 13851 as well as the Nicaragua Human Rights and Anticorruption Act of 2018 ("NHRAA"): the NICARAGUAN NATIONAL POLICE ("NNP"), Luis Alberto PEREZ OLIVAS, Justo Pastor URBINA, and Juan Antonio VALLE VALLE. 85 Fed. Reg. 14,725 (Mar. 13, 2020). The State Department press statement on these designations of the NNP and three of its commissioners, available at <https://2017-2021.state.gov/the-united-states-sanctions-the-nicaraguan-national-police-and-three-commissioners/>, includes the following further information:

The United States is designating the NNP under E.O. 13851 due to its role in engaging in serious human rights abuses in Nicaragua. The NNP is also being designated pursuant to the NHRAA for being responsible for or complicit in, or responsible for ordering, controlling, or otherwise directing, or having knowingly participated in, directly or indirectly, significant acts of violence or conduct that constitutes a serious abuse or violation of human rights against persons associated with the protests in Nicaragua that began on April 18, 2018. The Ortega regime uses the NNP as its primary tool of violent repression against the Nicaraguan people. The NNP has used live ammunition against protesters, participated in death squads, and carried out extrajudicial executions,

disappearances, and arbitrary arrests. The United States has previously sanctioned two NNP officials involved in targeted violence and human rights abuses.

The three NNP commissioners sanctioned today are Nicaraguan government officials and leaders of the NNP. Valle Valle is the chief of the NNP's Department of Surveillance and Patrolling; in 2019, he directed the harassment of citizens while they were sheltering in Metrocentro shopping center in Managua. Perez Olivas is the chief of the NNP's Judicial Assistance Directorate and Director of El Chipote prison, an infamous place of abusive practices. Urbina is the commissioner of the NNP's Special Operations Division, which has played a central role in repression throughout the country.

On May 22, 2020, OFAC designated the following under E.O. 13851: Julio Cesar AVILES CASTILLO and Ivan Adolfo ACOSTA MONTALVAN. 85 Fed. Reg. 32,101 (May 28, 2020).

OFAC amended the Nicaragua Sanctions Regulations (31 CFR part 582) to incorporate the Nicaragua Human Rights and Anticorruption Act of 2018, effective July 17, 2020. 85 Fed. Reg. 43,436 (July 17, 2020). Also on July 17, 2020, OFAC designated Juan Carlos ORTEGA MURILLO, Jose Jorge MOJICA MEJIA, Difuso Comunicaciones S.A., and Mundo Digital S.A., in light of, among other things, various corrupt activities of the Ortega regime in Nicaragua. 85 Fed. Reg. 44,377 (July 22, 2020). The State Department press statement announcing the sanctions, available at <https://2017-2021.state.gov/the-united-states-sanctions-two-individuals-and-two-entities-related-to-corruption-in-nicaragua/>, includes the following:

These individuals and entities have misappropriated public funds and expropriated private assets for personal gain or political purposes, engaged in corruption related to government contracts, or bribery. Ortega Murillo, the son of President Daniel Ortega and Vice President/First Lady Rosario Murillo, manages a media company, Difuso Comunicaciones S.A., which he uses to stifle independent voices, spread regime propaganda, and defend the Ortegas' violence and repression. Mojica and Mundo Digital S.A. have long benefitted from corrupt arrangements with the regime, both to enrich themselves and enable regime associates to avoid sanctions.

On October 9, 2020, OFAC designated the following under E.O. 13851: Ana Julia GUIDO DE ROMERO, Paul Herbert OQUIST KELLEY, and the entity COOPERATIVA DE AHORRO Y CREDITO CAJA RURAL NACIONAL RL (a.k.a. Caruna). 85 Fed. Reg. 67,421 (Oct. 22, 2020). The State Department issued a press statement regarding the October 9 designations, available at <https://2017-2021.state.gov/the-united-states-sanctions-a-member-of-the-nicaraguan-judiciary-another-member-of-ortegas-inner-circle-and-another-entity/>, which includes the following background information on those designated:

Guido is the Attorney General of the Prosecutor's Office, and she helped form a group of prosecutors who worked with the U.S.-sanctioned Nicaraguan National Police to fabricate cases against political prisoners. Additionally, Guido created a specialized unit that has spent the past two years bringing charges against peaceful protesters. Oquist is the Secretary of the Presidency for President Daniel Ortega and plays a lead role in covering up and justifying the regime's crimes and human rights abuses.

Caruna is a savings and loan cooperative operating as the Ortega regime's main tool for funneling proceeds from Nicaragua's concessionary oil schemes with Venezuela to use as a resource to pay off the Ortega patronage network. Regime officials, including those sanctioned by the Treasury's Office of Foreign Assets Control, are taking advantage of Caruna's lack of regulatory oversight to shelter their ill-gotten gains.

On December 21, 2020, OFAC designated the following under E.O. 13851: Marvin Ramiro AGUILAR GARCIA, Walmaro Antonio GUTIERREZ MERCADO, and Fidel De Jesus DOMINGUEZ ALVAREZ. 85 Fed. Reg. 84,468 (Dec. 28, 2020).

f. Mali

OFAC designated the following individuals pursuant to E.O. 13882 for being responsible for or complicit in, or having directly or indirectly engaged in, actions or policies that threaten the peace, security, or stability of Mali: Houka Houka AG ALHOUSSEINI, Mahri Sidi Amar BEN DAHA, Mohamed Ould MATALY, Mohamed Ben Ahmed MAHRI, and Ahmed AG ALBACHAR. 85 Fed. Reg. 27,805 (May 11, 2020).

g. Nigeria

See *Digest 2019* at 570 regarding previous visa restrictions imposed relating to those undermining elections in Nigeria. On September 14, 2020, the State Department announced in a press statement that the United States was imposing additional visa restrictions on Nigerians responsible for undermining the democratic process. The press statement, available at <https://2017-2021.state.gov/imposing-visa-restrictions-on-nigerians-responsible-for-undermining-the-democratic-process-2/>, includes the following:

Today, the Secretary of State is imposing additional visa restrictions on individuals for their actions surrounding the November 2019 Kogi and Bayelsa State elections and in the run up to the September and October 2020 Edo and Ondo State elections. These individuals have so far operated with impunity at the expense of the Nigerian people and have undermined democratic principles.

The Department of State emphasizes that the actions announced today are specific to certain individuals and not directed at the Nigerian people. This decision reflects the Department of State's commitment to working with the

Nigerian government to realize its expressed commitment to end corruption and strengthen democracy, accountability, and respect for human rights.

h. Central African Republic

On January 31, 2020, Acting Deputy Permanent U.S. Representative to the UN Cherith Norman Chalet delivered the U.S. explanation of vote on the resolution renewing the sanctions regime in the Central African Republic (“CAR”). The statement is excerpted below and available at <https://usun.usmission.gov/explanation-of-vote-after-the-renewal-of-sanctions-in-the-central-african-republic/>.

* * * *

The United States is pleased to join the large majority of Council members in voting in favor of this resolution renewing the sanctions regime in the Central African Republic. We hope the extension of the arms embargo, asset freeze, and travel ban will keep necessary pressure on the armed groups that continue to undermine CAR’s peace and security.

This decision is grounded on the overarching goal to strengthen the Central African Republic as a country, as a whole, and support its institutions. However, this resolution aside, that a dynamic that played out in this negotiation, we must raise the issue of recent remarks on this matter from the Russian Ambassador in Bangui that are deeply concerning. In public comments, the Ambassador denigrated any members of this Council who would disagree with Russia’s position, saying that those governments—including my own—quote “do not want peace and security in the country” and are, quote, “against the interests of the CAR’s people.” In fact, nothing could be further from the truth. The members of this Council differ regarding technical elements most appropriate for an effective sanctions regime, the issues we seek to highlight in Security Council resolutions, and even sometimes how to characterize recent developments in the Central African Republic. But all of us are engaged on this matter because we want to see peace and security in the Central African Republic and elevate the interests of the Central African people.

The United States demonstrates our commitment as the largest single-country humanitarian donor in the Central African Republic. Our life-saving assistance of more than \$140 million in just the last year is directly helping millions of Central Africans who were forced to flee their homes. Moreover, we are helping to rebuild the Central African Republic’s security institutions, so that they can protect the people and the territory of the Central African Republic. If our Russian colleagues are suggesting that life-saving humanitarian aid is against the interests of those who depend on it, it would not be the first time they have done so in the Security Council this month. But that would not make the claim true.

As other speakers have noted, we believe this Council would be favorably disposed to exemption requests from the Central African Republic government to import new arms, but we have not received any such requests since the last relaxation of the arms embargo in September. We look forward to future reporting on progress toward the benchmarks for the next iteration of this resolution. Colleagues, Russia’s divisive propaganda leads down a dangerous path. Central African Republic is a fragile state, and it is in the interests of all of us in the international

community to support its return to full sovereignty and avoid any acts that could destabilize the country. This point is crucial in the run-up to the December 2020 elections.

We should all be seeking to de-escalate tensions and build confidence among political actors, rather than spread false narratives. We should support political dialogue and transitional justice, and work transparently to address violations of the peace agreement in a constructive, consultative manner with the UN and the African Union. Rather than questioning the motives of Council members whose views do not align with their own, we hope that Russia will work cooperatively with the United States and other friends of the Central African Republic to support the strengthening of state institutions in a transparent and coordinated way, and to ensure that elections in December 2020 are free and fair.

* * * *

Effective July 22, 2020, the Department of State amended the International Traffic in Arms Regulations (“ITAR”) to reflect United Nations Security Council Resolutions (“UNSCRs”) concerning the Central African Republic (“CAR”), including resolution 2488, and resolution 2507 relating to the arms embargo and providing certain exceptions to those adopted by resolution 2488. 85 Fed. Reg. 44,188 (July 22, 2020). The recent resolutions respond to the signing of a peace agreement between the CAR government and fourteen armed groups on February 6, 2019 and are intended to support implementation of the peace agreement.

On July 28, 2020, Rodney Hunter, political coordinator for the U.S. Mission to the UN, delivered the explanation of vote for the United States, Germany, Estonia, and Belgium, on the resolution on CAR sanctions, on which the Council vote was unanimous in renewing the sanctions regime and the mandate of the panel of experts. The explanation of vote is available at <https://usun.usmission.gov/explanation-of-vote-on-the-adoption-of-the-central-african-republic-sanctions-resolution/> and excerpted below.

* * * *

Our governments hope the extension of the sanctions regime, and especially the territorial arms embargo, will keep pressure on the armed groups that undermine CAR’s peace and security by threatening its elected government and its people. It is an important element to accompany the CAR government on its way towards stability and peace.

We welcome the CAR’s continued efforts to make further progress on key benchmarks pertaining to Security Sector Reform, programs for the disarmament, demobilization, reinsertion, and repatriation of former fighters, and the management of weapons and ammunition. We strongly encourage the CAR government to intensify such efforts, also in close coordination and cooperation with MINUSCA and other international partners.

Without better management and tracking of weapons brought into the country, ... we are concerned that changes in the sanctions regime significantly increase the risk of the proliferation of rocket-propelled grenades both within the Central African Republic and within the region. Rocket-propelled grenades are a common weapons system that can be easily stolen and smuggled if not properly stored. The widespread availability of small arms increases the lethality

of conflicts in the region, and we remain committed to combatting this scourge, including through the AU's *Silencing the Guns* initiative. We urge the CAR government to take responsibility for ensuring effective control of all the arms it receives, acting to prevent any risk of proliferation.

Despite our concerns, we voted in favor of the resolution in response to the requests from the CAR government. Our governments want to see consensus and concerted action on this file, given the importance of stability in the lead-up to elections later this year. We have been, and will continue to be, collaborative partners with the Government of CAR. We strongly oppose any measure or action that would weaken the CAR government, provide support to armed groups, or misrepresent the responsible actions of this Council.

That is why many of our governments, either bilaterally or multilaterally, including through the EUTM, have provided technical support to the CAR government to help it improve its storage, management, and tracking of weapons by both military and internal security forces, including any new weapons that will be brought in as a result of today's easing. We strongly support the return of the mandate cycle to 12 months and are hopeful that this will give the government more time to achieve necessary progress on the benchmarks, which we strongly encourage.

* * * *

On August 7, 2020, OFAC designated Bi Sidi SOULEYMANE pursuant to section 1(a)(ii)(A)(4) of E.O. 13667 of May 12, 2014, "Blocking Property of Certain Persons Contributing to the Conflict in the Central African Republic." 85 Fed. Reg. 48,768 (Aug. 12, 2020). The State Department issued a statement on August 7, 2020 regarding the designation, which is available at <https://2017-2021.state.gov/the-united-states-imposes-sanctions-on-central-african-republic-militia-leader/>, and includes the following background on Souleymane:

Today, the United States took action against the notorious leader of a murderous group that has committed numerous human rights abuses and displaced thousands of people in the Central African Republic (CAR) since 2015. The United States acted pursuant to Executive Order 13667 and alongside the UN in designating Bi Sidi Souleymane, also known as Sidiki Abbas, who leads the Central African Republic based militia group Return, Reclamation, Rehabilitation (3R). On September 27, 2016, 3R raided the village of De Gaulle, killing at least 17 villagers, and raping women and girls. During and immediately after 3R's raid on De Gaulle, 3R members and Souleymane himself tortured villagers. On May 21, 2019, 3R killed at least 34 unarmed civilians in three villages in northwest CAR's Ouham-Pendé province, summarily executing adult males.

i. Democratic Republic of Congo

The following were designated on February 19, 2020 under E.O. 13413 of 2006 (Blocking Property of Certain Persons Contributing to the Conflict in the Democratic Republic of the Congo) as amended by E.O. 13671 of 2014 (Taking Additional Steps to Address the National Emergency With Respect to the Conflict in the Democratic Republic of the

Congo), for activities that threaten the peace, security, or stability of the Democratic Republic of the Congo (“DRC”): Guidon Shimiray MWISSA; Lucien NZABAMWITA; Muhindo Akili MUNDOS; and Gedeon Kyungu MUTANGA. 85 Fed. Reg. 10,824 (Feb. 25, 2020).

j. *Somalia*

On July 10, 2020, the Director of OFAC determined that circumstances no longer warrant the inclusion of the following individual on the SDN List (he had been designated in the annex to E.O. 13620 of 2012, “Taking Additional Steps to Address the National Emergency with Respect to Somalia”): Yemane GHEBREAB. 85 Fed. Reg. 48,767 (Aug. 12, 2020).

k. *Zimbabwe*

On March 3, 2020, OFAC designated Anselem Nhamo SANYATWE and Owen NCUBE, who was designated under Section 7031(c) in 2019 for his involvement in gross violations of human rights, under E.O. 13469 of 2008 (“Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe”). 85 Fed. Reg. 16,190 (Mar. 20, 2020). Also on March 3, 2020, OFAC determined that the following individuals, identified in E.O. 13288 and the annex to E.O. 13391, no longer warranted inclusion on the SDN List under those orders relating to Zimbabwe: Ray Joseph KAUKONDE, Shuvai Ben MAHOFA, Sithokozile MATHUTHU, and Naison K. NDLOVU. *Id.* See also March 11, 2020, State Department press statement, available at <https://2017-2021.state.gov/the-united-states-sanctions-two-zimbabwean-officials-for-human-rights-abuses/> (OFAC designations reinforce previous State Department designations of Sanyatwe and Ncube under Section 7031(c)).

On August 5, 2020, OFAC designated the following under E.O. 13469: Kudakwashe Regimond TAGWIREI, and SAKUNDA HOLDINGS. 85 Fed. Reg. 48,632 (Aug. 11, 2020). Also on August 5, 2020, OFAC determined that the following persons, previously designated under E.O. 13469, were no longer subject to the order: John BREDENKAMP, ALPHA INTERNATIONAL, BRECO (ASIA PACIFIC) LTD, BRECO (EASTERN EUROPE) LTD, BRECO (SOUTH AFRICA) LTD, BRECO (U.K.) LTD (a.k.a. BRECO (U.K.) LIMITED), BRECO GROUP, BRECO INTERNATIONAL, BRECO NOMINEES LTD, BRECO SERVICES LTD, CORYBANTES LTD, ECHO DELTA HOLDINGS LTD, KABABANKOLA MINING COMPANY, MASTERS INTERNATIONAL LTD., MASTERS INTERNATIONAL, INC., PIEDMONT (UK) LIMITED, RACEVIEW ENTERPRISES, SCOTTEE HOLDINGS (PVT) LTD, SCOTTEE RESORTS, TIMPANI LTD, TREMALT LTD. *Id.* See also August 5, 2020 State Department press statement, available at <https://2017-2021.state.gov/the-united-states-imposes-sanctions-on-zimbabwean-businessman-kudakwashe-tagwirei/> (Tagwirei, a notoriously corrupt Zimbabwean businessman, and his company Sakunda Holdings, are involved in public government corruption; Bredenkamp and entities associated with him were delisted because he is deceased).

l. Libya

On August 6, 2020, OFAC designated the following pursuant to E.O. 13726 of 2016, “Blocking Property and Suspending Entry into the United States of Persons Contributing to the Situation in Libya”: Faysal AL-WADI, (for actions or policies that threaten the peace, security, or stability of Libya; also for illicit exploitation of crude oil or any other natural resources in Libya); Musbah Mohamad M WADI (for actions or policies that threaten the peace, security, or stability of Libya); Nourddin Milood M MUSBAH (for actions or policies that threaten the peace, security, or stability of Libya); ALWEFAQ LTD, (linked to Musbah Mohamad M Wadi, and Nourddin Milood M Musbah); as well as one vessel. 85 Fed. Reg. 48,632 (Aug. 11, 2020). See also August 6, 2020 State Department press statement, available at <https://2017-2021.state.gov/the-united-states-sanctions-network-threatening-the-security-of-libya/>, describing the smuggling network subject to sanctions as follows:

Wadi has worked with a network of contacts in North Africa and southern Europe to smuggle fuel from, and illicit drugs through, Libya to Malta. Competition for control of smuggling routes, oil facilities, and transport nodes is a key driver of conflict in Libya and deprives the Libyan people of economic resources. Wadi’s illicit trafficking operation transported drugs between the Libyan port of Zuwarah and the maritime location known as Hurd’s Bank, just outside of Malta’s territorial waters. Hurd’s Bank is a well-known geographic transfer location for illicit maritime transactions. Wadi has kept all official documentation clear of his name, while being the primary organizer of smuggling operations using the vessel Maraya.

The Department of the Treasury’s press release about the designations is available at <https://home.treasury.gov/news/press-releases/sm1083>.

m. Belarus

On October 2, 2020, OFAC determined that property of the following individuals was blocked pursuant to E.O. 13405 of 2006 (“Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus”): Khazalbek Bakhtsibekavich ATABEKAU; Yuriy Henadzievich NAZARANKA; Alyaksandr BARSUKOV; Yuriy Khadzymuratavich KARAEU; Alena Mikalaeuna DMUKHAYALA; Vadzim Dzmitrievich IPATAU; Dzmitriy uladimiravich BALABA; Ivan Uladimiravich KUBRAKOU. (The Federal Register notice of the determination is dated December 18, 2020.) 86 Fed. Reg. 186 (Jan. 4, 2021). The State Department issued a press statement on October 2, 2020, which is available at <https://2017-2021.state.gov/the-u-s-action-against-belarusian-individuals-involved-in-efforts-to-undermine-belarusian-democracy/index.html>, and explains:

Today, in response to the continued, brutal repression of peaceful, pro-democracy protesters in Belarus, the United States and the European Union have taken coordinated action against Belarusian individuals involved in efforts to undermine Belarusian democracy. The U.S. Departments of Treasury and State have exercised separate authorities against 25 Belarusians involved in the 2020 election falsification and human rights violations, joining 16 Belarusian officials sanctioned in 2006 for similar actions, for a total of 41 Belarusian officials.

The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) has sanctioned eight additional Belarusian officials for their roles in falsifying results of the August 9, 2020, presidential election and the crackdown that followed, pursuant to Executive Order 13405. They include prominent members of Alyaksandr Lukashenka's regime and security apparatus complicit in the violent crackdown on peaceful election-related protests. Those sanctioned today join a group of 16 individuals and nine entities, including Alyaksandr Lukashenka and Central Election Commission Chair Yarmoshina, already sanctioned under E.O. 13405. ...

In addition, the U.S. Department of State has taken action pursuant to Presidential Proclamation 8015 to identify 24 Belarusian individuals responsible for undermining Belarusian democracy and impose visa restrictions on them, which makes them generally ineligible for entry into the United States. Some officials have been named under both authorities.

Treasury's press release on the October actions regarding Belarus is available at <https://home.treasury.gov/news/press-releases/sm1143>.

On December 23, 2020, OFAC made further designations under E.O. 13405 of the following: one individual—Henadz Arkadzievich KAZAKEVICH—and four entities—CENTRAL COMMISSION OF THE REPUBLIC OF BELARUS ON ELECTIONS AND HOLDING REPUBLICAN REFERENDA; KGB ALPHA; MAIN INTERNAL AFFAIRS DIRECTORATE OF THE MINSK CITY EXECUTIVE COMMITTEE; MINSK SPECIAL PURPOSE POLICE UNIT. 85 Fed. Reg. 86,650 (Dec. 30, 2020).

B. EXPORT CONTROLS

1. Measures responding to the People's Republic of China

a. Relating to Hong Kong

On June 29, 2020, the State Department announced in a press statement, available at <https://2017-2021.state.gov/u-s-government-ending-controlled-defense-exports-to-hong-kong/>, that it was ending exports of U.S.-origin defense equipment to Hong Kong. The press statement explains:

The Chinese Communist Party's decision to eviscerate Hong Kong's freedoms has forced the Trump Administration to re-evaluate its policies toward the territory. As Beijing moves forward with passing the national security law, the United States will today end exports of U.S.-origin defense equipment and will take steps toward imposing the same restrictions on U.S. defense and dual-use technologies to Hong Kong as it does for China.

The United States is forced to take this action to protect U.S. national security. We can no longer distinguish between the export of controlled items to Hong Kong or to mainland China. We cannot risk these items falling into the hands of the People's Liberation Army, whose primary purpose is to uphold the dictatorship of the CCP by any means necessary.

On July 31, 2020, the Department of Commerce's Bureau of Industry and Security ("BIS") amended the Export Administration Regulations ("EAR") to eliminate provisions for differential treatment of Hong Kong compared to the People's Republic of China ("PRC"). 85 Fed. Reg. 45,998 (July 31, 2020). The action is part of revised U.S. policy toward Hong Kong in response to the newly imposed security measures on Hong Kong by the Chinese Communist Party, which undermine Hong Kong's autonomy and increase the risk of diversion of sensitive U.S. technology and items. *Id.*

On December 23, 2020, the Department of Commerce published a final rule, amending the EAR to remove Hong Kong from the list of destinations in the EAR. 85 Fed. Reg. 83,765 (Dec. 23, 2020). The rule implements sections 2 and 3 of Executive Order 13936 of July 14, 2020, discussed in section A.4.b, *supra*, and further responds to the new security measures imposed on Hong Kong.

b. *Relating to Huawei*

See *Digest 2019* at 575-76 regarding the addition of Huawei and its affiliates to the Commerce Department Entity List. See also section A.4.a, *supra*, for discussion of visa restrictions directed at Huawei. On May 15, 2020, the State Department announced in a press statement, available at <https://2017-2021.state.gov/the-united-states-protects-national-security-and-the-integrity-of-5g-networks//index.html>, that the Commerce Department was expanding its foreign direct product rule to restrict Huawei from circumventing U.S. law. The statement includes the following:

The Department of Justice has indicted Huawei for stealing U.S. technology and helping Iran evade sanctions, and the Department of Commerce placed Huawei on the Entity List in 2019. The Department of State has engaged for more than a year to share what we know about Huawei and other untrustworthy vendors with allies and partners around the world.

Today's expanded rule helps prevent Huawei from undermining U.S. export controls, closing a loophole that has allowed the company to exploit U.S. technology and threaten our national security. It also imposes U.S. export control restrictions on countries that use U.S. technology or software to design

and produce semiconductors for Huawei. Companies wishing to sell certain items to Huawei produced with U.S. technology must now obtain a license from the United States.

In a June 24, 2020 State Department press statement, available at <https://2017-2021.state.gov/the-tide-is-turning-toward-trusted-5g-vendors/>, the Secretary of State hailed other countries—such as the Czech Republic, Poland, Sweden, Estonia, Romania, Denmark, Latvia, and Greece—as well as large telecommunications providers in France, India, Australia, South Korea, Japan, the UK, Canada, Spain, Germany, and Brazil—for rejecting Huawei offers for 5G services in favor of more trusted vendors. On July 14, 2020, the State Department welcomed the United Kingdom’s decision to prohibit Huawei from future 5G networks and phase out Huawei equipment from existing networks in a press statement, available at <https://2017-2021.state.gov/welcoming-the-united-kingdom-decision-to-prohibit-huawei-from-5g-networks/>.

On August 17, 2020, the State Department announced in a press statement, available at <https://2017-2021.state.gov/the-united-states-further-restricts-huawei-access-to-u-s-technology/>, that the United States was further restricting Huawei. The August 17 press statement includes the following regarding the additional restrictions:

The Department of State strongly supports the Commerce Department’s expansion today of its Foreign Direct Product Rule, which will prevent Huawei from circumventing U.S. law through alternative chip production and provision of off-the-shelf (OTS) chips produced with tools acquired from the United States. This measure follows the more limited expansion of the Foreign Direct Product Rule in May, which Huawei has continuously tried to evade.

The Commerce Department also added 38 Huawei affiliates to its Entity List, which identifies foreign parties prohibited from receiving certain sensitive technologies and allowed Huawei’s Temporary General License (TGL) to expire. The United States has provided ample time for affected companies and persons – primarily Huawei customers – to identify and shift to other sources of equipment, software, and technology and wind-down their operations. Now that time is up.

The further restrictions on Huawei and other changes to controls for Huawei took effect on August 17, 2020 include: (1) adding additional non-U.S. affiliates of Huawei to the Entity List; (2) removing a temporary general license for Huawei and its non-U.S. affiliates; (3) amending General Prohibition Three, the foreign-produced direct product rule. 85 Fed. Reg. 51,596 (Aug. 20, 2020).

c. *Relating to human rights abuses, theft of trade secrets, and activities in the South China Sea*

In a December 18, 2020 press statement, available at <https://2017-2021.state.gov/u-s-imposes-new-sanctions-on-peoples-republic-of-china-actors-linked-to-malign-activities/>, the State Department announced the addition of 59 entities from the People's Republic of China ("PRC") to the Department of Commerce export-control Entity List. The press statement places the entities into categories based on their malign activities: (1) four entities involved in providing DNA-testing materials or surveillance technology to enable the PRC government to engage in human rights abuses; (2) nineteen entities involved in theft of trade secrets from U.S. corporations, activities that undermine U.S. efforts to counter illicit trafficking in nuclear and other radioactive materials, or using U.S. exports to support the PLA and PRC defense industrial base; (3) 25 shipbuilding research institutes affiliated with the China State Shipbuilding Corporation, as well as six other entities that provide research, development, and manufacturing support for the People's Liberation Army Navy or attempted to acquire U.S.-origin items in support of PLA programs; (4) five PRC state-owned enterprises, including the China Communications Construction Company, for their role in coercion of South China Sea claimant states.

2. Measures relating to Cyprus

Effective October 1, 2020, the Department of State amended the International Traffic in Arms Regulations ("ITAR") to implement a one-year waiver of limitations on non-lethal defense articles and defense services destined for or originating in Cyprus, temporarily removing prohibitions on exports, reexports, retransfers, and temporary imports. 85 Fed. Reg. 60,698 (Sep. 28, 2020). Excerpts below from the Federal Register notice provide supplementary information on the temporary measure:

Section 1250A(d) of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92) and section 205(d) of the Eastern Mediterranean Security and Energy Act (Div. J., Pub. L. 116–94) provide that the policy of denial for exports, reexports, or transfers of defense articles on the United States Munitions List (USML) to Cyprus shall remain in place unless the President determines and certifies to the appropriate congressional committees not less than annually that: (A) Cyprus is continuing to cooperate with the U.S. Government in anti-money laundering reforms; and (B) Cyprus has taken the steps necessary to deny Russian military vessels access to ports for refueling and servicing. These provisions further provide that the President may waive these limitations for one fiscal year if the President determines that it is essential to the national security interests of the United States to do so. On April 14, 2020, the President delegated to the Secretary of State the functions and authorities vested by section 1250A(d) of the National Defense authorization Act for Fiscal Year 2020 (Pub. L. 116–92) and section 205(d) of the Eastern Mediterranean Security and

Energy Partnership Act of 2019 (Div. J., Pub. L. 116–94) (85 FR 35797). On June 2, 2020, utilizing these delegated functions and authorities, the Secretary of State determined that it is essential to the national security interest of the United States to temporarily remove restrictions on the export, reexport, retransfer, and temporary import of non-lethal defense articles and defense services destined for or originating in Cyprus. ...

3. Additions to the Entity List

In addition to the additions to the Entity List related to Huawei, the Commerce Department also added five Iranian nuclear scientists to the Entity List on March 15, 2020. See March 18, 2020 press statement, available at <https://2017-2021.state.gov/constraining-iranian-nuclear-scientists/>. The five are: Aref Bali Lashak, who served as a senior expert for Iran’s pre-2004 nuclear weapons program (“the Amad plan”); Sayyed Mohammad, Mehdi Hadavi, a project supervisor during the Amad plan; Kamran Daneshjou, head of the Amad plan project 111 (an effort to modify a Shahab-3 re-entry vehicle to house a probable nuclear device); Mehdi Teranchi, project supervisor in Amad subproject 3/30 (nuclear explosive testing); Ali Mehdipour Omrani, senior expert in Amad subproject 3/11 (nuclear weapons design).

4. Debarments

Effective January 16, 2020, the Department of State rescinded the statutory debarments of Jami Siraj Choudhury (2004), David Michael Janowski II (2009), Netria Corporation (2018), Jonathan Robert Reynolds (2003), and State Metal Industries, Inc. (2007). 85 Fed. Reg. 2802 (Jan. 16, 2020). Effective May 20, 2020, the Department of State rescinded the policy of denial concerning BAES SAL, a subsidiary of BAE Systems plc, which was published in the Federal Register May 23, 2011. 85 Fed. Reg. 30,783 (May 20, 2020).

On May 20, 2020, the State Department published a list of persons debarred under the AECA and ITAR, after being convicted in a U.S. District Court: (1) Asad-Ghanem, Rami Najm; (2) Boyko, Gennadiy; (3) Browning, Scott Douglas; (4) Brunt, Paul Stuart; (5) Chehade, Walid; (6) Dequarto, Dominick; (8) El Mir, Nafez; (9) Heubschmann, Andy Lloyd; (10) Joseph, Junior Joel; (11) Peterson, John James; (12) Prezas, Julian; (13) Rodriguez, Chris; (14) Ruchtein, Sergio; (15) Saiag, Allexander; (16) Saidi, Abdul Majid; (17) Shapovalov, Michael; (18) Sheng, Zimo; (19) Srivaranon, Apichart; (20) Taylor, Maurice; (21) Tishchenko, Oleg Mikhaylovich; (22) Zamarron-Luna, Carlos Antonio; (23) Zuppone, Brunella. 85 Fed. Reg. 30,783 (May 20, 2020).

5. Consent Agreement with Airbus

In a January 31, 2020 media note, available <https://2017-2021.state.gov/u-s-department-of-state-concludes-10-million-settlement-of-alleged-export-violations-by-airbus-se/>, the State Department announced that it had concluded a consent agreement

with Airbus SE to settle alleged violations of the Arms Export Control Act (“AECA”), 22 U.S.C. § 2751 *et seq.*, and the International Traffic in Arms Regulations (“ITAR”), 22 C.F.R. Parts 120-130. The media describes the alleged violations as:

...providing false statements on authorization requests; the failure to provide accurate and complete reporting on political contributions, commissions, or fees ...in connection with sales; the failure to maintain records involving ITAR-controlled transactions; and the unauthorized re-export and retransfer of defense articles.

The terms of the agreement include a civil penalty of \$10 million, \$5 million of which will be suspended on condition that those funds are used for remedial compliance measures approved by the Department. The terms of the agreement also include engagement of a “Special Compliance Official,” to oversee implementation and additional compliance measures. In recognition of Airbus SE’s voluntary disclosure of the violations and cooperation in the review and compliance improvements, the Department decided not to administratively debar Airbus SE.

6. Litigation

a. Stagg v. Department of State

As discussed in *Digest 2016* at 677-79 and *Digest 2019* at 578 plaintiff in *Stagg* lost a challenge related to the dissemination of information that is in the public domain. On December 28, 2020, the Court of Appeals for the Second Circuit affirmed the district court’s grant of summary judgment for the Department, agreeing that the licensing regulations did not cover plaintiff’s intended speech and that plaintiff was not at risk of injury from those licensing provisions it alleged to be unconstitutional. *Stagg v. Dep’t of State*, No. 19-811. Excerpts follow from the court’s decision.

* * * *

Because the unambiguous terms of the ITAR exempt from its registration and licensing requirements the materials that Stagg’s complaint asserts an intention to republish, we conclude that Stagg alleges no injury it might suffer resulting from application of the ITAR to its intended actions. Although Stagg’s suit may have presented a “case” or “controversy” at the outset of this litigation, because of the Defendants’ statements that threatened imposition of the licensing requirement for Stagg’s intended speech, the district court’s (and our) rulings on the meaning of the ITAR eliminate the threat. Accordingly, Stagg no longer has a personal stake in its plea for a declaration that those provisions are unconstitutional.

* * * *

Stagg's complaint alleges that it intends to disseminate, through its published materials and public presentations, "published and generally accessible public information that is available from bookstores and libraries . . . [that] would have otherwise constituted technical data but is excluded from the technical data provisions because it is in the public domain." App'x at 115. This includes information, Stagg alleges, that was "not authorized by the Defendants into the public domain." *Id.* at 116. Additionally, the complaint asserts Stagg's intention to "aggregate and modify public domain information to provide more interactive examples." *Id.* The complaint does not allege an intention to disseminate anything that is not "published," "generally accessible," and "available from bookstores and libraries." Stagg asserts a fear of prosecution for two reasons: (1) because DOS's 2015 Notice interprets the ITAR to require a license for republication of materials that are publicly available through one of the means enumerated in the public domain provision, if these materials were never authorized for release to the public; and (2) because DOS's 2013 Notice expresses DOS's view that aggregation of public domain materials can create a new set of "technical data," so that republication would require a license. Notwithstanding these allegations, the district court concluded that Stagg "never truly faced a prior restraint." App'x at 65. We agree, and we therefore conclude that Stagg can no longer establish the requisite "personal stake" to sustain federal court jurisdiction, because its intended republication of these materials does not subject it to a credible threat of enforcement of the license requirement. *See Susan B. Anthony List*, 573 U.S. at 159.

First, under the ITAR licensing requirement, "technical data" that is subject to licensing does not include "information in the public domain." 22 C.F.R. § 120.10. "Public domain," in turn, "means information which is published and which is generally accessible or available to the public" through any of the means listed in § 120.11, including through bookstores, *id.* § 120.11(a)(1), and at libraries, *id.* § 120.11(a)(4). Nowhere do the ITAR state or imply that prior government authorization is required for information to qualify as "in the public domain." To the contrary, § 120.11 states unambiguously that any information which is "published" and "generally accessible or available" through one of the listed means is in the public domain, and therefore is not subject to the ITAR's licensing requirement. Because the ITAR provisions are unambiguous on this point, DOS's 2015 Notice, proclaiming an interpretation contrary to the unambiguous terms of the regulations, has no effect. While a government agency's views are entitled to great deference as to the meaning of ambiguous provisions of that agency's regulations, when the regulations lay down an unambiguous rule, the agency's expression of views interpreting its regulations in a manner inconsistent with their plain meaning receives no deference. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) (courts do not give deference to agency interpretation of its own regulation when regulation is unambiguous). Because the ITAR provisions make this plain, we conclude Stagg is not subject to a licensing requirement under the ITAR for use of "information that is available from bookstores and libraries" but was never "authorized by the Defendants into the public domain," App'x at 115–16, regardless of DOS's 2015 Notice to the contrary. That information is in the "public domain," and therefore is not subject to the ITAR. 22 C.F.R. § 125.1(a).

Second, nothing in the ITAR states, implies, or supports the interpretation that the bare aggregation of public domain data, without more, removes that data from the coverage of the public domain provision. Rather, the unambiguous text of the ITAR excludes *all* "information in the public domain" from the definition of "technical data." Information that otherwise satisfies the definition of "public domain" does not lose that status simply because it is presented together with other information that also satisfies that definition. Such information would still be

“published” and “generally accessible or available to the public” through one of the eight means listed in § 120. Accordingly, Stagg’s intent to release aggregations of public domain data does not establish a credible threat of enforcement of the ITAR against it.

* * * *

b. Washington v. Department of State and Defense Distributed

In 2016, the Fifth Circuit upheld State Department enforcement of AECA and ITAR restrictions on the posting of CAD files for 3D printing of various weapons on the website of Defense Distributed. For background on the litigation in *Defense Distributed*, see *Digest 2015* at 680-84, *Digest 2016* at 668-75, and *Digest 2019* at 578-79. The State Department reached a settlement with Defense Distributed and other parties to the prior litigation. Several states then sued in federal court in the State of Washington, claiming the federal government action was *ultra vires* and in violation of the Administrative Procedure Act (“APA”) and the Tenth Amendment to the U.S. Constitution. The State Department defended its actions as lawful, but that court entered a temporary restraining order against the Government, followed by a preliminary injunction. On November 12, 2019, the court granted summary judgment in favor of plaintiffs, finding that the State Department had violated the APA.

On January 23, 2020, agency rulemaking reassigned the relevant items to be subject to Department of Commerce regulation. 85 Fed. Reg. 3819 (Jan. 23, 2020); 85 Fed. Reg. 4136 (Jan. 23, 2020). A coalition of States sued the State and Commerce Departments after the publication of the rulemaking, alleging that these rules violated the APA. On March 6, 2020, a federal district court in the State of Washington granted in part the plaintiffs’ motion for a preliminary injunction *State of Washington v. U.S. Dep’t of State*, No. 20-111. The U.S. Court of Appeals for the Ninth Circuit is considering the case on appeal from the district court’s decision. ***

Defense Distributed brought a new case against the Department of State in 2020.

c. Thorne v. Department of State

As discussed in *Digest 2019* at 579, plaintiff in *Thorne* challenged the State Department’s denial of his licenses for the permanent export of firearms and ammunition to South Africa and the court found the denial to be committed to the agency’s judgment and not subject to judicial review under the APA. Plaintiffs appealed. The U.S. Court of Appeals for the Ninth Circuit issued its decision affirming the district court on October 26, 2020. *Thorne v. Dep’t of State*, No. 19-17606. Excerpts follow from the opinion.

*** Editor’s note: The Ninth Circuit filed its opinion in the case on April 27, 2021, reversing the district court injunction and ordering the court to dismiss the case. *State of Washington v. Dep’t of State*, No. 20-35391.

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To establish a de facto debarment under § 127.7, plaintiffs must show that they have been “prohibit[ed] . . . from participating directly or indirectly in any [ITAR and AECA] activities that are subject to this subchapter.” 22 C.F.R. § 127.7(a)–(b). Although it is possible to read “any” in § 127.7 to mean “less than all,” the better reading of “any” is to read it synonymously with “total.” If the regulation’s drafters truly meant for “any” to mean “less than all,” the clearer way to indicate such a meaning would be to state, “prohibit[ed] . . . from participating directly or indirectly in any [ITAR and AECA] *activity* that *is* subject to this subchapter.” (emphasis added). Such a reading is also more in line with the general concept of a debarment in other contexts. *Cf.*, e.g., 22 C.F.R. § 513.200; 48 C.F.R. § 9.405; 29 C.F.R. § 503.24; 2 C.F.R. § 417.625. So, to establish a de facto debarment under § 127.7, plaintiffs need to show that the DDTC has completely prohibited them from legally engaging in all ITAR and AECA activities.

Plaintiffs have not met their burden in that regard. The facts and evidence Thorne points to establish, at best, the denial of some license applications to export arms to the Dave Sheer entities, not a complete prohibition to act under ITAR and AECA. The denial of a license pertaining to a specific transaction only is not tantamount to a debarment. *See U.S. Ordnance, Inc. v. U.S. Dep’t of State*, 432 F. Supp. 2d 94, 99 (D.D.C. 2006) (“Debarment . . . would permanently deprive plaintiff of any chance to obtain a license under the AECA. Whereas, a decision to deny an export license is not an enforcement action, but rather is an exercise of the broad discretion[] granted to the Department. Thus, a denial of a license is only a preliminary action . . .”), *vacated as moot by U.S. Ordnance, Inc. v. Dep’t of State*, 231 F. App’x 2, 2007 WL 141656, at *1 (D.C. Cir. 2007). A decision to deny an export license is not an enforcement action, but rather an exercise of the broad discretion granted to the DDTC. Indeed, as Thorne was merely denied a license, the DDTC suggested to Thorne the reconsideration process offered by § 126.7, not the reinstatement and appeal process of § 127.7, i.e., the only process available for debarred individuals and entities. *See* 22 C.F.R. § 127.7(a), (b), (d). Thorne’s claim of a government ruse in that regard is unconvincing when he never formally attempted to avail himself of any of the aforementioned review processes, which would probably have shed greater light on his ITAR and AECA status. *See Nat’l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 174 (2004) (“[T]here is a presumption of legitimacy accorded to the Government’s official conduct. . . . [C]lear evidence is usually required to displace it.” (citations omitted)).

As for the Dave Sheer entities and owners, it is true that the DDTC termed them unreliable end users, “flagged” them in its internal database, and sent provisos to some third parties instructing them not to engage in business with those entities. That being said, the harshest result of these actions has been the Thorne license denials and DDTC’s instruction to some third parties to refrain from engaging in business with the Dave Sheer entities and owners. The license denials, however, pertained to a singular group of transactions with Thorne only. Additionally, plaintiffs point to nothing in the record challenging the DDTC’s assertion that it “did *not* add [the] provisos [plaintiffs complain of] to licenses for . . . end-use in South Africa, where the risk of diversion [of arms to the Dave Sheer entities] was determined to be *low*,” not non-existent. The Dave Sheer entities and owners cannot claim a de facto § 127.7 debarment when the DDTC has only prohibited some third parties from engaging in transactions with those plaintiffs. Moreover, as with Thorne, those plaintiffs have never directly availed themselves of the ITAR and AECA process in a way that establishes pretext or an actual, consequential change

in their legal status—they have only ever been listed as “foreign consignees or end-users” on *Thorne’s* license applications.

By essentially only informally requesting further clarification regarding Thorne’s license denials, plaintiffs have not pleaded sufficient facts or provided sufficient evidence of a nefariously imposed complete prohibition on their legal engagement in ITAR and AECA activities so as to overcome the “presumption of legitimacy” that is “accord[ed to] Government records and official conduct.” *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 179 (1991). Because plaintiffs never engaged in the ITAR and AECA processes after Thorne’s license application denials, seemingly unrefuted is the DDTC’s assertion that “none of the Plaintiffs have been deemed ineligible by DDTC or are the subject of . . . a . . . debarment” and that it “will continue to review any license applications submitted where Robert Thorne is the exporter or the [Dave Sheer] entities . . . are the foreign consignees or end-users on a case-by-case basis.”

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Cross References

U.S. Passports Invalid for Travel to North Korea, **Ch. 1.A.4**

Bautista-Rosario v. Mnuchin (litigation regarding Section 7031(c)), **Ch. 1.B.1.a**

Visa restrictions, **Ch. 1.B.5**

U.S. actions against terrorist groups, **Ch. 3.B.1.e**

International Criminal Court (including E.O. 13928 sanctions), **Ch. 3.C.2**

Crystallex v. Venezuela, **Ch. 5.A.1**

PDVSA v. MUFG, **Ch. 5.C.3**

UN Third Committee resolution on “Unilateral Coercive Measures” (sanctions), **Ch. 6.A.3.b**

OAS actions on Venezuela, **Ch. 7.D.1**

Venezuela, **Ch. 9.A.1**

Hong Kong, **Ch. 9.B.7**

Restrictions on Air Service to Cuba, **Ch. 11.A.3**

Actions related to U.S. investors and Chinese companies, **Ch. 11.G.1**

Sudan, **Ch. 17.B.5**

Other actions in response to Iran, **Ch. 18.A.2**

Iran, **Ch. 19.B.2.a**

U.S. export policy for unmanned aerial systems (“UAS”), **Ch. 19.C.2**

Chemical weapons in Syria, **Ch. 19.D.1**

CHAPTER 17

International Conflict Resolution and Avoidance

A. MIDDLE EAST PEACE PROCESS

See Chapter 9 for discussion of the agreements to normalize relations with Israel (the Abraham Accords).

In January of 2020, President Trump delivered to Israeli Prime Minister Benjamin Netanyahu “Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People,” (“Vision for Peace”) an 80-page document which Prime Minister Netanyahu endorsed. See January 28, 2020 joint statements, available at <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-prime-minister-netanyahu-state-israel-joint-statements/>. A White House fact sheet on the Vision for Peace, including a link to the full document, is available at <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trumps-vision-peace-prosperity-brighter-future-israel-palestinian-people/>.

On February 13, 2020, the U.S. Mission to the UN released a statement by Ambassador Craft on the release by UN High Commissioner for Human Rights Michelle Bachelet of a database of companies doing business in Israeli-controlled territories. Ambassador Craft’s statement follows and is available at <https://usun.usmission.gov/statement-by-ambassador-craft-on-the-release-of-a-database-of-companies-doing-business-in-israeli-controlled-territories/>. Secretary Pompeo also condemned the UN High Commissioner’s publication of the database, calling on other UN member states to reject the boycott, divestment, and sanction (“BDS”) campaign, in a press statement, available at <https://2017-2021.state.gov/un-office-of-the-high-commissioner-for-human-rights-database-report-release/index.html>. On November 19, 2020, Secretary Pompeo announced the policy of the United States opposing the BDS campaign and directing the identification of organizations engaging in

anti-Semitic BDS activities. The press statement, available at <https://2017-2021.state.gov/identifying-organizations-engaged-in-anti-semitic-bds-activities/>, further explains that the State Department will ensure that its funds are not used to support the global BDS campaign and that foreign assistance funding is not provided to organizations engaged in anti-Semitic BDS activities.

* * * *

Earlier this week the Security Council met to discuss President Trump's Vision for Peace, and used that opportunity to speak as one in reinforcing the importance of dialogue and the role of the international community in supporting good-faith engagement between the Palestinians and Israelis. It is thus appalling to me that UN High Commissioner for Human Rights Michelle Bachelet decided yesterday to release a database of international companies doing business in Israeli-controlled territories. This database was created by the discredited UN Human Rights Council with the intent to fuel economic retaliation against listed companies.

The publication of this database is shameful, and only serves to further divide the very people we are trying to bring together. We expect more from the leadership of the UN to foster reconciliation and communication, while not being a source of division. In releasing this database, the High Commissioner falls prey, by intent or accident, to the very impulses that have impeded the path to peace for seventy years. UN leadership, including the Secretary-General, must make their views and voices heard so there can be no mistaking the UN's intentions as they pertain to peace in the Middle East.

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On September 14, 2020, Jason Mack, counselor for economic and social affairs for the U.S. Mission to the UN, provided the U.S. explanation of vote on a resolution on the repercussions of the Israeli occupation on the living conditions of Palestinians. That explanation of vote is excerpted below and available at <https://usun.usmission.gov/explanation-of-vote-on-the-resolution-on-the-economic-and-social-repercussions-of-the-israeli-occupation-on-the-living-conditions-of-the-palestinian/>.

* * * *

The United States is disappointed yet again at the presentation of a one-sided and biased resolution, which we cannot support. The resolution before us, during this 2021 ECOSOC session, is virtually identical to those previously considered by ECOSOC—its deficiencies should be well known to this body by now.

We remain very concerned about the decidedly one-sided bias against Israel that still exists within the United Nations' Economic and Social Council. This resolution, like others before it, as well as the accompanying report, do nothing to advance the aspirations of the Palestinians and Israelis for a more secure, peaceful, and prosperous future. The resolution and

the report are unbalanced, and unfairly single out Israel in a forum that is not intended to be politicized.

The only realistic path to end this conflict is through negotiations aimed at achieving a comprehensive and lasting peace. Biased and counterproductive resolutions and reports like these have no place in our discourse. Rather than perpetuating politicized resolutions and reports such as this, the international community should rally around productive and tangible efforts that improve the situation on the ground.

For example, the historic Abraham Accords breakthrough is the most significant step toward peace in the Middle East in over 25 years. The United Arab Emirates (UAE) is the first Arab state to recognize Israel since the Israel-Jordan Peace Treaty was signed on October 26, 1994; and just last week, the Kingdom of Bahrain joined the UAE in establishing full diplomatic relations with Israel. The countries have committed to the exchange of embassies and ambassadors, and have begun cooperation in a broad range of fields including education, healthcare, trade, and security. Expanded business and financial ties between these thriving economies will accelerate growth and economic opportunity across the Middle East. The deal provides a foundation for further advances toward regional peace in the future. The Accords will allow further exploration of the U.S. Vision for Peace which lays out a comprehensive, fair, realistic and lasting peace between Israel and the Palestinians and in the region.

The United States stands ready to help promote economic security. The United States will work with all parties to improve conditions and promote the cause of peace, but resolutions such as this do nothing to improve the situation. As such, we have no choice but to vote against this resolution.

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B. PEACEKEEPING AND CONFLICT RESOLUTION

1. UN Security Council Resolution on Ceasefire during the COVID-19 Pandemic

On July 1, 2020, the UN Security Council adopted resolution 2532, calling for an immediate cessation of hostilities in all situations on its agenda, responding to the UN Secretary General's call for a worldwide ceasefire to combat the coronavirus pandemic. S.C. Res. 2532 (July 1, 2020). The U.S. explanation of vote on the resolution is excerpted below and available at <https://usun.usmission.gov/explanation-of-vote-on-the-resolution-on-covid-19/>.

* * * *

Throughout our engagement in fighting the spread of this pandemic, we have consistently emphasized the need for complete transparency, objectivity, and the timely sharing of public health data and information with the international community. We have also stressed the importance of collecting accurate, science-based data and analyzing the origins, characteristics, and spread of the virus. While the United States generally supports the resolution voted on today, we would like to note that it does not include crucial language to emphasize transparency and

data-sharing as critical aspects in fighting this virus. We consistently expressed this concern throughout the consultation process on this resolution.

Additionally, we would like to note that the United States supports the Secretary-General's call for a global ceasefire, while recognizing the imperative for critical counterterrorism operations to continue the fight against terrorists who seek to exploit this pandemic and that of course nothing in this resolution can or is intended to prejudice actions by States in the exercise of their inherent right of sovereignty and self-defense, consistent with international law. We welcome efforts by parties to armed conflicts to respect existing cease-fire agreements and urge continued efforts to negotiate new humanitarian ceasefires in implementation of the political commitments expressed in this resolution.

The United States continues to lead the world's humanitarian and health response to the COVID-19 pandemic. We are working directly with governments and authorities, multilateral organizations within their existing mandates, non-governmental organizations, the private sector, faith-based, and other organizations responding on the ground to combat this virus.

That said, the United States remains seriously concerned about terrorist groups posing as humanitarian actors to exploit and benefit from humanitarian assistance, which is why Member States must remain committed to fulfilling their counterterrorism finance-related obligations, including by implementing appropriate domestic legislation in compliance with Security Council Resolution 2462 (2019) and other international obligations. Therefore, we note that nothing in this resolution is meant to call into question the lawful application of domestic laws, as required by and in a manner consistent with international law, to prevent the provision of financing and other material support to terrorists and terrorist groups, or to call into question non-arbitrary restrictions on humanitarian assistance that may be imposed consistent with international humanitarian law.

The United States has already made available more than \$1.3 billion in emergency health, humanitarian, and economic assistance to combat COVID-19, in addition to the funding we already provide to NGOs and international organizations. This assistance is part of more than \$12 billion allocated by agencies and departments across the U.S. government to benefit the global response, including vaccine and therapeutics development, preparedness efforts, and humanitarian assistance.

* * * *

2. Afghanistan

Work continued in 2020 toward a peace agreement in Afghanistan. A February 21, 2020 press statement, available at <https://2017-2021.state.gov/next-steps-toward-a-u-s-agreement-with-the-taliban/>, looks ahead to the signing of a U.S.-Taliban agreement regarding significantly reducing violence. On February 29, 2020, senior administration officials provided a briefing on next steps in the peace process, which is available at <https://2017-2021.state.gov/briefing-with-senior-administration-officials-on-next-steps-toward-an-agreement-on-bringing-peace-to-afghanistan/>, and excerpted below. One of the officials continued to answer questions on February 29, see <https://2017-2021.state.gov/senior-administration-official-on-next-steps-toward-an-agreement-on-bringing-peace-to-afghanistan/>.

* * * *

...[W]e're five days into a reduction in violence agreement that was announced last Saturday. The United States, the Taliban, and the Afghan Government agreed to this and to hold this in place for seven days in advance of announcing the start of talks to seek a political settlement for the conflict in Afghanistan.

During this reduction in violence period, the Taliban have pledged to not undertake major attacks of any sort, including car bomb attacks, suicide bombings, rocket attacks, IEDs. The United States, for its part, has pledged to hold off on any air strikes and also raids on Taliban facilities, including other major military actions with the exception of the ISIS forces located on the Afghan border. And the Afghan National Army has likewise committed to withhold any major military activities.

Over the five—soon to be six—days in Afghanistan, if you are going by their time, we have seen a substantial reduction in violence. In addition to the substantial reduction of violence, we've also seen a level of commitment by all the parties, including the Taliban, to enforce the reduction in violence upon their various constituencies. We have established a communications channel between us and the Taliban that works in Doha for notifications, or questions, or concerns, and we have seen that used not only ...for us to raise concerns, but also for us to receive information from Taliban officials regarding their efforts or disavowing some of the acts of violence that we still have seen happen in Afghanistan.

So generally, it's a level of both ability and political will that we hoped to have seen from the Taliban, and as we progress towards Saturday, we are expecting at this point that we will be able to confirm that it met our expectations to get us to the signing that will happen on that day. ...On Saturday, Secretary of State Pompeo will be in Doha to sign an agreement that will commit the United States and the Taliban to the launch of a ... negotiation towards a political solution, political settlement, to the war in Afghanistan. At the same time in Kabul, Secretary of Defense Esper will be releasing a joint statement with the Afghan president likewise committing the Afghan Government to this process and welcoming the start of these negotiations towards what will hopefully be a permanent end to the conflict in Afghanistan.

As part of that kickoff, the United States will be committed to make an initial reduction in our forces in Afghanistan to a level that General Miller has identified as necessary to fulfill his mission. I think many of you have heard General Scott Miller on this issue, but he has spoken of 8,600 troops as being the necessary contingent to meet his mission, although he is much less focused on numbers and more focused on achieving the mission that the Secretary of Defense and the Chairman of the Joint Chiefs have given him here as well as with ...our coalition partners in the fight.

That will then be in place during the course of this negotiations, and the reduction in violence will continue, and also it will be our very early objective to try to gain a complete ceasefire in Afghanistan once all the parties are at the table.

The parties will be meeting in Oslo. That negotiation will kick off as soon as each of the various components of that can get their negotiators to Oslo. Our estimate is ...the first half of March. ...Throughout this period, the reduction in violence remains in place, so it will give us a good opportunity to test the durability of the reduction in violence and also perhaps set a better stage for us to move towards a permanent ceasefire once all the parties are at the table.

The parties at the table will be, of course, the Afghan Government and opposition; it will be the Taliban; it will be Afghan civil society, and especially and including women's groups will all be parties for this negotiation at the table. The United States will be present, but this will be an intra-Afghan negotiation.

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On February 29, 2020, Secretary Pompeo announced that the United States had secured separate commitments from the Islamic Republic of Afghanistan and the Taliban to hold negotiations for peace. His remarks after the signing ceremony are available at <https://2017-2021.state.gov/at-a-press-availability-after-the-afghanistan-signing-ceremony/>. His remarks at the signing ceremony are excerpted below and available at <https://2017-2021.state.gov/secretary-michael-r-pompeo-at-afghanistan-signing-ceremony/>.

* * * *

Here's our take on what steps by the Taliban will make this agreement a success.

First, keep your promises to cut ties with al-Qaida and other terrorists. Keep up the fight to defeat ISIS. Welcome the profound relief of all Afghan citizens—men and women, urban and rural—as a result of this past week's massive reduction in violence and dedicate yourselves to continued reductions. It is this significant de-escalation of violence that will create the conditions for peace, and the absence of it, the conditions and cause for failure. All Afghans deserve to live and prosper without fear.

Sit down with the Afghan Government, other Afghan political leaders, and civil society, and start the difficult conversations on a political roadmap for your country. Exercise patience, even when there is frustration. Honor the rich diversity of your country and make room for all views. Afghan governments have failed because they weren't sufficiently inclusive. The Afghan Government of 2020, and indeed the Afghanistan of 2020, is not the same as in 2001. Embrace the historic progress obtained for women and girls and build on it for the benefit of all Afghans. The future of Afghanistan ought to draw on the God-given potential of every single person.

If you take these steps, if you stay the course and remain committed to negotiations with the Afghan Government and other Afghan partners, we and the rest of the international community assembled here today stand ready to reciprocate.

I know there will be a temptation to declare victory. But victory ... for Afghans ... will only be achieved when they can live in peace and prosper. Victory for the United States will only be achieved when Americans and our allies no longer have to fear a terrorist threat from Afghanistan, and we will do whatever it takes to protect our people. The United States will press all sides to stay focused on the goal of a peaceful, prosperous, and sovereign Afghanistan and an Afghanistan free of malign foreign interference where all voices and communities are heard and are represented. This is the only way ... a sustainable peace can be achieved. And for all of us here, and most importantly for the security of the American and Afghan people, this must happen.

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In remarks to the press on March 5, 2020, available at <https://2017-2021.state.gov/secretary-pompeos-remarks-to-the-press/>, Secretary Pompeo referenced the agreement with the Taliban signed in Doha along with the U.S.-Afghan joint declaration as opening a door for lasting peace in Afghanistan and urged both sides “to stop posturing, start a practical discussion about prisoner releases, knuckle down and prepare for the upcoming intra-Afghan negotiations.”

On March 9, 2020, the State Department issued a media note conveying the text of a statement agreed by representatives of the European Union, France, Germany, Italy, Norway, the United Kingdom, the United Nations and the United States of America after the signing of the U.S.-Taliban Agreement at a meeting on March 1, 2020 in Doha, Qatar. The statement follows and the media note is available at <https://2017-2021.state.gov/joint-statement-on-the-signing-of-the-u-s-taliban-agreement-2/>.

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1. [The representatives] Welcomed the important steps, enabled by the United States-Taliban agreement and the United States-Afghanistan joint declaration of February 29, towards ending the war and opening the door to intra-Afghan negotiations scheduled for March 10.
2. Expressed their readiness to work towards a comprehensive and sustainable peace agreement that ends the war, contributes to regional stability and global security, respects the internationally-recognized rights of all Afghans also reflected in the Afghan Constitution, and is honored by all Afghans, including the Government of the Islamic Republic of Afghanistan, political leaders, civil society and the Taliban.
3. Reiterated that a comprehensive and sustainable peace can be achieved only through an inclusive negotiated political settlement among Afghans, in which, notably, women participate meaningfully, and by respecting Afghanistan’s integrity and sovereignty.
4. Reaffirmed that the Islamic Emirate of Afghanistan is not recognized by the international community, and furthermore, the international community will not accept or support the restoration of the Islamic Emirate of Afghanistan.
5. Welcomed the Taliban committing to join a political process and their prospective role in a new post-settlement Afghan Islamic government as determined by the intra-Afghan negotiations.
6. Appreciated the February 22-28 reduction of violence and urged all sides to further decrease violence in order to create an environment conducive to intra-Afghan negotiations.
7. Called on the Taliban and other Afghan armed groups to take concrete steps to ensure that the territory of Afghanistan should not be used by either them or al-Qa-ida, Daesh, or other international terrorist groups to threaten or attack other countries.
8. Stated their expectations that all sides will observe a ceasefire for the duration of intra-Afghan negotiations to enable participants to reach agreement on a political roadmap for Afghanistan’s future and the modalities of a permanent and comprehensive ceasefire.

9. Called on all Afghans to begin discussions immediately on issues of mutual concern, such as prisoner releases and a ceasefire.

10. Reaffirmed existing commitments to provide political support and economic and development assistance to a future Afghan government, provided that it preserves and respects the internationally-recognized rights of all Afghans also reflected in the Afghan Constitution, including for women, youth and minorities, and responds to the desire of Afghans to build on the gains achieved since 2001.

11. Reaffirmed existing commitments to continue assistance to the Afghan National Defense and Security Forces on a sustainable basis.

12. Took note of the readiness of the United States upon the commencement of the intra-Afghan negotiations to engage with other members of the United Nations Security Council and Afghanistan to review the status of sanctions designations in order to support the peace process, noting that Taliban action to further reduce violence, make sustained efforts to advance intra-Afghan negotiations, and otherwise cease to engage in or support activities that threaten the peace, stability and security of Afghanistan or other countries will affect the review.

13. Encouraged all countries to support the Afghan people and contribute to a lasting peace settlement in the interest of all.

14. Welcomed all international efforts that support the Afghan peace process.

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On March 9, 2020, the day of President Ghani's inauguration, Secretary Pompeo expressed U.S. opposition to the use of force and any action to establish a parallel government in Afghanistan and encouraged reaching an agreement on an inclusive government that will work toward peace. The March 9, 2020 press statement is available at <https://2017-2021.state.gov/statement-on-presidential-inaugurations-in-afghanistan/index.html>.

In a March 10, 2020 press statement, available at <https://2017-2021.state.gov/on-intra-afghan-negotiations-and-the-road-to-peace/>, the State Department spokesperson explained that the presidential election crisis in Afghanistan had delayed the start of intra-Afghan negotiations, which had been planned for March 10, 2020. The statement further conveys:

President Ghani has told us he is consulting with Dr. Abdullah and other Afghan leaders and will announce an inclusive [government negotiating] team in the coming few days.

Other challenges remain. The current high level of violence by the Taliban is unacceptable. We acknowledge the Taliban have taken steps to stop attacks against the Coalition and in cities. But they are killing too many Afghans in the countryside. This must change. Violence at these levels risks drawing both sides into a vicious cycle, serves no one, and undermines peace.

Also on March 10, 2020, Acting Deputy Permanent U.S. Representative to the UN Cherith Norman Chalet provided the U.S. explanation of vote on the UN Security Council resolution regarding the February 29 U.S.-Taliban agreement and U.S.-Afghanistan joint

declaration. Ambassador Chalet's statement is excerpted below and available at <https://usun.usmission.gov/explanation-of-vote-on-the-un-security-council-adoption-of-a-u-s-draft-resolution-on-the-u-s-taliban-agreement/>.

* * * *

On February 29th, the United States took a decisive step toward a negotiated peace in Afghanistan with the announcement of a joint declaration with the Afghan government and an agreement with the Taliban. We were pleased to introduce this resolution endorsing the U.S.-Taliban agreement and the U.S.-Afghanistan joint declaration, and we appreciate the Security Council's support for this resolution and the constructive engagement of all of our colleagues during negotiations. The support and engagement of the international community will continue to be critical in the next steps of the peace process. We are especially grateful to His Highness Sheikh Tamim for Qatar's support, and the critical role it played in hosting the talks that led to this momentous occasion.

We are eagerly looking forward to the next steps of the peace process, though unfortunately, the presidential electoral process and unacceptably high levels of violence by the Taliban in Afghanistan have not permitted intra-Afghan negotiations to start on time. Prioritizing an inclusive government and unified Afghanistan is paramount for the future of the country and especially for the cause of peace. To that end, we welcome President Ghani's statement at his inauguration on March 9th that discussions and negotiations will continue for the next two weeks to reach an agreement on an inclusive government—one which unifies the country and prioritizes peace. We also appreciate Dr. Abdullah's March 9th statement underscoring similar commitments to peace and inclusivity. We hope that all parties will resolve their political differences without resorting to violence and come together to focus on peace. Similarly, President Ghani's March 10th decree on a Taliban prisoner release in exchange for prisoners held by the Taliban is a significant measure that brings Afghans one step closer to intra-Afghan negotiations. Significantly, the decree means that technical talks between the Taliban and the Afghan government representatives in Doha—as well as actual releases—can start immediately.

All of this brings Afghans closer to the opportunity to chart a political roadmap for their country's future. For Afghanistan to enjoy international standing, support, and investment, fundamental rights must be safeguarded and championed. We hope the people of Afghanistan seize the opportunity to achieve an historic peace settlement that ends the conflict in Afghanistan; preserves the gains of the last two decades in human rights, basic freedoms, and the meaningful participation of women in political and civil institutions; and ensures that the territory of the Afghan people will never again be used by international terrorists to threaten the world. As part of the agreement endorsed by today's Security Council resolution, the Taliban has made strong commitments to end its relationships with international terrorists and to prevent any group or individual, including al-Qaida, from using Afghanistan to threaten the security of the United States and our allies. We will be carefully monitoring and tracking Taliban progress and we will continually assess whether the Taliban is living up to its side of the bargain.

Other challenges remain. The current high level of violence by the Taliban is not conducive to advancing the peace process. We acknowledge the Taliban have taken steps to stop attacks in cities and against major bases. But more needs to be done and we urge them to also reduce violence against Afghan forces in the countryside to give intra-Afghan negotiations and peace the opportunity to succeed. Violence at these levels risks drawing both sides into a vicious

cycle, serves no one, and undermines peace. As Secretary Pompeo has stated, we expect the Taliban and all Afghans to embrace the progress that has been made for women and girls, and to build on it. A brighter future for Afghanistan needs to honor the dignity and potential of all Afghans, taking care to respect the rights of women and those on the margins of society. With that in mind, the text of today's Resolution makes clear that the Security Council does not support the restoration of the Islamic Emirate—and most especially its oppressive policies against women, girls, and minorities. We urge the Taliban to learn the negative lessons of the past and be prepared to respect the contributions of all Afghan citizens to the country's development.

Mr. President, as illustrated by our Joint Declaration with the Government of Afghanistan, the United States will continue to steadfastly support Afghanistan. This occasion does not mark the end of the close U.S. partnership with the government and people of Afghanistan, but a new beginning. After almost two decades and more than a trillion dollars in investment in Afghanistan's security and development, the United States is not walking away. We will continue to invest in a durable relationship with the Afghan government, including through development and security assistance. We will maintain our engagement with the Afghans to help them achieve a sovereign, unified Afghanistan at peace with itself and its neighbors.

The developments endorsed by this resolution are the product of more than a year of unprecedented U.S. diplomatic engagement with the Taliban, in coordination with our partners in Afghanistan, the region, and around the world. They were made possible by 19 years of military, diplomatic, and economic engagement by NATO and our other coalition partners. We are proud of our achievements. The Afghanistan of today is not the Afghanistan of 2001 and that is because of the sincere efforts of Afghans working hand in hand with their friends in the international community. This is a hopeful moment, but it is only the beginning. The United States is conscious of the long-held desire of the Afghan people for peace. And as we have in the past, we will continue to support the goal of a lasting peace in Afghanistan. We hope that you will join us in doing so as well.

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On March 23, 2020, the State Department issued a press statement from Secretary Pompeo after he traveled to Kabul to urge the leaders of Afghanistan to compromise and agree on an inclusive government. The press statement is available at <https://2017-2021.state.gov/on-the-political-impasse-in-afghanistan/> and announces a reduction in U.S. assistance to Afghanistan by \$1 billion in 2020 in response to the "leadership failure," as elaborated below.

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The United States remains convinced that a political settlement is the only solution to the conflict. We note that Afghan leaders are acting inconsistently with their commitments under the Joint Declaration, chiefly failing to establish an inclusive national team to participate in intra-Afghan negotiations or take practical steps to facilitate prisoner releases by both sides as a

confidence-building measure to reach a political settlement and achieve a permanent and comprehensive ceasefire. We are proceeding with the conditions-based withdrawal of our forces in accordance with the U.S.-Taliban agreement.

Should Afghan leaders choose to form an inclusive government that can provide security and participate in the peace process, the United States is prepared to support these efforts and revisit the reviews initiated today.

The United States is not abandoning our partnership with Afghanistan, nor our commitment to support the Afghan security forces, but reviewing the scope of our cooperation given the irresponsible actions of Afghan leaders. To illustrate America's steadfast commitment to the Afghan people, the United States will be providing \$15 million in assistance to help combat the spread of the coronavirus in Afghanistan.

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On September 10, 2020, the United States welcomed the announcement that Afghanistan peace negotiations would begin on September 12. See September 10, 2020 State Department press statement, available at <https://2017-2021.state.gov/welcoming-the-launch-of-afghanistan-peace-negotiations/>. The statement includes the following:

Immense sacrifice and investment by the United States, our partners, and the people of Afghanistan have made this moment of hope possible. ...The people of Afghanistan and the international community will be watching closely. The United States is prepared to support as requested.

The United States recalls the commitment by the Afghan government and the Taliban that terrorists can never again use Afghan soil to threaten the United States or its allies. ...

On September 11, 2020, Special Representative for Afghanistan Reconciliation Ambassador Zalmay Khalilzad held a special briefing on the peace negotiations set to begin on September 12. The transcript of the briefing is available at <https://2017-2021.state.gov/special-representative-for-afghanistan-reconciliation-ambassador-zalmay-khalilzad-on-the-afghanistan-peace-negotiations/> and excerpted below.

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For the first time in 40 years, Afghans will sit together, the government delegation that includes people who are not part of the government as well as four very distinguished women, civil society, political groups will be sitting with an authoritative Taliban delegation to discuss and hopefully come to an agreement on a political roadmap to end the protracted war that Afghanistan has had. The people of Afghanistan demand an end to the war. We support them in that effort. And this meeting tomorrow is one of the key requirements, a product of the U.S.-Taliban agreement which was signed on February 29th.

That agreement had three other elements, one which is a timetable for phased and condition-based U.S. withdrawal of forces; two, a commitment by the Taliban that they will not allow terrorist groups, including al-Qaida, to threaten the United States, U.S. allies from the territories that they control and if they became part of a future government that commitment will continue; and the other key part was a comprehensive formal ceasefire. That will be one of the subjects of the negotiations between the two sides.

On that day we also had a ... joint declaration with the Afghan Government where the Afghan Government supported these elements that I described, meaning that Afghanistan, the territory that the government controls and a post-peace Afghanistan, would not allow terrorists such as al-Qaida to threaten the United States, ... and our allies, and that we expect to have a good and enduring relationship with Afghanistan.

We also would like to clarify that these negotiations are an important achievement but that there are difficulties, significant challenges on the way to reaching agreement. This is a test for both sides, for the Taliban and the government. Can they reach an agreement despite differences, in terms of their visions for the future of Afghanistan? We are prepared to assist if our assistance is needed, but this is a new phase in the diplomacy for peace in Afghanistan. Now we are entering a process that is Afghan-owned and Afghan-led. There will be no mediator and no facilitator when Afghans meet with each other. They will be talking to each other. The secretariat of the conference will also be carried out, that function, by the Afghans from the two sides.

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Secretary Pompeo delivered a statement at the opening ceremony for the Intra-Afghan Negotiations in Doha, Qatar on September 12, 2020. His remarks are excerpted below and available at <https://2017-2021.state.gov/secretary-michael-r-pompeo-at-intra-afghan-negotiations-opening-ceremony/>.

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... We welcome the Taliban commitment not to host international terrorist groups, including al-Qaida, nor to allow them to use Afghan territory to train, recruit, or to fundraise.

We welcome the same commitments by the Government of the Islamic Republic of Afghanistan that they should never permit their nation to serve as a base for international terrorists to threaten other countries.

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On our part ..., the United States is a proponent of a sovereign, unified, and representative Afghanistan that is at peace with itself and with its neighbors.

I want to elaborate on each of those three words. What do we mean when we say “sovereign, unified, and representative?”

First, sovereign: We know that Afghans yearn to determine their own affairs. It’s why you all are here. Free from outside interference. We hope you will enjoy cooperation and mutual respectful relations with your neighbors and other international partners and that you will indeed become self-reliant, liberated from the shackles of dependence on others.

Second, unified: We know the tremendously negative and divisive impact that four decades of violence have had on Afghanistan and on the Afghan people. Through an inclusive negotiation process, ... you each have an opportunity ... to overcome your divisions and reach agreement on a peaceful future for the benefit of all Afghans, and if ... Afghans embrace their common interest in a united Afghanistan while respecting the rich diversity of the country's people, we believe with all our hearts that a durable peace is in fact possible.

I would urge each of you to engage the representatives of all Afghan communities, including women, ethnic and religious minorities, and the victims of your country's long war. These historic negotiations should produce a political arrangement that accommodates competing views and rejects the use of violence to achieve political aims.

Third, representative: Look, the choice of your political system is of course yours to make. In the United States, we've found that democracy—notably the principle of peaceful resolution and rotation of political power—works best. Democratic systems reflect the choices of the majority while protecting the human rights of everyone as they are made in the image of God. This model ... has yielded great peace and prosperity for us and for other democratic nations. And while it is indeed the case that no one size fits all solution, the United States doesn't seek to impose its system on others. We believe firmly that protecting the rights of all Afghans is indeed the best way for you to break the cycle of violence.

... We urge you to make decisions that move away from the violence and the corruption and towards peace and development and prosperity.

I urge you to preserve and to build upon the advancement of the social, economic, and political gains that Afghanistan has achieved in the past 20 years.

To cite one bright example, the expansion of women's participation in public life, as illustrated by the presence here today of four prominent woman negotiators on the Islamic Republic team—a landmark achievement. A landmark achievement of the U.S.-Taliban agreement was setting the stage for these negotiations. We welcome your responsibility, your assumption of that responsibility.

I would urge you—as you make your decisions you should keep in mind that your choices and conduct will affect both the size and scope of United States future assistance. Our hope ... is that you will reach a sustainable peace and our goal is an enduring partnership with Afghanistan.

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On November 27, 2020, the State Department published as a media note the joint communiqué issued by the participants in the 2020 Afghanistan Conference. The communiqué follows and the media note is available at <https://2017-2021.state.gov/communique-on-the-2020-conference-on-afghanistan/>.

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The 2020 Afghanistan Conference took place at the Palais des Nations in Geneva with participants from 66 countries and 32 international organizations. The Conference was held in a virtual format and it was co-hosted by the Government of Islamic Republic of Afghanistan, the

Government of Finland and the United Nations. The event took place under extraordinary circumstances, at the beginning of the final four-year cycle of the Transformation Decade, shortly after the start of the Afghanistan Peace Negotiations and during the COVID-19 pandemic. At the Conference, the participants renewed their long-term commitment to support Afghanistan in seizing this historic opportunity on its path towards peace, prosperity and self-reliance and to continue efforts for the benefit of all Afghans. The participants committed to reconvene to review progress and pledges at a Senior Officials Meeting in 2021 and in a Ministerial Meeting in 2022.

1. We, the Government of Islamic Republic of Afghanistan (hereafter called the Afghan Government) and the international community along with other partners underline our commitment to establish a renewed partnership to strengthen a sovereign, unified, democratic and peaceful Afghanistan that is on a path towards prosperity and self-reliance for the benefit of all Afghans. Under this partnership, we welcome the Afghanistan National Peace and Development Framework II and the Afghanistan Partnership Framework and undertake to be mutually accountable in supporting the efforts of the Afghan people to achieve tangible results in the field of peace-building, state-building, and market-building.

2. We acknowledge the widespread and sincere demand of the Afghan people for lasting peace and an end to the war, and recognize that a sustainable peace can be achieved only through an Afghan-led, Afghan-owned peace process that is internationally supported. We call for earnest efforts by all to realize lasting peace and stability in Afghanistan.

3. In keeping with the United Nations Security Council Resolution 2513, we welcome the start of the Afghanistan Peace Negotiations on September 12, 2020, aiming for an inclusive political settlement and a permanent and comprehensive peace. We further welcome the efforts of all regional and international partners of Afghanistan in this regard and recognize the efforts of the Government of Afghanistan and of all other Afghan actors, including the two negotiating teams in facilitating the Afghanistan Peace Negotiations. We acknowledge that significant progress in the peace negotiations in the spirit of the United Nations Security Council resolution 2513 is a key factor for the delisting within the United Nations Security Council Committee established pursuant to resolution 1988(2011).

4. We call for an inclusive and meaningful peace process with the participation of women, youth and ethnic, religious and other minorities. We affirm that any political settlement must protect the rights of all Afghans, including women, youth and minorities. It should respect the strong desire of Afghans to achieve durable peace and prosperity, and must respond to the strong desire of Afghans to sustain and build on the economic, social, political and development gains achieved since 2001, including adherence to the rule of law, respect for Afghanistan's international obligations, and improving inclusive and accountable governance.

5. We underscore the importance of the Afghan Government's efforts, which the international community is committed to support, to fulfill its commitment to a unified, sovereign, peaceful and democratic Afghanistan. We emphasize the need for a meaningful role for civil society, including the independent media, in this process. While respecting the sovereign right of the Afghan people to decide on the nature of the future political settlement, we underscore that the outcome, as outlined in paragraph four, above, will shape the future of international support and assistance.

6. We highlight that international development assistance and South-South cooperation bear great importance to Afghanistan's economic and social development. We call

on the international community to continue their financial support to Afghanistan, with the aim of helping Afghan people to achieve peace, reconstruction and development at an early date.

7. We acknowledge that security and stability are vital to sustainable development. We express deep concern about the continuing high level of violence and the security situation in Afghanistan, especially the number of civilian casualties and call for an immediate permanent and comprehensive ceasefire, and full respect of International Humanitarian Law.

8. We further express deep concern about the threat posed by terrorism to Afghanistan and the region, express serious concern over the continuing presence of ISIL, Al-Qaida as well as other international terrorist organizations and their affiliated groups in Afghanistan. We condemn in the strongest terms all terrorist activity and all terrorist attacks and reaffirm the importance of ensuring that the territory of Afghanistan should not be used by ISIL, Al-Qaida or other international terrorist groups to threaten or attack any other country, and that neither the Taliban nor any other Afghan entity, group or individual should support terrorists operating on the territory of any country.

9. We emphasize the importance of supporting the Afghan Government in capacity building, in particular of the Afghan National Defense and Security Forces (ANDSF) including the Afghan National Police (ANP) in securing their country and in their fight against terrorism.

10. We stress the important role and long-term commitment of the United Nations in promoting peace and stability in Afghanistan and welcome UNAMA's ongoing efforts in the implementation of mandated tasks.

11. In the spirit of mutual accountability, we underscore the importance of the Afghan Government's actions and the commitment from the international community to support the efforts of the Government in fulfilling its commitments to improve governance and the rule of law, including transitional justice as an essential component of the ongoing peace process, budget execution and the fight against corruption throughout the country.

12. We highlight the importance of regional cooperation, with a view to promoting stability and peace, as well as assisting Afghanistan in utilizing its unique geopolitical and geographical position as a land bridge to promote regional cooperation and connectivity, based on transparency, openness and inclusiveness with the aim of enhancing dialogue and collaboration to advance shared goals of economic development across the region.

13. We express concern over the cultivation, production, trade and trafficking of illicit drugs in Afghanistan which continue to pose a threat to peace and stability in the region and beyond, and call upon the Afghan Government and the international community to strengthen efforts to counter this threat through international, regional and sub-regional cooperation.

14. We acknowledge the economic development achieved by Afghanistan with the support of the international community in the past years, notably through the Afghanistan Reconstruction Trust Fund (ARTF) and recall the critical role the private sector, revenue generation and a conducive business climate, that includes the participation of women, will continue to play in this regard. We highlight the need for renewed vigor in implementing economic reforms and undertake to renew our long-term support and assistance to the Afghan people in achieving the Sustainable Development Goals.

15. We call for all relevant parties to work closely to facilitate the voluntary, safe, dignified and sustainable return, rehabilitation and reintegration of the Afghan refugees and express appreciation to those regional countries, in particular Pakistan and the Islamic Republic of Iran, that continue to host them.

16. We further call for continued cooperation between the Afghan Government, international partners, and neighboring countries to stem irregular migration through enhanced collaborative efforts to fight migrants smuggling and human trafficking networks.

17. We note that humanitarian aid will continue to be needed for the foreseeable future and access of humanitarian actors must be ensured throughout the country in full abidance to humanitarian principles.

18. We recognize the profound challenges posed by the COVID-19 pandemic and climate change, and their impact on Afghanistan and the well-being of its citizens, notably women, and express continued readiness to support the Afghan people towards a socially, economically and ecologically sustainable recovery.

19. We look forward to a Senior Officials Meeting in 2021 and a biennial ministerial meeting in 2022 to review progress as Afghanistan is approaching the end of its Transformation Decade.

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On December 2, 2020, the United States welcomed the agreement announced on that day by the government of Afghanistan and the Taliban, the culmination of the efforts described, *supra*. The press statement from Secretary Pompeo on the agreement is excerpted below and available at <https://2017-2021.state.gov/the-united-states-welcomes-major-milestone-in-afghanistan-peace-negotiations/>.

The Agreement codifies the rules and procedures the two sides have been negotiating since the start of talks. The teams made a number of important decisions that will guide their negotiations on a political roadmap and a comprehensive ceasefire.

...What has been achieved provides hope they will succeed in reaching a political settlement to this more than forty-year-old conflict. The United States thanks Qatar for its role as host and facilitator of the talks.

...The United States, along with most of the international community, will continue to support the peace process in pursuit of this goal. As negotiations on a political roadmap and permanent ceasefire begin, we will also work hard with all sides in pursuit of a serious reduction of violence and ceasefire.

3. Syria

On January 10, 2020, Ambassador Kelly Craft, U.S. permanent representative to the UN, delivered the U.S. explanation of vote on the UN Security Council resolution on the Syria humanitarian cross-border mandate renewal. Ambassador Craft's statement is excerpted below and available at <https://usun.usmission.gov/explanation-of-vote-on-the-un-security-council-resolution-on-the-syria-humanitarian-cross-border-mandate-renewal-2/>

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The United States abstained from this evening's vote for one reason, and for one reason only: after months of negotiations, this text was the only path forward that would reasonably allow for the delivery of any aid at all to the Syrian people. We could not veto such a measure, as we are committed to supporting innocent Syrians to the greatest extent possible. In abstaining, we are lending a voice to four million Syrians whose welfare has been overlooked for far too long. But I want to be inescapably clear about what just happened.

What we have seen today from the Russian Federation is shocking, comprehensive indifference to human suffering. We are left with a watered-down resolution, wholly inadequate to the needs of the Syrian people, because of the unwillingness of our Russian colleagues to maintain current levels of aid flows. This resolution needlessly places the immediate futures of over one million Syrians in jeopardy. It would be easy to say we were forced into an impossible choice today—a choice between vetoing this measure in a principled stand for aid to all who need it, or sacrificing the principle to secure a small measure of aid for millions of Syrians entering the heart of winter. But this framing lets Russia off the hook far too easily, for it suggests the Council really had no other options.

In truth, we do not find ourselves in this situation because the conditions on the ground no longer allow for aid delivery; as we have heard over and over again from the UN officials, the existing cross-border aid mechanism is working. Nor are we here because of lack of willingness among the other Council members to find a way forward: my Elected-10 colleagues went to great lengths to find a solution that could provide more food and medicine to people. We find ourselves in this situation because the Russian Federation has decided to use deprivation as a weapon against the Syrian people. This is a crisis of Russia's making. It is theirs to own.

Though we are profoundly disappointed by the intransigence of our Russian colleagues, the United States is not willing to play politics with the lives of innocent Syrians. It is the unambiguous conclusion of the UN officials that the humanitarian situation in Syria is steadily worsening. This is why the United States sought to renew all four of the crossings currently authorized by Resolution 2449, and to add a fifth crossing at Tel Abyad in northeast Syria. It is why we did not obstruct a measure to provide at least some aid to the Syrian people.

The record should reflect that any attempts to characterize the humanitarian situation as improving are gross distortions of the truth. I wish to make it clear, that consent by the Syrian authorities is not required in order for humanitarian assistance to be provided through the border crossings, as in all other prior Syria humanitarian resolutions of the Security Council.

Though we are proud of our principled stand to help every Syrian, we are bitterly disappointed at the Council's inability to deliver what the Syrian people so plainly need. It is never right to leave even a single life hanging in the balance, but today, we have handed down this fate to one million people. Today's action is body blow not only to the Council's credibility, but also to its moral authority. And remember: the UN asked for—and the United States strongly supported—a 12-month extension. Tragically, in six months, we will now be here again. Will Russia try one more time to hold this Council hostage? Will we be faced, once again, with Russian attempts to further erode principled humanitarian action?

Moving forward, the United States will do everything in its power to recover the Council's moral authority; we will not fail to remind this body of its obligation to maintain peace and security; we will not tire in our defense of humanitarian principles; and we will not cease in

our work to provide every last Syrian woman, man, and child with the resources they need to survive.

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On March 15, 2020, the State Department released as a media note the text of a joint statement by the governments of France, Germany, the United Kingdom, and the United States on the ninth anniversary of the uprising in Syria. The joint statement is available at <https://2017-2021.state.gov/joint-statement-on-the-ninth-anniversary-of-the-syrian-uprising/> and excerpted below.

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Nine years ago today, tens of thousands of Syrians peacefully took to the streets calling for respect for human rights and the end of government corruption. Instead of heeding the Syrian people's legitimate demands, the Assad regime responded with a ruthless campaign of arbitrary arrests, detentions, torture, enforced disappearances, and violence. As the Syrian conflict enters its 10th year, the Assad regime's brutal pursuit of a military victory has displaced over 11 million people—nearly half of Syria's pre-war population—and killed more than 500,000 Syrians.

The Assad regime must accept the will of the Syrian people who demand and deserve to live in peace and free of shelling, chemical weapons attacks, barrel bombs, airstrikes, arbitrary detention, torture, and starvation.

We express our satisfaction at the liberation by the Global Coalition and the Syrian Democratic Forces of all territory once held by Daesh. However, the threat from Daesh remains, and we are resolved to continue our joint effort through the Coalition to ensure their lasting defeat. We are fighting terrorism with determination and are on the front lines of the fight.

But fighting terrorism cannot and must not justify massive violations of international humanitarian law or continued violence. The reckless military offensive by Assad, Russia, and Iran in Idlib only causes further suffering and an unprecedented humanitarian crisis, as medical and humanitarian infrastructures and workers, as well as civilians, are killed. In its latest bloody assault on Idlib, the Assad regime, backed by Russia and Iran, has displaced nearly one million civilians since December alone, the fastest displacement since the start of the conflict. For the latest ceasefire in northwest Syria to endure, a nationwide ceasefire must be established as called for in UN Security Council Resolution (UNSCR) 2254.

Despite significant efforts by the international community, life-saving assistance is still not reaching large numbers of those in desperate need. As major donors since the beginning of the war, we will continue to support humanitarian assistance to the Syrian people, including through cross-border assistance which is a vital necessity, and we demand that all parties, particularly the Syrian regime and its allies, allow safe, unimpeded and sustained humanitarian access to all people in need in Syria. Yet, we will not consider providing or supporting any reconstruction assistance until a credible, substantive, and genuine political process is irreversibly underway. Absent such a process, reconstruction assistance for Syria would only entrench a deeply flawed and abusive government, increase corruption, reinforce the war economy and further aggravate the root causes of the conflict.

We encourage the international community to continue to provide assistance to Syria's neighbors to share the costs of Syria's refugee crisis. Displaced Syrians must be allowed to return voluntarily and safely to their homes, without fear of arbitrary detention, violation of rights and forced conscription. Yet, the Syrian regime continues to prevent them from doing so.

We will continue to demand accountability for the atrocities committed by the Assad regime and we will continue our efforts to make sure that those who are responsible for crimes against humanity, war crimes, and other violations and abuses are identified and held accountable. The international community must come together to support the collection and release of documentation of violations and abuses of human rights and violations of international humanitarian law, including the critical work of the UN Commission of Inquiry; the UN International, Impartial, and Independent Mechanism for Syria; and the UN Secretary General's Board of Inquiry.

The military solution the Syrian regime hopes to achieve, with backing from Russia and Iran, will not bring peace. We reiterate our strong support for the UN-led process in Geneva and UNSCR 2254 to bring about a peaceful and stable Syria.

We—France, Germany, the United Kingdom, and the United States—demand that the Assad regime stop the ruthless killing and engage meaningfully in all aspects of UNSCR 2254, including a nationwide ceasefire, a reformed constitution, release of arbitrarily detained persons, as well as free and fair elections. A credible political process cannot be limited to attempts at convening a constitutional committee. All Syrian citizens, including citizens who are displaced persons and refugees, should be allowed to participate in free and fair elections, under UN supervision.

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On June 23, 2020, the State Department spokesperson expressed sympathy for the families of civilians killed and those wounded in a terrorist attack in Tel Halaf and an airstrike in Kobane. The statement is available at <https://2017-2021.state.gov/attacks-in-syria/> and also calls for:

sustained focus by all on the critical need for a lasting political resolution to the conflict in Syria, as called for by United Nations Security Council Resolution (UNSCR) 2254 (2015). A continued spiral of violence impedes the hope for any such resolution. We reiterate our strong support for UN Secretary General Guterres' and Special Envoy Pedersen's calls for an immediate nationwide ceasefire and efforts by Special Envoy Pedersen to facilitate a political resolution to the conflict under UNSCR 2254.

On July 11, 2020, Ambassador Craft delivered the U.S. explanation of vote on the UN Security Council resolution on the Syria humanitarian cross-border mandate renewal. Ambassador Craft's statement is excerpted below and available at <https://usun.usmission.gov/explanation-of-vote-on-the-adoption-of-un-security-council-resolution-2533-on-syria-cross-border-humanitarian-aid-deliveries/>.

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For weeks this Council has struggled to come to terms with the efforts of two of its members to end cross-border humanitarian aid to the Syrian people. Good faith negotiations were met with intransigence and contempt, and resolutions repeatedly faced inexplicable veto. But today, the Council showed that resolve and unity is a powerful combination.

Today, the UN Security Council worked on behalf of the very people the Charter set out to protect. The United States thanks co-penholders Belgium and Germany for their responsible stewardship of this negotiation, and once again thanks all of those Council members who stood up for what was right. Today, we saved lives.

Let's not be mistaken, this resolution is not what the United States and a majority of this Council fought for over the course of the past six weeks – and indeed, for the past six months. This resolution is also not what the United Nations, Secretary-General Antonio Guterres, and dozens of NGOs operating in Syria have repeatedly urged this Council to do.

But the United States and the majority of this Council remained determined through nine rounds of voting this week to ensure that UN aid convoys will continue to cross into Syria from Turkey filled with food, vaccines, and other humanitarian items for another year. We have given reassurance and hope to millions of Syrian civilians who have relied on the UN aid mechanism since cross-border operations started in 2014.

To be clear, today's outcome leaves us sickened and outraged at the loss of the Bab al-Salaam and al-Yaroubia border crossings. Behind those locked gates are millions of women, children, and men who believed that the world had heard their pleas. Their health and welfare are now at great risk.

Yet there is no question that the Council's authorization of cross-border humanitarian access through Bab al-Hawa for 12 months is a victory in light of the Russian Federation and the People's Republic of China's willingness to use their veto to compel a dramatic reduction in humanitarian assistance. This solemn victory must not end our struggle to address the mounting human needs in Syria – that fight is far from over. ...

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The following is the text of a Joint Statement by the Foreign Ministers of the Small Group on Syria made on October 22, 2020 and available as a State Department media note at <https://2017-2021.state.gov/joint-statement-by-the-foreign-ministers-of-the-small-group-on-syria-4/>.

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We, the Foreign Ministers of Egypt, France, Germany, Jordan, Saudi Arabia, the United Kingdom, and the United States continue to strongly support a political resolution of the Syrian crisis on the basis of UN Security Council Resolution 2254.

We support the efforts of United Nations Special Envoy for Syria Geir Pedersen to move forward with the political process. A political solution as set out in UNSCR 2254 is the only way to bring a sustainable peace, stability, and security to the Syrian people, and would facilitate

the withdrawal of all foreign forces that came into Syria after 2011. Such a solution must preserve the territorial integrity, unity, and sovereignty of Syria.

We took note of the Constitutional Committee's launch in 2019. We urge continued engagement with the committee to ensure substantial progress on the discussion of the constitution in line with the committee's mandate and procedures. We stand behind Special Envoy Pedersen's efforts to convene the fourth round of meetings, which must discuss substantial issues in order to achieve meaningful progress. Steps should be made to advance all of the other dimensions of the political process, including towards the convening of UN-supervised free and fair elections in a safe and neutral environment as outlined in UNSCR 2254, in which internally displaced persons, refugees, and the diaspora must be able to participate.

After almost 10 years of conflict, the people of Syria have suffered deeply. Hundreds of thousands have been killed and millions forcibly displaced. Now facing COVID-19 and continued economic difficulties, we want to highlight again the importance of providing safe and unhindered humanitarian access for all Syrians currently in need of it, including areas where conditions are noticeably deteriorating, as in Idlib province and South Syria. We would also like to urge the international community to continue supporting Syrian refugees and their hosting countries and communities until Syrians can voluntarily return home in safety, dignity, and security. We also oppose forced demographic change and commit to disburse no assistance for any resettlement of Syrian refugees that is not in line with UNHCR standards.

Additionally, we want to reinforce that efforts toward a political solution in line with UNSCR 2254 must result in progress toward facilitating the safe, voluntary, and dignified return of IDPs and refugees, the release of Syrian detainees, and holding all those responsible for atrocities accountable. We stress the importance of sufficient international support to assist host countries of refugees to help them in their efforts to fulfill the needs of refugees and maintain the resilience of host communities.

There is no military solution that will bring peace, security, and stability to Syria. Progress on the political process as outlined in UNSCR 2254, in addition to the establishment of a nationwide ceasefire also as outlined in UNSCR 2254, remains the only path forward towards a better future for all Syrians.

We reiterate our commitment to the enduring defeat of ISIS and other UN-recognized terrorist groups throughout Syria including in the Northwest and the South, including al-Qaeda and HTS. We express our deep concern regarding the terrorist threat in the South of Syria and commit to supporting humanitarian efforts there. We deplore the possible further internalization of the Syrian conflict by the transfer of combatants, including militants, and equipment by various parties to other areas of conflict.

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4. Armenia and Azerbaijan and Nagorno-Karabakh

On July 13, 2020, the State Department issued a strong condemnation on behalf of the United States of the violence along the border between Armenia and Azerbaijan. See July 13, 2020 State Department press statement from the spokesperson, available at <https://2017-2021.state.gov/violence-along-the-armenia-azerbaijan-international-border/>. The statement includes the following:

We urge the sides to stop using force immediately, use the existing direct communication links between them to avoid further escalation, and strictly adhere to the ceasefire.

As a Co-Chair of the OSCE Minsk Group, the United States remains strongly committed to helping the sides achieve a lasting, peaceful settlement of the Nagorno-Karabakh conflict. We will remain actively engaged in efforts to accomplish that goal.

The United States joins the Minsk Group Co-Chairs in calling for the sides to resume substantive negotiations as soon as possible and in emphasizing the importance of returning OSCE monitors to the region as soon as circumstances allow.

On September 27, 2020, the State Department issued a press statement expressing concern about renewed violence between Armenian and Azerbaijani forces along the Line of Contact in Nagorno-Karabakh, resulting in significant casualties, including civilians. The statement is excerpted below and available at <https://2017-2021.state.gov/escalation-of-violence-between-armenia-and-azerbaijan/>.

The United States condemns in the strongest terms this escalation of violence. Deputy Secretary Biegun called the Foreign Minister of Azerbaijan, Jeyhun Bayramov, and the Foreign Minister of Armenia, Zohrab Mnatsakanyan, to urge both sides to cease hostilities immediately, to use the existing direct communication links between them to avoid further escalation, and to avoid unhelpful rhetoric and actions that further raise tensions on the ground.

The United States believes participation in the escalating violence by external parties would be deeply unhelpful and only exacerbate regional tensions. We urge the sides to work with the Minsk Group Co-Chairs to return to substantive negotiations as soon as possible. As a Co-Chair of the OSCE Minsk Group, the United States remains committed to helping the sides achieve a peaceful and sustainable settlement to the conflict.

On October 5, 2020, the State Department released as a media note the text of a statement by the OSCE Minsk Group countries (the United States, the Russian Federation, and France), calling for a ceasefire in Nagorno-Karabakh. The media note is available at <https://2017-2021.state.gov/joint-statement-calling-for-a-ceasefire-in-nagorno-karabakh/>.

The Co-Chairs of the OSCE Minsk Group issued another joint statement regarding Nagorno-Karabakh on October 25, 2020, which is available at <https://2017-2021.state.gov/osce-minsk-group-co-chair-statement/>, and excerpted below.

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The Co-Chairs met in Washington D.C. on October 24 with Armenian Foreign Minister Zohrab Mnatsakanyan and Azerbaijani Foreign Minister Jeyhun Bayramov, and also participated in a joint meeting with the Foreign Ministers and U.S. Deputy Foreign Minister Stephen Biegun. The Personal Representative of the OSCE's Chairman in Office, Andrzej Kasprzyk, also participated in the meetings.

The Co-Chairs urged the sides to take immediate steps to implement all aspects of the October 10 Moscow Joint Statement in accordance with their commitments, noting that they had reaffirmed these commitments with Paris on October 18. The Co-Chairs also reminded the sides of the October 1, 2020 joint statement of United States President Donald J. Trump, French President Emmanuel Macron, and Russian President Vladimir Putin, as well as the October 5 joint statement of Secretary of State of the United States of America Michael R. Pompeo, Minister for Europe and Foreign Affairs of France Jean-Yves Le Drian, and Minister of Foreign Affairs of the Russian Federation Sergey Lavrov, calling on the sides to cease hostilities immediately and to resume substantive negotiations to resolve the Nagorno-Karabakh conflict under the auspices of the OSCE Minsk Group Co-Chairs.

During their intensive discussions, the Co-Chairs and Foreign Ministers discussed implementing an immediate humanitarian ceasefire, possible parameters for monitoring the ceasefire, and initiating discussion of core substantive elements of a comprehensive solution, in accordance with the October 10 Joint Statement. The Co-Chairs and Foreign Ministers agreed to meet again in Geneva on October 29 to discuss, reach agreement on, and begin implementation, in accordance with a timeline to be agreed upon, of all steps necessary to achieve a peaceful settlement of the Nagorno-Karabakh conflict in accordance with the basic principles accepted by the leaders of Azerbaijan and Armenia.

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5. Sudan

On August 31, 2020, the Troika (the United States, Norway, and the United Kingdom) issued a joint statement on the August 28, 2020 peace agreement in Sudan between the Sudan Revolutionary Front ("SRF") and the Civilian-led Transitional Government of Sudan. The State Department published the joint statement as a media note, available at <https://2017-2021.state.gov/troika-statement-on-the-peace-agreement-between-sudan-armed-opposition-groups/index.html>. Excerpts follow from the August 31, 2020 Troika statement.

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...The peace agreement lays a foundation for sustainable peace and stability in Darfur and other conflict-affected areas that is critical for Sudan's democratic transition.

We recognize the concessions all have made to conclude these negotiations and call on all parties to implement the agreement in good faith, with the same spirit of partnership and

compromise, and in a way that complements the ongoing talks with other groups. The agreement demonstrates the commitment of the parties to prioritize peace as called for in the August 2019 Constitutional Decree. It is an important step in restoring security, dignity, and development to the population of Sudan's conflict-affected and marginalized areas. We believe the formal agreement must be followed up with local peace and reconciliation efforts in the conflict-affected areas.

The Troika urges the Sudan People's Liberation Movement-North-Abdelaziz al-Hilu and the Sudan Liberation Movement-Abdulwahid Al Nur to build on this achievement and to engage in serious negotiations with the Government of Sudan in order to achieve the promise of a comprehensive peace called for by the Sudanese people in the revolution of December 2018. All Sudanese have the right to live in peace and enjoy the same privileges and responsibilities. Only a fully inclusive national process can address fundamental questions relating to the identity of the state.

The non-violent December 2018 Revolution provided a once-in-a generation opportunity to transform Sudan into an inclusive, peaceful, and just state. The recent increase in violence in Darfur, South Kordofan and Blue Nile states, and Port Sudan highlights the challenges to achieving sustainable peace. We urge the government and its partners to establish the Peace Commission and the Transitional Legislative Council and begin to bring accountable administration and justice to all of Sudan. A just Sudan requires neutral and professional security services that protect and safeguard all Sudanese equally. We urge the SRF, other opposition groups, and political parties to put aside differences and personal ambitions for the good of their entire country. The Troika urges Sudan's diverse communities to overcome old enmities and to unite to support this singular opportunity for lasting peace.

We commend the Government of South Sudan for its role in mediating the peace negotiations, and recognize the valuable support provided by the United Nations and regional and bilateral partners that helped make the peace agreement possible.

The Troika will continue to support the Sudanese people in their quest for freedom, peace, and justice.

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On October 3, 2020, a more comprehensive peace agreement was signed by the Government of Sudan and Sudanese opposition groups. The Troika statement on the October 3 agreement follows and is available, as an October 4, 2020 press release from the U.S. Embassy in Juba, at <https://ss.usembassy.gov/troika-statement-on-the-peace-agreement-between-the-government-of-sudan-and-sudanese-opposition-groups/>.

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The United States, the United Kingdom, and Norway (the Troika) welcome the signing of the peace agreement between the Civilian-led Transitional Government, the Sudan Revolutionary Front (SRF), Sudan Liberation Movement-Minni Minawi and Sudanese Alliance on October 3, 2020. The peace agreement marks an important step toward meeting the calls of the Sudanese

people for freedom, peace, and justice, especially for those affected by conflict in Darfur, South Kordofan and Blue Nile states, and other parts of Sudan.

The agreement includes a ceasefire and an increase in participation from the opposition movements and conflict affected communities in the transitional government, as well as mechanisms and commitments for reconciliation, justice and resource sharing. We commend the parties for engaging in the good faith negotiations needed for this comprehensive agreement and thank the Government of South Sudan for its mediation efforts leading to today's signing. We also recognize the role played by the UN and other regional and bilateral partners.

The Troika also welcomes the recent dialogue between the Government of Sudan and the Sudan People's Liberation Movement-North/Abdelaziz al-Hilu and encourages both sides to begin wider negotiations on ending their conflict so all Sudanese can play a part in the transitional process. We call on the Sudan Liberation Movement/Abdulwahid Al Nur and the Government of Sudan to begin talks to achieve a comprehensive peace involving all the major armed movements.

A lasting peace will require dedicated and Sudanese-led efforts to implement this agreement in the spirit of cooperation and compromise. The Troika looks forward to continuing our support for the parties and all Sudanese in the realization of a lasting peace.

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6. South Sudan

The Troika (the governments of the United States of America, the United Kingdom, and the Kingdom of Norway) issued a joint statement on February 11, 2020, urging compromise in order to form a transitional government in accordance with the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan ("R-ARCSS"). The February 11 Joint Statement is excerpted below and available as a State Department media note at <https://2017-2021.state.gov/troika-statement-compromise-essential-to-timely-formation-of-south-sudans-revitalized-transitional-government-of-national-unity/>.

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On February 8, Intergovernmental Authority on Development leaders met during the African Union summit to discuss the peace process in South Sudan. The Troika recognizes the serious efforts that the region has taken to unblock the current impasse and shares its frustration at the lack of progress.

With few days remaining until a power-sharing government is due to form, time has almost run out. We encourage all parties to exercise the spirit of political compromise at the heart of the ...R-ARCSS in these final days.

We urge the government of South Sudan and all opposition parties to work together to resolve issues blocking the formation of an inclusive national unity government by the February 22 deadline. A credible unity government needs to be inclusive as specified in the R-ARCSS and cannot be formed on the basis of unilateral action. Specifically, we encourage all sides, including

the government, to reach consensus on a way forward on the number of states. Refusing to compromise and move forward undermines the agreement, risks the ceasefire, and erodes the trust of the public and the confidence of partners.

During this critical time, we urge all parties to continue to uphold and publicly commit to the permanent ceasefire, to instruct their forces to exercise restraint, and to avoid inflammatory statements. It is of fundamental importance to avoid a return to armed conflict with devastating consequences for the people of South Sudan and for the region as a whole.

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On February 26, 2020, a senior State Department official provided a special briefing on developments in South Sudan's peace process. The briefing is transcribed at <https://2017-2021.state.gov/senior-state-department-official-on-developments-in-south-sudans-peace-process/> and excerpted below.

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But the big development that's just happened is this last Saturday a new unity government as called for in the peace agreement came into being, and that kicked the country into the next phase, which is the transition phase. That's supposed to last three years, and then the country's first national election since its independence. ... [T]he peace agreement is really a fulsome agreement. They call it the revitalized peace agreement, because—the 2015 agreement that failed, they took that as the starting point for the new agreement. And it has a good, healthy reform agenda built into it. And this transition period is when they're supposed to start getting to some of those reforms.

...[A] collaborative approach is what we're looking for. ...The parties had to compromise to get here, but they've done that.

So now the work continues, and starts in some cases. A lot of the obligations for the pre-transition period haven't, in fact, been completed. There's still a lot of work to be done on the security sector.

... So this new government will have to continue that process in the security sector. They'll have to kind of reinvent how they do governance. ...And then the other parts of the peace agreement that should kick in are a recovery program that includes returns of refugees and displaced people; improvements in public financial management and transparency and counter-corruption; transitional justice is a big chapter, so reconciliation and transitional justice. And then there's also a chapter in the peace agreement on a constitutional process that will kick in leading to the elections. And that's where they will have these big national dialogues about federalism and the shape of the country and the shape of the future government that comes after the transition period.

So it's a big agenda, a very big agenda. And this is where we're at right now. A lot of people will be looking to see what the international community's role in this process will be. The key players are the neighbors of South Sudan, the IGAD countries, which were the guarantors of this process. Sudan is the new chairman of the IGAD, but Ethiopia, Kenya, Uganda are all very

key players here. And then if you look at concentric circles, the AU also has a lot of roles to play here in the peace process, and the United Nations. The UNMISS mission is one of the biggest – the biggest by some parameters – peacekeeping mission in the world right now. And we have the pen on the resolutions up in New York on the Security Council, so we and other internationals are paying a lot of attention to this as well.

But the nature of that partnership ... will depend on the nature of this new government. Are they taking responsible decisions that are focused on the needs of their people, or are they taking self-interested decisions based on their own kind of political needs or their needs for power or corrupt finances? And so this is, again, a watchful situation, but it's also more hopeful than it's been in a long time.

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... There's five major parties to this peace agreement, and some of those are umbrellas that include many more parties. So that – the first thing about keeping the ceasefire going is that these parties have confidence in each other, but the citizens' confidence in their government will be a little harder to come by, and we'll be – we won't jump into changing the way we do assistance right away either, so we're very watchful. We don't – for instance, none of our assistance goes to or through the government. We do it – we're the biggest donors there because of the humanitarian emergencies, but our assistance does not go to or through the government because we can't be sure that it will be well spent that way. ...

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...[T]his is not an agreement that we signed. In 2015 we signed that one. This one we've participated in in the sense of putting pressure on, and we have been watchful, and we have been commenting on it and pushing the parties along, but this is not our agreement in that sense. ... We will be watchful, we will ... have healthy skepticism, and we will hopefully see some positive things that we can encourage and enable as well, but we'll also be calling them if they're ... making some of the same mistakes.

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... [W]e reserve the right to use all our diplomatic tools, including more sanctions, if necessary. We have ... all the same authorities in place, and I've made sure that that's clear. ...

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But also, some of the mechanisms that are to be built into the reform efforts, chapter 5 of the peace agreement is on transitional justice. So there's a Truth, Reconciliation, and Healing Commission. There is supposed to be a hybrid court – it's an AU-South Sudan hybrid court for, one would think, the worst perpetrators of human rights atrocities during the war. So that has to be constituted. And all these tools together – there's also other international mechanisms. There's the UN Commission for Human Rights in South Sudan that's established in Geneva. We used to have the pen on that when we were still on the council. And a report just came out from them that covered a whole range of human rights issues, including starvation as a crime, which is

a kind of interesting take, but some of the gender-based violence reporting that's come out of the UN system and our own reporting, it's been just – it's so difficult to deal with. I have to say it's probably one of the most difficult things to kind of comprehend the magnitude of it when I got there, and I've worked in places like Taliban, Afghanistan, and I found South Sudan shocking at the level of sexual violence there.

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The Troika issued a June 9, 2020 joint statement calling on the Government of South Sudan to appoint governors. The June 9 statement is available at <https://2017-2021.state.gov/the-troika-calls-on-the-government-of-south-sudan-to-appoint-governors/index.html> and excerpted below.

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The formation of the Transitional Government of National Unity in February was a major step forward in South Sudan's peace process. Since then, a new challenge has emerged, not just for South Sudan, but for all of us. COVID-19 is a truly global challenge that will have far-reaching political and economic impacts. The Troika will continue to support South Sudan in its response.

We are deeply concerned at the increased levels of violence across South Sudan. This causes immense suffering for the people of South Sudan, puts in jeopardy any gains that have been made, and has implications across the region. In Jonglei, the vacuum created by the lack of governance has exacerbated cycles of intercommunal violence. In Central Equatoria, the ceasefire signed in January between the government and non-signatory groups has broken down and we have seen heavy fighting between forces in recent weeks, with villages destroyed and their communities displaced. Shocking reports of sexual violence against women and girls continue. We are concerned with the impact of the fighting on humanitarian access.

Now is the moment for the President and Vice Presidents, supported by the Intergovernmental Authority on Development and the guarantors of the peace agreement, to agree on the selection of governors and to move forward to govern together for the benefit of the people of South Sudan. Any further delay creates uncertainty that undermines the transition process, slows the fight against COVID-19, and holds back efforts to end the violence that now threatens the hard-won peace.

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On September 12, 2020, the Troika issued a statement on the second anniversary of the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan ("R-ARCSS"). The statement follows and is available at <https://ss.usembassy.gov/statement-of-the-troika-special-envoys-on-the-2nd-anniversary-of-the-revitalized-agreement-on-the-resolution-of-the-conflict-in-the-republic-of-south/>.

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The Troika (Norway, the United States and the United Kingdom) reconfirms its support for the people of South Sudan and shares their desire to see a permanent end to conflict and fear of a return to violence. As we mark the two-year anniversary of the signing of the Revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) we commend progress to date, but express concern at delay. This week, during the first visit of all Troika Envoys to South Sudan since 2017, we urged all sides to demonstrate the leadership needed to deliver progress and maintain peace.

We applaud President Salva Kiir, First Vice President Riek Machar, and all parties to the R-ARCSS for the leadership demonstrated in February through the forming of the Revitalized Transitional Government of National Unity (RTGoNU). Despite this, we remain concerned by the violence that has killed hundreds in recent months, further disrupting livelihoods and humanitarian access, with more than 50% of the population facing severe acute food insecurity. Regardless of the causes of this violence all sides must accelerate efforts to deliver the R-ARCSS in full and see that the national ceasefire is maintained. We also urge those groups who remain outside the R-ARCSS to demonstrate their clear commitment to peace through effective dialogue and honor their commitment in the Rome Declaration to end violence.

Leadership and clear action is needed to address outstanding tasks, such as the finalization of governance structures and the building of a national security apparatus capable of addressing violence across the country regardless of political or ethnic affiliation. Humanitarian access must also be allowed across the country, without impediment. And as partners delivering support to South Sudan we urge the RTGoNU to deliver its commitment on economic reforms, inclusivity and transparency of public finances: these will help increase the confidence of the international community to provide further support and to build a relationship for the development of the country. Participation of women at all levels of government is a key element of the Peace Agreement.

South Sudan's leaders have a real opportunity to deliver the foundation of a stable and prosperous nation for all, and to demonstrate their commitment to peace. We urge them to demonstrate this as a matter of urgency and will work with South Sudan to support progress.

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7. Libya

On February 12, 2020, Acting Deputy Permanent U.S. Representative to the UN Cherith Norman Chalet provided the U.S. explanation of vote on the UN Security Council resolution on a Libya ceasefire. S.C. Res. 2510 (Feb. 12, 2020). The statement is excerpted below and available at <https://usun.usmission.gov/explanation-of-vote-on-the-un-security-council-resolution-on-libya-ceasefire/>.

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[W]e are disappointed that today's vote did not garner unanimous support among the Council members, despite commitments ... by leaders in Berlin, including the Russian Federation.

It's also very unfortunate that foreign mercenaries, including from the Kremlin-linked Wagner Group, are making an inclusive political solution harder to achieve. These actions undermine achieving a political solution facilitated by the UN, and [do] not help the Libyan parties come together, as was stated was necessary. However, through the resolution just adopted, the UN Security Council answers the call of the Libyan people for the international community to stop using their country to wage conflict, to stop driving Libyans from their homes, to help foster respect for international humanitarian law and the need for unhindered, life-saving humanitarian access, and to support their desire for democratic governance; to let schools re-open and health centers restock.

In voting to adopt this resolution, the United States emphasizes the need for additional accountability for those member states that continue to violate the arms embargo, in spite of the explicit commitments made in Berlin—violations that continued immediately following the Berlin Conference. External actors must stop fueling the conflict. Countries that participated in the Berlin conference committed to respect the arms embargo—promises made by the highest level of government. This resolution makes clear that now is the time for all member states to comply with the UN arms embargo.

The United States also reiterates its call for de-escalation and the immediate withdrawal of all foreign forces, including foreign mercenaries and fighters. It is deeply regrettable that despite commitments made at the Berlin Conference, again, some countries, including from around this table, and others mentioned in the Panel of Experts report, continue to send military equipment and personnel to Libya. We remain concerned about reports that forces affiliated with both the Libyan National Army and the Government of the National Accord, are contemplating significant military action in the near future. This resolution clearly supports UNSMIL's important steps to have both the LNA and GNA agree to deescalate and take active steps to establish a lasting ceasefire through ongoing 5+5 Joint Military Commission talks. These talks should continue unimpeded.

The United States also condemns the grave threat to Libya's unity and to the wellbeing of the Libyan people posed by the shutdown of Libyan oil and gas facilities by the Libyan National Army. Libya's energy resources belong to its people, and underly Libya's economic wellbeing. This Council has previously made clear that no party should use these resources as a political bargaining chip. These facilities must be reopened without preconditions. Economic issues are core drivers of the ongoing conflict, and Libya's resources and revenues must also be distributed transparently and equitably for the benefit of all Libyan people.

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On March 21, 2020, the State Department issued a press statement expressing U.S. support for the cessation of hostilities endorsed by the prime minister of Libya. The statement is available at <https://2017-2021.state.gov/the-united-states-calls-on-lna-to-observe-cessation-of-hostilities-in-libya/> and follows:

The United States joins the UN Support Mission in Libya in welcoming the decision of Libyan Prime Minister al-Sarraj to endorse an immediate humanitarian cessation of hostilities to allow local authorities to come together

in response to the unprecedented public health challenge posed by COVID-19. Libyan leaders must urgently prioritize the health of the Libyan people; it is the only responsible thing to do. Now is the time for all actors, including LNA Commander Haftar, to suspend military operations, reject toxic foreign interference, and enable health authorities to fight this global pandemic. The United States has consistently opposed all military escalation and the ongoing transfer of foreign military equipment and personnel into Libya; in that spirit, we support UN-facilitated dialogue among Libyan actors in order to achieve a lasting ceasefire and create the conditions for all actors to halt their military activities and return to meaningful negotiations.

On June 24, 2020, representatives of the U.S. Government and the Libyan Ministry of the Interior (“MOI”) met virtually to resume discussions on militia demobilization. See June 26, 2020 State Department media note, available at <https://2017-2021.state.gov/u-s-gna-discussions-on-militia-demobilization/>. The media note further explains:

The end of the siege of Tripoli has created a renewed opportunity and an imperative to address militias, in the west and in the east of Libya. As part of continued U.S. engagement with all sides, the U.S. delegation will convene a similar conversation with LNA representatives.

The two parties affirmed that all Libyan citizens should enjoy the protection of capable and accountable security forces, free from the dangers posed by militias, armed groups, and foreign fighters. The MOI delegation briefed the U.S. side on its efforts to promote security and a program for militia disarmament, demobilization, and reintegration (DDR), as well as ongoing work to neutralize unexploded ordnance in the Tripoli region. The delegations reaffirmed that armed groups that attempt to spoil the political process or engage in criminal acts do so at a significant risk of international sanctions.

The U.S. delegation stressed opposition to all foreign intervention in Libya and discussed the imperative of an immediate ceasefire and return to UN-facilitated security and political negotiations.

On July 16, 2020, the United States joined other governments in releasing a joint statement on hostilities in Tripoli, excerpted below, and available as a State Department media note at <https://2017-2021.state.gov/joint-statement-on-hostilities-in-tripoli/index.html>.

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The governments of Egypt, France, Italy, the United Arab Emirates, the United Kingdom, and the United States reiterate their deep concern about ongoing hostilities in Tripoli, call for an immediate de-escalation and halt to the current fighting, and urge the prompt return to the UN-

mediated political process. There can be no military solution in Libya. Persistent violence has claimed nearly 1,100 lives, displaced more than 100,000, and fueled a growing humanitarian emergency. The ongoing confrontation has threatened to destabilize Libya's energy sector and exacerbated the tragedy of human migration in the Mediterranean.

We note our deep concerns about the ongoing attempts by terrorist groups to exploit the security vacuum in the country, call on all parties to the Tripoli conflict to dissociate themselves from all such terrorists and individuals designated by the UN Sanctions Committee, and renew our commitment to see those responsible for further instability held accountable.

We fully support the leadership of UN Special Representative of the Secretary-General Ghassan Salamé as he works to stabilize the situation in Tripoli, restore confidence in order to achieve a cessation of hostilities, expand his engagement throughout Libya, promote inclusive dialogue, and create the conditions for the resumption of the UN political process. We need to re-energize UN mediation, which aims to promote a transitional government representing all Libyans, prepare for credible parliamentary and presidential elections, enable a fair allocation of resources, and advance the reunification of the Central Bank of Libya and other Libyan sovereign institutions. We also call on all UN member states to fully respect their obligations to contribute to Libya's peace and stability, prevent destabilizing arms shipments, and safeguard Libya's oil resources in accordance with Security Council resolutions 2259 (2015), 2278 (2016), 2362 (2017), and 2473 (2019). Finally, we remind all Libyan parties and institutions of their responsibility to protect civilians, safeguard civilian infrastructure, and facilitate access to humanitarian supplies.

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8. Yemen

On January 28, 2020, the State Department released a press statement expressing alarm at the escalation of violence in Yemen. The statement, available at <https://2017-2021.state.gov/escalation-of-violence-in-yemen/>, calls on

all parties to put the needs of the Yemeni people first and immediately return to restraint. The Houthis must cease attacks on Saudi territory. De-escalation is a vital steppingstone for UN Special Envoy Martin Griffiths' efforts to bring the parties in Yemen to a political settlement. The United States will continue to work with our international partners to bring peace, prosperity, and security to Yemen.

C. CONFLICT AVOIDANCE AND ATROCITIES PREVENTION

Congressional Report under the Elie Wiesel Genocide and Atrocities Prevention Act

On August 4, 2020, Secretary Pompeo announced that the second annual report under the Elie Wiesel Genocide and Atrocities Prevention Act of 2018, Pub. L. No. 115-441, Section 5 ("the Elie Wiesel Act") had been submitted to Congress. The press statement

making the announcement is available at <https://2017-2019.state.gov/submission-of-the-second-congressional-report-pursuant-to-the-elie-wiesel-genocide-and-atrocities-prevention-act-of-2018/>. As discussed in *Digest 2019* at 607, the Elie Wiesel Act took effect in January 2019.

[T]he U.S. Government has made significant progress in preventing, mitigating, and responding to atrocities globally. We have enhanced early warning, strengthened civil society and multilateral engagement, and increased the capacity of U.S. government personnel to coordinate, integrate, and institutionalize atrocity prevention across our foreign policy. The Elie Wiesel Act and the U.S. government's atrocity prevention efforts serve as a model to the world.

Preventing atrocities is critical to promote U.S. values, including respect for human rights, the sacred value of life, and fundamental freedoms. The 2017 U.S. National Security Strategy states, "No nation can unilaterally alleviate all human suffering, but just because we cannot help everyone does not mean that we should stop trying to help anyone." We will not ignore the suffering of those who experience atrocities. We will continue to promote accountability for perpetrators of genocide and other atrocities.

Cross References

Accountability proceedings and mechanisms, **Ch. 3.C.3**

Claims against the Palestinian Authority and PLO under the Promoting Security and Justice for Victims of Terrorism Act of 2019, **Chapter 8.A**

South Sudan, **Ch. 9.A.3**

Libya, **Ch. 9.A.4**

Israel, **Ch. 9.B.8**

Israel-Lebanon maritime boundary, **Ch. 12.A.3**

Syria sanctions, **Ch. 16.A.3**

Chemical weapons in Syria, **Ch. 19.D.1**

CHAPTER 18

Use of Force

A. GENERAL

1. January U.S. Air Strike in Iraq

On January 8, 2020, U.S. Permanent Representative to the UN Kelly Craft provided a letter to the president of the Security Council, in accordance with Article 51 of the UN Charter reporting the actions taken in self-defense. U.N. Doc. No. S/2020/20. The body of the letter follows.

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In accordance with Article 51 of the Charter of the United Nations, I wish to report, on behalf of my Government, that the United States has undertaken certain actions in the exercise of its inherent right of self-defence. These actions were in response to an escalating series of armed attacks in recent months by the Islamic Republic of Iran and Iran-supported militias on United States forces and interests in the Middle East region, in order to deter the Islamic Republic of Iran from conducting or supporting further attacks against the United States or United States interests, and to degrade the Islamic Republic of Iran and Islamic Revolutionary Guard Corps Qods Force-supported militias' ability to conduct attacks. These actions include an operation on 2 January 2020 against leadership elements of Iran's Islamic Revolutionary Guard Corps Qods Force on the territory of Iraq. The United States is prepared to take additional actions in the region as necessary to continue to protect United States personnel and interests.

Over the past several months, the United States has been the target of a series of escalating threats and armed attacks by the Islamic Republic of Iran. These have included a threat to the amphibious ship USS Boxer on 18 July 2019, while the ship was conducting a planned inbound transit of the Strait of Hormuz, by an Iranian unmanned aerial system, which was previously reported to the Council, as well as an armed attack on 19 June 2019 by an Iranian surface-to-air missile on an unmanned United States Navy MQ-4 surveillance aircraft on a routine surveillance mission monitoring the Strait of Hormuz in international airspace. The actions taken by the United States occurred in the context of continuing armed attacks by the Islamic Republic of Iran that have endangered international peace and security, including attacks

on commercial vessels off the port of Fujayrah and in the Gulf of Oman that threaten freedom of navigation and the security of international commerce, and missile and unmanned aircraft attacks on the territory of Saudi Arabia.

Additionally, Qods Force-backed militias have engaged in a series of attacks against United States forces. Qods Force-backed militia groups in Iraq, including Kata'ib Hizballah, have conducted a series of indirect fire attacks targeting bases where United States forces in Iraq are located. On 27 December 2019, one such attack resulted in the death of a United States Government contractor and injury to four United States service members, all of whom were present in Iraq with the consent and at the request of the Iraqi Government for counter-ISIS operations notified to the Council in the United States letter dated 23 September 2014. In immediate response to this 27 December attack, the United States struck five targets associated with Kata'ib Hizballah in Iraq and Syria on 29 December 2019. Kata'ib Hizballah and other Qods Force-backed militias then participated in an attack on the United States Embassy in Baghdad on 31 December 2019, which resulted in significant damage to Embassy property.

Since our response, Iran on 7 January launched more than a dozen ballistic missiles against United States military and coalition forces in Iraq. It is clear that these missiles were launched from Iran and targeted at least two Iraqi military bases hosting United States military and coalition personnel at Al-Asad and Erbil.

The United States wishes to note—as it has done repeatedly over the past years—that we remain committed to a diplomatic resolution. We stand ready to engage without preconditions in serious negotiations with Iran, with the goal of preventing further endangerment of international peace and security or escalation by the Iranian regime.

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On March 4, 2020, the general counsel for the U.S. Department of Defense, Paul C. Ney, Jr., delivered remarks at Brigham Young University Law School, entitled “Legal Considerations Related to the U.S. Air Strike Against Qassem Soleimani.” The remarks are excerpted below and available at

<https://www.defense.gov/Newsroom/Speeches/Speech/Article/2181868/dod-general-counsel-remarks-at-byu-/#:~:text=Paul%20C.,Law%20School%20in%20Provo%2C%20Utah.>

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... On January 2, 2020, at the direction of the President of the United States, the U.S. military conducted an air strike in Iraq targeting Qassem Soleimani, a major general in the Islamic Revolutionary Guard Corps of Iran, and the commander of an expeditionary Revolutionary Guards unit called the Qods Force. Among others also killed in the strike was Abu Mahdi al-Muhandis, the leader of Kata'ib Hizballah, also known as KH, a Qods Force-backed Shia militia in Iraq.

President Trump directed the strike on Soleimani in response to an escalating series of attacks in preceding months by Iran and Iran-backed militias, including KH, against U.S. forces and interests in the Middle East region. The strike was ordered to protect U.S. personnel; to deter

Iran from conducting or supporting further attacks on U.S. forces and interests; to degrade Iran's and Qods Force-backed militias' ability to conduct attacks; and to end Iran's strategic escalation of attacks on U.S. interests.

My aim today is to explain the international and domestic law underpinnings of the January 2nd air strike. Much of what I will explain is reflected in publicly available documents that the U.S. Government has already provided to the United Nations Security Council and to Congress. The key legal conclusions are already a matter of record.

In the Pentagon, we always begin with the Bottom Line Up Front or B-L-U-F. Here's the BLUF for my remarks today. First, with respect to international law, the President directed the January 2, 2020, air strike against Soleimani as an exercise of the United States' inherent right to act in self-defense, consistent with Article 51 of the Charter of the United Nations and customary international law. Second, as to U.S. domestic law, the President had legal authority to order the strike against Soleimani pursuant to his Article II constitutional power as Commander-in Chief to use armed force to protect U.S. personnel and property in Iraq and U.S. interests in the Middle East, and also pursuant to statutory authority under the 2002 Authorization for Use of Military Force (AUMF) to "defend the national security of the United States against the continuing threat posed by Iraq."

I hope that by explaining how international law and U.S. domestic law applied to the facts surrounding that operation, you will understand better why the strike on Soleimani was lawful.

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Although the threat posed by Saddam Hussein's regime was the initial focus of the statute, the United States has relied upon the 2002 AUMF to authorize the use of force for the purpose of establishing a stable, democratic Iraq and addressing terrorist threats emanating from Iraq, even after Saddam Hussein's demise.

Additionally, from 2003 to 2008, as sectarian violence erupted with the fall of the former Ba'athist regime, President Bush directed a campaign against al-Qa'ida in Iraq pursuant to the 2001 Authorization for Use of Military Force or "2001 AUMF," authorizing the use of force against groups like al-Qa'ida—the "organization" responsible for the terrorist attacks of September 11, 2001. In 2014, al-Qa'ida's Iraq faction split from al-Qa'ida's core leadership and became the Islamic State of Iraq and Syria, or ISIS.

As Iraq became more stable, the United States and Iraq signed a cooperation agreement in November 2008 that included defense and security related commitments and a recognition of the importance of cooperation to "improve and strengthen security and stability in Iraq and the region." The two countries also signed an agreement providing for the withdrawal of U.S. military personnel from Iraq by the end of 2011.

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U.S. forces, Iraqi Security Forces, and forces from countries participating in the Global Coalition to Defeat ISIS (or D-ISIS) together fought to reverse ISIS's conquests in Iraq and helped liberate the Iraqi people from ISIS's brutal control. Today, 100 percent of the territory ISIS once held in Iraq has been returned to Iraqi government control. But despite the defeat of ISIS's control of territory in Iraq, ISIS remains a threat, and so U.S. forces have remained in Iraq to support Iraqi forces and ensure the enduring defeat of ISIS. There are presently more than 5,000 U.S. military personnel in Iraq.

As the United States has sought to establish stability in Iraq and to address terrorist threats in and emanating from Iraq, Iran has remained a malign presence there and throughout

the Middle East. According to the Defense Intelligence Agency, Iran remains “implacably opposed” to the United States, the U.S. presence in the Middle East, and U.S. support for certain governments in the region, all of which Iran views as threats to its goals of regime survival and regional dominance.

To achieve these goals, Iran typically uses “unconventional warfare elements and asymmetric capabilities,” including “a complex network of State and non-State partners and militant proxies” in the Middle East. The Islamic Revolutionary Guard Corps Qods Force is Iran’s “primary tool” for conducting unconventional warfare and providing support to its foreign partners and proxies like Hizballah, Hamas, and the Houthis.

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Qassem Soleimani had commanded the Qods Force beginning in the late 1990s and orchestrated the group’s ascendance. He was the lead architect behind Iran’s campaign of terrorism, assassinations, arms-smuggling, and violence throughout the Middle East, including against U.S. personnel in Iraq. Soleimani’s malign activities have not been limited to the Middle East. In 2011, Soleimani supervised a Qods Force plot to assassinate Saudi Arabia’s Ambassador to the United States with explosives at a Washington, D.C. restaurant. ... In April 2019, the United States designated the Islamic Revolutionary Guard Corps, “including the Qods Force,” as a foreign terrorist organization, citing, among other things, the Qods Force’s support for terrorist groups and plots in the United States, Europe, Africa, and the Middle East.

In the months preceding the January 2nd air strike against Soleimani, Iran and Iran-supported militias had engaged in a series of attacks against U.S. personnel and property in Iraq and against U.S. interests and Allies and partners in the Middle East. In June 2019, an Iranian surface-to-air missile destroyed an unmanned U.S. Navy surveillance aircraft while it was on a routine mission in international airspace monitoring the Strait of Hormuz.

The U.S. response to the attack at that time was measured and muted, but Iran continued its pattern of aggression against U.S. interests in the region. In July 2019, USS Boxer, an amphibious assault ship, came under threat from Iranian unmanned aerial systems while conducting a planned transit of the Strait of Hormuz. Iran has also attacked and seized commercial ships in the area, threatening freedom of navigation. And, Iran-backed Houthi rebels in Yemen shot down two U.S. unmanned surveillance aircraft in Yemeni airspace and conducted multiple missile and other attacks in Saudi Arabia targeting airports and other civilian facilities. Moreover, on September 14, 2019, Iran launched a devastating air attack on a gas plant and an oil refinery in Saudi Arabia.

In the weeks preceding the air strike against Soleimani, provocations against the United States intensified with a series of attacks by Iran-supported militias on U.S. personnel and property in Iraq. KH, the Qods Force-backed Shia militia group, fired rockets at bases in Iraq where U.S. forces are located. Between November 9 and December 9, 2019, Qods Force-backed militia groups fired rockets at the Qayyarah West Air Base, Al Asad Air Base, and the Baghdad Embassy complex. Then, on December 27, KH attacked the K-1 Air Base in Kirkuk, killing a U.S. contractor and injuring U.S. and Iraqi military personnel. In response, U.S. forces struck a number of KH installations in Iraq and Syria to degrade the group’s ability to launch additional attacks. Then, on December 31, KH and other Iran-backed militia groups organized a demonstration that turned violent at the U.S. Embassy in Baghdad, inflicting significant damage to U.S. property and imperiling U.S. lives.

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First, let's talk about international law.

The U.N. Charter generally prohibits States from resorting to the use of force against another State without a legal basis. This rule is part of the law governing the resort to force, or, to use the Latin term, *jus ad bellum*. The United States recognizes three circumstances in which a resort to force in a foreign country is not generally prohibited under international law: (1) use of force authorized by the U.N. Security Council acting under the authority of Chapter VII of the U.N. Charter; (2) use of force in the exercise of the inherent right of self-defense; and (3) use of force in an otherwise lawful manner with the consent of the territorial State.

The strike targeting Soleimani in Iraq was taken under the second justification I mentioned – in U.S. self-defense – consistent with Article 51 of the U.N. Charter. Article 51 provides in relevant part that: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations”

Article 51 thus recognizes the inherent right of States to resort to force in individual or collective self-defense against an armed attack. In accordance with Article 51, the United States reported the air strike to the UN Security Council on January 8, 2020, in written correspondence from the U.S. Ambassador to the United Nations, Kelly Craft, to the other members of the Security Council, through the President of the Security Council.

The use of force in self-defense is subject to the customary international law requirements of necessity and proportionality.

As the DoD Law of War Manual explains, “[t]he *jus ad bellum* condition of necessity requires that no reasonable alternative means of redress are available. For example, in exercising the right of self-defense, diplomatic means must be exhausted or provide no reasonable prospect of stopping the armed attack or threat thereof.”

Applying this legal standard to the facts which I just described, the United States had been subject to an escalating series of armed attacks by Iran and by Iran-supported militias in the Middle East, including Iraq. This included the threat to USS Boxer by Iranian unmanned aerial systems and an armed attack by an Iranian surface-to-air missile on an unmanned U.S. Navy MQ-4 surveillance aircraft in international airspace in the Persian Gulf region. And the strike against Soleimani occurred in the larger context of continuing armed attacks by Iran that endangered international peace and security, attacks on commercial vessels in the Gulf of Oman, attacks on the territory of Saudi Arabia, and attacks by Qods Force-backed militias against U.S. forces in the previous several months. Although I cannot speak to the classified information that senior leaders reviewed, I hope you can see, based simply on these facts that are publicly known, why our senior leaders and the President were reasonable in believing that the use of force was necessary. Attacks against U.S. forces and interests were assessed to be highly likely to continue in the absence of a military response in self-defense to restore deterrence.

Moreover, the strike on January 2d was also consistent with the international law requirement that our measures in self-defense be “proportionate to the nature of the threat being addressed.” As DoD communicated to the public at the time, “General Soleimani was actively developing plans to attack American diplomats and service members in Iraq and throughout the region.” “He had orchestrated attacks on coalition bases in Iraq over the last several months,” and he also approved the demonstration that turned violent at the U.S. Embassy in Baghdad just two days earlier on December 31. Targeting the Iranian commander responsible for

orchestrating, planning, and supporting recent attacks against the United States and planning new attacks was a proportionate response to the threat of such attacks.

Some have questioned whether another Iranian armed attack against the United States was “imminent” at the time of the strike targeting Soleimani. This is a red herring, as the saying goes. Under international law, an imminent attack is not a necessary condition for resort to force in self-defense in this circumstance because armed attacks by Iran already had occurred and were expected to occur again.

Of course, although such analysis was not necessary in this case given this recent history of past attacks, the threat of an imminent armed attack can also justify a resort to force under international law. That is, although Article 51 refers explicitly to self-defense only in response to an actual armed attack, the United States maintains that international law also includes the right to use force where an armed attack is imminent. This view of the United States is widely known and also shared by many like-minded states in the international community.

In addition to regulating the resort to force, international law also regulates the conduct of hostilities. The law of war requires, for example, that attacks be directed against military objectives, that precautions be taken to reduce the likelihood of civilian casualties, and that any damage caused be proportionate to the military objective. The law of war does not prohibit targeting specifically identified leaders of adversary militaries—they may be made the object of attack as enemy combatants.

As the leader of the Qods Force, Soleimani was a legitimate military target in Iraq under the international law governing the conduct of hostilities. The others killed in the U.S. strike were the leader and members of KH, an Iran-backed militia. As such, they, too, were “military objectives” who could be made the object of attack under the law of war.

To sum up, the January 2, 2020, air strike against Soleimani in Iraq was lawful as a matter of international law as an exercise of the inherent right of self-defense recognized by Article 51 of the U.N. Charter. An imminent attack is not a necessary condition for use of force in self-defense under Article 51 when an armed attack has already been perpetrated and the response is necessary and proportionate.

Let me turn now to a discussion of the legal basis for the strike under U.S. domestic law.

The use of military force requires a basis in domestic law. The President may rely on congressional authorizations for the use of force – such as the 2001 AUMF and the 2002 AUMF – and the President may rely on Article II constitutional authority. In the absence of statutory authorization, the President’s constitutional authority to direct military action can be distilled into two inquiries. First, whether the President could reasonably determine that the action serves important national interests. Second, whether the “anticipated nature, scope and duration” of the conflict might rise to the level of a war under the Constitution.

Applying this domestic law framework to the circumstances of the strike targeting Soleimani, the President had a sufficient legal basis both under his constitutional authority and pursuant to the statutory authority of the 2002 AUMF.

First, with respect to the question of the President’s constitutional authority to order the strike, the important national interest to prevent or respond to attacks on U.S. personnel and property is at the very heart of his constitutional power as Chief Executive and Commander-in-Chief. Past Presidents have used force specifically in response to attacks on U.S. embassies and personnel, including by State actors abroad. For instance, in April 1986, President Reagan directed air strikes against the Libyan leader Qaddafi and his intelligence services in Libya following terrorist attacks that killed and wounded American soldiers and civilians at a

discotheque in Germany. And in June 1993, President Clinton ordered the launch of cruise missiles on Iraqi Intelligence Headquarters based on “compelling evidence” that Iraqi intelligence had tried to assassinate former President George H.W. Bush in Kuwait. President Clinton also ordered air strikes in August 1998 against Usama bin Laden and al-Qa’ida in Afghanistan and Sudan, in response to al-Qa’ida bombings of the U.S. Embassies in Nairobi and Dar es Salaam, which had killed more than 250 persons.

Let’s turn now to the second constitutional law inquiry: whether the air strike on Soleimani presented a sufficient risk of broadened conflict with Iran such that pre-approval by Congress may have been required. Although the Constitution vests in the President independent authority to use force, it reserves to Congress the power to “declare War” and the authority to fund military operations. This was a deliberate choice of the Founders. In the Federalist Papers, for example, Alexander Hamilton noted that the President lacks the authority of the British King, which “extends to the declaring of war and . . . the raising and regulating of fleets and armies.”

For that reason, the President’s decision to use armed force cannot be sustained over time without the acquiescence, indeed the approval, of Congress, for it is Congress that must appropriate the money to fight a war. The Department of Justice’s Office of Legal Counsel (OLC) has similarly recognized that the President should seek congressional approval prior to initiating military action that would bring the Nation into the kind of protracted conflict that would rise to the level of a “war” in the constitutional sense.

So what does a “war” in the constitutional sense mean? The relevant Department of Justice OLC opinions say that we must engage in a “fact-specific assessment of the ‘anticipated nature, scope, and duration’ of the planned military operations.” Under this standard, military operations may rise to the level of “war” in the constitutional sense when the actions are likely to lead to “prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.” Some of the most relevant facts in this analysis would include the numbers of additional forces to be deployed, the quantity of munitions expended, estimates regarding U.S. and enemy casualties, and whether ground forces are to be deployed into a war zone. Making an assessment of the anticipated nature, scope, and duration of planned military operations is one of those judgments that are, as Justice Jackson described, “delicate, complex, and involve large elements of prophecy,” which have traditionally been committed to the Executive branch, given its military, diplomatic, and intelligence resources.

The strike against Soleimani did not involve a substantial military engagement, the deployment of additional U.S. forces, or the risk of significant casualties. The operation was circumscribed: it consisted of one targeted air strike in Iraq, executed by an unmanned aerial vehicle, designed to avoid civilian casualties or substantial collateral damage, and intended to prevent future attacks against U.S. persons and interests in Iraq and throughout the region. It was not “aim[ed] at the conquest or occupation of territory nor . . . at imposing through military means a change in the character of a political régime.”

At the same time, there existed risk that the operation could escalate into a broader conflict. Although Soleimani and the Qods Force were not a conventional military formation, the Qods Forces is a part of the military of Iran, which has significant armed forces and military assets that could respond with armed force.

However, the President decided based upon available intelligence that the targeted operation would be unlikely to escalate into a full-scale war, and that, by restoring deterrence of further attacks orchestrated by the Qods Force, the strike could in fact result in a de-escalation of

the conflict between the United States and Iran. As the President himself said, the strike on Soleimani was taken to stop a war, not to start one. Indeed, the United States government made clear immediately after the January 2d air strike—as it had planned to do before launching the operation—that the strike reflected a limited engagement and that the United States did not seek a broader war with Iran.

Subsequent events appear to have confirmed the reasonableness of the assessment that the strike would not provoke an uncontrolled escalation. On January 7, 2020, Iran responded to the strike on Soleimani by firing ballistic missiles at U.S. military and coalition forces at two bases in Iraq. But the United States did not itself respond to this new attack with further air strikes, although it took precautions to minimize casualties and damages. Immediately after the missile attacks, Iran’s foreign minister, Javad Zarif, asserted that his country “took and concluded proportionate measures” in response to the targeting of Soleimani, adding that Iran “do[es] not seek escalation or war.”

In sum, given the narrow scope of the mission, the available intelligence, and the efforts to avoid escalation, it was reasonable for the President to have determined that the nature, scope, and duration of hostilities directly resulting from the strike against Soleimani in Iraq would not rise to the level of war with Iran for constitutional purposes.

Although the President had constitutional authority under Article II to direct the January 2nd air strike, he also had statutory authority under the 2002 AUMF. Pursuant to the 2002 AUMF, Congress has authorized the President “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.” As I mentioned earlier, although the threat posed by Saddam Hussein’s regime was the initial focus of the 2002 AUMF, the United States has relied consistently upon the 2002 AUMF to authorize the use of force for the purpose of establishing a stable, democratic Iraq and addressing terrorist threats emanating from Iraq under the George W. Bush, Obama, and Trump Administrations. Such uses of force need not only address threats from the Iraqi Government apparatus but may also address threats to the United States posed by militias, terrorist groups, or other armed groups in Iraq. For example, the Obama Administration invoked the 2002 AUMF (along with the 2001 AUMF) as domestic legal authority for conducting military operations against ISIS in Iraq and also operations in Syria to address threats emanating from Iraq.

The air strike against Soleimani in Iraq is consistent with this longstanding interpretation of the President’s authority under the 2002 AUMF. The use of force was tailored narrowly to Soleimani’s presence in Iraq and his support to – including in some cases the direction of – militias that attacked U.S. personnel and bases in Iraq. U.S. national security officials believed that Soleimani was actively planning additional attacks on U.S. personnel in Iraq and in the region. Soleimani, as the leader of the Qods Force directly orchestrating hostilities against U.S. personnel and property in Iraq, was a necessary and appropriate target for the President to use force against under the 2002 AUMF.

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On July 9, 2020, the State Department issued a press statement by Secretary Pompeo rejecting the opinion of a UN special rapporteur related to the U.S. strike that killed Soleimani. The statement, available at <https://2017-2021.state.gov/un-special-rapporteur-gives-more-cause-to-distrust-un-human-rights-mechanisms/>, reaffirms the U.S. rationale for the strike:

... The strike that killed General Soleimani was in response to an escalating series of armed attacks in preceding months by the Islamic Republic of Iran and militias it supports on U.S. forces and interests in the Middle East region. It was conducted to deter Iran from launching or supporting further attacks against the United States or U.S. interests, and to degrade the capabilities of the Qods Force.

The United States is transparent regarding the international law basis for the strike. As we outlined in a January 8, 2020, letter to the UN Security Council submitted in accordance with Article 51 of the UN Charter, the strike was undertaken in the exercise of the United States' inherent right of self-defense. ...

2. Other Actions in Response to Iran

On March 12, 2020, the U.S. Department of Defense issued a statement regarding the strikes conducted by U.S. forces against Kata'ib Hizbollah ("KH") in Iraq. The statement is excerpted below and available at <https://www.centcom.mil/MEDIA/STATEMENTS/Statements-View/Article/2110837/statement-by-the-department-of-defense/>.

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...These strikes targeted five weapon storage facilities to significantly degrade their ability to conduct future attacks against Operation Inherent Resolve (OIR) coalition forces. These weapons storage facilities include facilities that housed weapons used to target U.S. and coalition troops.

These strikes were defensive, proportional, and in direct response to the threat posed by Iranian-backed Shia militia groups (SMG) who continue to attack bases hosting OIR coalition forces.

Yesterday's attack on Camp Taji killed two U.S. and one U.K. service members and wounded 14 others. It marked the latest in a series of rocket attacks conducted by Iranian-backed SMGs against U.S. and coalition personnel—killing five and wounding dozens more, including Iraqi Security Forces.

"The United States will not tolerate attacks against our people, our interests, or our allies," Secretary of Defense Dr. Mark T. Esper said. "As we have demonstrated in recent months, we will take any action necessary to protect our forces in Iraq and the region."

During discussions with senior Iraqi officials, the department re-emphasized its commitment to the force protection of coalition service members and to preventing SMG attacks on coalition forces.

These terror groups must cease their attacks on U.S. and coalition forces or face consequences at a time and place of our choosing.

The U.S. and the coalition remain committed to the lasting defeat of ISIS, and the long-term security, stability, and sovereignty of Iraq.

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On April 22, 2020, the State Department issued a fact sheet on Iran's history of naval provocations. The fact sheet is excerpted below and available at <https://2017-2021.state.gov/irans-history-of-naval-provocations/>.

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Iran has long used its naval forces to terrorize the international maritime community... In 2015, during negotiations of the Iran Deal and after its adoption, the U.S. Navy recorded 22 incidents of unsafe and unprofessional conduct by the IRGC Navy (IRGCN), many that risked collision. An additional 36 incidents of unsafe and unprofessional conduct were recorded in 2016.

This includes the January 2016 incident where IRGC naval forces seized two U.S. Navy riverine boats and detained ten U.S. sailors for a period of 15 hours, violating their rights under the Geneva Convention by parading them in front of their propaganda cameras.

When President Trump took office, he initiated a comprehensive review of the United States' Iran policy in light of the Iran Deal's failure to address the regime's growing threats to international peace and security. During this review period, Iran continued its dangerous naval activity.

- In March 2017, the USNS *Invincible* was forced to change course to avoid collision with multiple approaching IRGCN fast-attack small crafts.
- In July 2017, an IRGCN vessel came within 150 yards of the USS *Thunderbolt* in the Persian Gulf, forcing it to fire warning shots.
- In August 2017, an unarmed Iranian drone flew close to the USS *Nimitz* as fighter jets landed at night, threatening the safety of the American pilots and crew.

In October 2017, President Trump announced a new Iran policy that made clear the United States would not tolerate the status quo from Iran, nor appease their provocations. Following the President's announcement, incidents of IRGC naval harassment sharply declined and remained depressed even after the United States withdrew from the JCPOA.

In May 2019, Iran began a panicked campaign of aggression to extort the world into granting it sanctions relief.

- On May 12, 2019, IRGC naval personnel placed and detonated limpet mines on two Saudi, one UAE, and one Norwegian-registered ships while they were harbored in UAE territorial waters near Fujairah Port.
- On June 13, 2019, IRGC naval personnel placed and detonated limpet mines on one Japanese ship and one Norwegian owned ship while they transited the Gulf of Oman. The U.S. later released a video showing IRGC naval personnel removing one of their limpet mines off the side of the Japanese tanker.

- On June 19, 2019, IRGC personnel deployed a surface-to-air missile to shoot down a U.S. unmanned aircraft operating over international waters in the Strait of Hormuz. IRGC Commander Hossein Salami announced that Iran had shot down the drone, claiming that it was operating within Iran's territorial waters.
- On July 19, 2019, the IRGC Navy seized the British-flagged, Swedish-owned Stena Impero tanker while it was transiting the Strait of Hormuz. On the same day, the IRGC also temporarily detained the Liberian-flagged Mesdar tanker. The Stena Impero and her crew were detained in Iran for more than two months as negotiating leverage.

At the same time the Iranian regime is seeking sanctions relief, it focuses its resources and efforts to harass the international maritime community.

- On April 14, 2020, the IRGC Navy forcibly boarded and detained the Hong Kong-flagged SC Taipei oil tanker in international waters, and sailed the tanker into Iranian waters.
- On April 15, 2020, eleven IRGC Navy small boats disrupted five U.S. naval vessels conducting a routine exercise by repeatedly engaging in high speed, harassing approaches. The Iranian vessels repeatedly crossed the bows and sterns of the U.S. ships coming as close as to within 10 yards of a US Coast Guard Cutter.

In response to the elevated risk posed to commercial vessels transiting the Strait of Hormuz, the United States spearheaded the creation of the International Maritime Security Construct (IMSC), a coalition of eight European, Middle Eastern, and Asian nations committed to ensuring freedom of navigation and the free flow of commerce through the strait. Since the IMSC was stood up in August 2019, Iranian mine attacks have ceased.

President Trump will not tolerate or appease Iran's foreign policy of violence and intimidation. Iran must act like every other normal nation, not a nation that sponsors piracy and terror.

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3. Bilateral and Multilateral Agreements and Arrangements

a. North Macedonia Accession to NATO

As discussed in *Digest 2019* at 615, the Protocol to the North Atlantic Treaty on the Accession of the Republic of North Macedonia was signed and received U.S. Senate advice and consent to ratification in 2019. On March 27, 2020, North Macedonia deposited its instrument of accession with the United States as depositary. See State Department press statement, available at <https://2017-2021.state.gov/north-macedonia-joins-the-nato-alliance/>. North Macedonia acceded at the 30th member of NATO. The protocol is available at <https://www.state.gov/20-319>.

b. Status of Forces Agreement with Trinidad and Tobago

On January 1, 2020, the extension of the U.S. status of forces agreement with Trinidad and Tobago entered into force via exchange of notes at Port of Spain on December 17, 2019 and January 30, 2020. The agreement is available at https://www.state.gov/trinidad_and_tobago-20-101.

c. *Agreement with Supreme Headquarters Allied Powers Europe*

The Agreement Between the United States and the Supreme Headquarters Allied Powers Europe (“SHAPE”) entered into force January 2, 2020 after an exchange of letters at Casteau October 18, 2019 and January 2, 2020. The agreement is available at <https://www.state.gov/shape-20-102>.

d. *Status of Forces Agreement with Antigua and Barbuda*

On January 24, 2020 the U.S. status of forces agreement with Antigua and Barbuda entered into force. The agreement was signed at Washington on March 12, 2014. The text of the agreement is available at https://www.state.gov/antigua_and_barbuda-20-124.

e. *Greece Mutual Defense Cooperation Agreement*

On February 13, 2020, the agreement amending and extending U.S. defense cooperation with Greece, which was signed at Athens on October 5, 2019, entered into force. The agreement is available at <https://www.state.gov/greece-20-213>. The original defense cooperation agreement from 1990 was previously extended every year from 1998, to 2017.

f. *Defense Agreement with the Netherlands on personnel in the Caribbean*

The U.S.-Netherlands defense agreement on the status of U.S. personnel in the Caribbean part of the Kingdom of the Netherlands entered into force on April 22, 2020. The agreement was effected by an exchange of notes at The Hague in 2018 and extends the application of a previous 2012 agreement with the Netherlands to Curacao. The text of the agreement is available at https://www.state.gov/netherlands_20-422.

g. *Rwanda Status of Forces Agreement*

On May 28, 2020, the Status of Forces Agreement with Rwanda entered into force upon signature at Kigali. The agreement is available at <https://www.state.gov/rwanda-20-528>.

h. *Poland Enhanced Defense Cooperation Agreement*

On August 15, 2020, in Warsaw, the United States and Poland signed an enhanced defense cooperation agreement (“EDCA”). The State Department fact sheet on the EDCA is excerpted below and available at <https://2017-2021.state.gov/u-s-poland-enhanced-defense-cooperation-agreement/>. The EDCA entered into force on November 13, 2020 and is available at <https://www.state.gov/poland-20-1113-enhanced-defense-cooperation-agreement/>.

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The United States values our strong bilateral relationship with Poland. We look forward to Poland's swift ratification of the EDCA, which will permit us to implement fully the enhanced defense cooperation [agreement]...

POLAND IS A CLOSE FRIEND OF THE UNITED STATES AND A LINCHPIN OF REGIONAL SECURITY

- The U.S.-Poland relationship is strong and getting stronger. We are fellow democracies, with a deep commitment to the rule of law, human rights, and individual freedom.
- Warsaw has been a strong NATO Ally since its accession to the Alliance in 1999, and serves as a linchpin of regional security. Poland is a crucial strategic U.S. Ally in Central Europe. Polish troops stand shoulder-to-shoulder with U.S. forces in Afghanistan and elsewhere, and provide critical support to the Defeat-ISIS Campaign.
- The United States leads the enhanced Forward Presence battle group in Poland and deploys a rotational Armored Brigade Combat Team under Operation Atlantic Resolve, funded through the European Deterrence Initiative.

THE U.S.-POLAND EDCA PROVIDES THE LEGAL FRAMEWORK FOR OUR COUNTRIES TO WORK TOGETHER

- The EDCA reflects the shared vision outlined in the joint declarations signed by Presidents Trump and Duda in 2019, and reaffirmed during President Duda's June 2020 visit to Washington, to deepen our defense cooperation.
- The EDCA supplements the 1951 NATO Status of Forces Agreement (SOFA) and establishes a framework to enhance and modernize our capabilities, in support of the NATO Alliance's collective defense. The United States has similar agreements with other NATO Allies such as Bulgaria, Hungary, and Romania.
- The EDCA outlines the legal status of U.S. forces in Poland and will provide the necessary authorities for U.S. forces to access specific Polish military installations and conduct activities for our mutual defense. This Agreement also supports expanded infrastructure, and enables an increased U.S. military presence in Poland.

THE U.S.-POLAND EDCA WILL STRENGTHEN NATO AND INCREASE TRANSATLANTIC SECURITY FOR DECADES TO COME

- The EDCA provides a mechanism for the sharing of logistical and infrastructure costs for U.S. forces present in Poland. By creating a durable framework for even closer defense cooperation with a crucial NATO Ally, it strengthens Eastern Flank security and deterrence.
- Poland's in-kind contributions under the EDCA will directly benefit the Polish economy. For its part, the United States will continue to bear the costs of training, equipping, and deploying U.S. forces to Poland, which is significantly higher than the cost of support Poland invests in support of U.S. forces once they are in country. Together, these efforts improved security and stability for both nations in a cost-effective way.
- The United States and Poland's extensive coordination and consultation on defense cooperation matters will be strengthened and streamlined by the EDCA.

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i. *U.S.-Netherlands Defense Agreement*

The Agreement between the United States of America and the Kingdom of the Netherlands Establishing a Framework for Defense Cooperation Activities was signed July 2, 2018 at Washington and entered into force November 1, 2020 with the exchange of correcting notes. The agreement is available at <https://www.state.gov/netherlands-20-1101>.

j. *Guatemala Status of Forces Agreement*

The United States-Guatemala Status of Forces Agreement was effected by an exchange of notes at Guatemala November 25 and December 1, 2020 and entered into force December 1, 2020. The agreement is available at <https://www.state.gov/guatemala-20-1201>.

4. International Humanitarian Law

a. *UN Security Council resolution on humanitarian access in the DRC*

On December 18, 2020, the United States submitted, for the record, an explanation of vote on a draft resolution on the UN Organization Stabilization Mission in the Democratic Republic of the Congo ("MONUSCO"). The statement reflects the U.S. view that requirements in UN Security Council resolutions that parties provide "safe, rapid, and unhindered" humanitarian access should not be combined with the phrase "in accordance with international law," because "safe, rapid, and unhindered" humanitarian access is not a requirement of international law in all circumstances. The statement follows and is available at <https://usun.usmission.gov/explanation-of-vote-on-a-draft-resolution-on-the-un-organization-stabilization-mission-in-the-democratic-republic-of-the-congo/>.

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We further appreciate the Council's efforts to support MONUSCO's gradual and responsible transition and note the importance of ensuring that the DRC government, UN country team, and other actors are prepared to take over the mission's important tasks, such as early warning alert networks.

However, we must clarify the U.S. position on the language in this resolution regarding humanitarian access. The United States strongly supports the need for humanitarian access in conflict areas, having backed language in numerous Security Council resolutions that demands parties to a conflict provide safe, rapid, and unhindered access to humanitarian aid. Our words are supported by our actions, as the United States has provided more funding for humanitarian aid than any other country in the world — more than \$10.5 billion last year.

Our concern in this resolution is related to changes made this year regarding how international law is referred to in the humanitarian context. While the United States recognizes that in certain circumstances States may have obligations related to humanitarian aid, there is no universal and unlimited international legal obligation for States to allow and facilitate “safe, rapid, and unhindered” humanitarian access. Therefore, the United States disagrees with the insertion of the phrase “in accordance with international law” in paragraph 35 of this resolution, where its placement suggests that safe, rapid, and unhindered humanitarian access is required by international law without exception. Nonetheless, the United States remains a strong advocate, in this Council and more generally, for States and parties to the conflict to allow and facilitate safe, rapid, and unhindered humanitarian access. We invite other members of this Council to consult with us regarding how we can maintain strong humanitarian access clauses in Security Council resolutions while accurately capturing the law.

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b. Applicability of international law to conflicts in cyberspace

On March 2, 2020, General Counsel Ney delivered remarks at the U.S. Cyber Command Legal Conference, addressing considerations for conducting legal reviews of U.S. military cyber operations. Mr. Ney’s remarks are excerpted below and available at <https://www.defense.gov/Newsroom/Speeches/Speech/Article/2099378/dod-general-counsel-remarks-at-us-cyber-command-legal-conference/>.

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I have two objectives today. First, I’ll offer a snapshot of how we in DoD are integrating cyberspace into our overall national defense strategy. Second, I will summarize the domestic and international law considerations that inform the legal reviews that DoD lawyers conduct as part of the review and approval process for military cyber operations. We at DoD now have considerable practice advising on such operations and are accordingly in a position to begin to speak from experience to some of the challenging legal issues that cyber operations present.

To set the scene, when I talk about “cyberspace,” I am referring to “the interdependent network of information technology infrastructures and resident data, including the Internet, telecommunications networks, computer systems, and embedded processors and controllers.” Physically, and logically, the domain is in a state of perpetual transformation. It enables the transmission of data across international boundaries in nanoseconds—controlled much more by individuals or even machines than by governments—spreading ideas to disparate audiences and, in some cases, the generating of physical effects in far-flung places.

1. Today's Cyber Threat Environment and DoD's Response

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2. Framework for Legal Analysis

To evaluate the legal sufficiency of a proposed military cyber operation, we employ a process similar to the one we use to assess non-cyber operations. We engage our clients to understand the relevant operational details: What is the military objective we seek to achieve? What is the operational scheme of maneuver and how does it contribute to achieving that objective? Where is the target located? Does the operation involve multiple geographic locations? What is the target system used for? How will we access it? What effects—such as loss of access to data—will we generate within that system? How will those effects impact the system's functioning? Which people or processes will be affected by anticipated changes to the system's functioning? Are any of those likely to be impacted civilians or public services? Answers to these questions will drive the legal analysis.

A. U.S. Domestic Law

Let's take up considerations of U.S. domestic law first. We begin with the foundational question of domestic legal authority to conduct a military cyber operation. The domestic legal authority for the DoD to conduct cyber operations is included in the broader authorities of the President and the Secretary of Defense to conduct military operations in defense of the nation. We assess whether a proposed cyber operation has been properly authorized using the analysis we apply to all other operations, including those that constitute use of force. The President has authority under Article II of the U.S. Constitution to direct the use of the Armed Forces to serve important national interests, and it is the longstanding view of the Executive Branch that this authority may include the use of armed force when the anticipated nature, scope, and duration of the operations do not rise to the level of "war" under the Constitution, triggering Congress's power to declare war. Furthermore, the Supreme Court has long affirmed the President's power to use force in defense of the nation and federal persons, property, and instrumentalities. Accordingly, the President has constitutional authority to order military cyber operations even if they amount to use of force in defense of the United States. Of course, the vast majority of military operations in cyberspace do not rise to the level of a use of force; but we begin analysis of U.S. domestic law with the same starting point of identifying the legal authority.

In the context of cyber operations, the President does not need to rely solely on his Article II powers because Congress has provided for ample authorization. As I noted earlier, Congress has specifically affirmed the President's authority to direct DoD to conduct military operations in cyberspace. Moreover, cyber operations against specific targets are logically encompassed within broad statutory authorizations to the President to use force, like the 2001 Authorization for the Use of Military Force, which authorizes the President to use "all necessary and appropriate force" against those he determines were involved in the 9/11 attacks or that harbored them. Congress has also expressed support for the conduct of military cyber operations to defend the nation against Russian, Chinese, North Korean, and Iranian "active, systematic, and ongoing campaigns of attacks" against U.S. interests, including attempts to influence U.S. elections.

In addition to questions of legal authority, DoD lawyers advise on the Secretary of Defense's authority to direct the execution of military cyber operations as authorized by the President and statute, "including in response to malicious cyber activity carried out against the

United States or a United States person by a foreign power,” and to conduct related intelligence activities. Our lawyers ensure that U.S. military cyber operations adhere to the President’s specific authorizations as well as the generally applicable NSPM-13.

After concluding that the operation has been properly authorized, DoD lawyers assess whether there are any statutes that may restrict DoD’s ability to conduct the proposed cyber operation and whether the operation may be carried out consistent with the protections afforded to the privacy and civil liberties of U.S. persons. To illustrate, I am going to talk about two statutes and the First Amendment as examples of laws that we may consider, depending on the specific cyber operation to be conducted.

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B. International Law

Those are some highlights of U.S. domestic law considerations that may be implicated by proposed military cyber operations; let me turn now to international law.

We recognize that State practice in cyberspace is evolving. As lawyers operating in this area, we pay close attention to States’ explanations of their own practice, how they are applying treaty rules and customary international law to State activities in cyberspace, and how States address matters where the law is unsettled. DoD lawyers, and our clients, engage with our counterparts in other U.S. Government departments and agencies on these issues, and with Allies and partners at every level—from the halls of the United Nations to the floors of combined tactical operations centers—to understand how we each apply international law to operations in cyberspace. Initiatives by non-governmental groups like those that led to the Tallinn Manual can be useful to consider, but they do not create new international law, which only states can make. My intent here is not to lay out a comprehensive set of positions on international law. Rather, as I have done with respect to domestic law, I will tell you how DoD lawyers address some of the international law issues that today’s military cyber operations present.

I will start with some basics. It continues to be the view of the United States that existing international law applies to State conduct in cyberspace. Particularly relevant for military operations are the Charter of the United Nations, the law of State responsibility, and the law of war. To determine whether a rule of customary international law has emerged with respect to certain State activities in cyberspace, we look for sufficient State practice over time, coupled with *opinio juris*—evidence or indications that the practice was undertaken out of a sense that it was legally compelled, not out of a sense of policy prudence or moral obligation.

As I discussed a few minutes ago, our policy leaders assess that the threat environment demands action today—our clients need our advice today on how international legal rules apply when resorting to action to defend our national interests from malicious activity in cyberspace, notwithstanding any lack of agreement among States on how such rules apply. Consequently, in reviewing particular operations, DoD lawyers provide advice guided by how existing rules apply to activities in other domains, while considering the unique, and frequently changing, aspects of cyberspace.

First, let’s discuss the international law applicable to uses of force. Article 2(4) of the Charter of the United Nations provides that “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” At the same time, international law recognizes that there are exceptions to this rule. For example, in the

exercise of its inherent right of self-defense a State may use force that is necessary and proportionate to respond to an actual or imminent armed attack. This is true in the cyber context just as in any other context.

Depending on the circumstances, a military cyber operation may constitute a use of force within the meaning of Article 2(4) of the U.N. Charter and customary international law. In assessing whether a particular cyber operation—conducted by or against the United States—constitutes a use of force, DoD lawyers consider whether the operation causes physical injury or damage that would be considered a use of force if caused solely by traditional means like a missile or a mine. Even if a particular cyber operation does not constitute a use of force, it is important to keep in mind that the State or States targeted by the operation may disagree, or at least have a different perception of what the operation entailed.

Second, the international law prohibition on coercively intervening in the core functions of another State (such as the choice of political, economic, or cultural system) applies to State conduct in cyberspace. For example, “a cyber operation by a State that interferes with another country’s ability to hold an election” or that tampers with “another country’s election results would be a clear violation of the rule of non-intervention.” Other States have indicated that they would view operations that disrupt the fundamental operation of a legislative body or that would destabilize their financial system as prohibited interventions.

There is no international consensus among States on the precise scope or reach of the non-intervention principle, even outside the context of cyber operations. Because States take different views on this question, DoD lawyers examining any proposed cyber operations must tread carefully, even if only a few States have taken the position publicly that the proposed activities would amount to a prohibited intervention.

Some situations compel us to take into consideration whether the States involved have consented to the proposed operation. Because the principle of non-intervention prohibits “actions designed to coerce a State ... in contravention of its rights,” it does not prohibit actions to which a State voluntarily consents, provided the conduct remains within the limits of the consent given.

Depending on the circumstances, DoD lawyers may also consider whether an operation that does not constitute a use of force could be conducted as a countermeasure. In general, countermeasures are available in response to an internationally wrongful act attributed to a State. In the traditional view, the use of countermeasures must be preceded by notice to the offending State, though we note that there are varying State views on whether notice would be necessary in all cases in the cyber context because of secrecy or urgency. In a particular case it may be unclear whether a particular malicious cyber activity violates international law. And, in other circumstances, it may not be apparent that the act is internationally wrongful and attributable to a State within the timeframe in which the DoD must respond to mitigate the threat. In these circumstances, which we believe are common, countermeasures would not be available.

For cyber operations that would not constitute a prohibited intervention or use-of-force, the Department believes there is not sufficiently widespread and consistent State practice resulting from a sense of legal obligation to conclude that customary international law generally prohibits such non-consensual cyber operations in another State’s territory. This proposition is recognized in the Department’s adoption of the “defend forward” strategy: “We will defend forward to disrupt or halt malicious cyber activity at its source, including activity that falls below the level of armed conflict.” The Department’s commitment to defend forward including to counter foreign cyber activity targeting the United States—comports with our obligations under international law and our commitment to the rules-based international order.

The DoD OGC view, which we have applied in legal reviews of military cyber operations to date, shares similarities with the view expressed by the U.K. Government in 2018. We recognize that there are differences of opinion among States, which suggests that State practice and *opinio juris* are presently not settled on this issue. Indeed, many States' public silence in the face of countless publicly known cyber intrusions into foreign networks precludes a conclusion that States have coalesced around a common view that there is an international prohibition against all such operations (regardless of whatever penalties may be imposed under domestic law).

Traditional espionage may also be a useful analogue to consider. Many of the techniques and even the objectives of intelligence and counterintelligence operations are similar to those used in cyber operations. Of course, most countries, including the United States, have *domestic* laws against espionage, but international law, in our view, does not prohibit espionage *per se* even when it involves some degree of physical or virtual intrusion into foreign territory. There is no anti-espionage treaty, and there are many concrete examples of States practicing it, indicating the absence of a customary international law norm against it. In examining a proposed military cyber operation, we may therefore consider the extent to which the operation resembles or amounts to the type of intelligence or counterintelligence activity for which there is no *per se* international legal prohibition.

Of course, as with domestic law considerations, establishing that a proposed cyber operation does not violate the prohibitions on the use of force and coercive intervention does not end the inquiry. These cyber operations are subject to a number of other legal and normative considerations.

As a threshold matter, in analyzing proposed cyber operations, DoD lawyers take into account the principle of State sovereignty. States have sovereignty over the information and communications technology infrastructure within their territory. The implications of sovereignty for cyberspace are complex, and we continue to study this issue and how State practice evolves in this area, even if it does not appear that there exists a rule that all infringements on sovereignty in cyberspace necessarily involve violations of international law.

It also longstanding DoD policy that U.S. forces will comply with the law of war "during all armed conflicts however such conflicts are characterized and *in all other military operations*." Even if the law of war does not technically apply because the proposed military cyber operation would not take place in the context of armed conflict, DoD nonetheless applies law-of-war principles. This means that the *jus in bello* principles, such as military necessity, proportionality, and distinction, continue to guide the planning and execution of military cyber operations, even outside the context of armed conflict.

DoD lawyers also advise on how a proposed cyber operation may implicate U.S. efforts to promote certain policy norms for responsible State behavior in cyberspace, such as the norm relating to activities targeting critical infrastructure. These norms are non-binding and identifying the best methods for integrating them into tactical-level operations remains a work in progress. But, they are important political commitments by States that can help to prevent miscalculation and conflict escalation in cyberspace. DoD OGC, along with other DoD leaders, actively supports U.S. State Department-led initiatives to build and promote this framework for responsible State behavior in cyberspace. This includes participation in the UN Group of Governmental Experts and an Open-Ended Working Group on information and communications technologies in the context of international peace and security. These diplomatic engagements

are an important part of the United States' overall effort to protect U.S. national interests by promoting stability in cyberspace.

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On May 22, 2020, Ambassador Cherith Norman Chalet, acting deputy permanent representative to the UN, delivered the U.S. statement at a UN Security Council meeting on cyber stability and responsible state behavior in cyberspace, held via video teleconference. Ambassador Chalet's remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-security-council-arria-formula-meeting-on-cyber-stability-and-responsible-state-behavior-in-cyberspace-via-vtc/>.

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The United States remains committed to working with all member states to safeguard the extraordinary benefits of cyberspace. We must all redouble our efforts—and not just in New York and Geneva—to create accountability for state actions in cyberspace. Cyberspace has become a central and indispensable domain of global activity, and its protection through responsible state behavior is critical to ensuring the maintenance of international peace and security.

The United Nations began discussing the issue of international security in cyberspace in the early 2000s. For years, the international community struggled to develop an appropriate and functional framework for enhancing international peace and security in this domain. Since given the nature of the technology, traditional arms control approaches were not entirely practical or useful references. Nevertheless, through its three consensus reports in 2010, 2013, and 2015, the UN Group of Governmental Experts succeeded at established a framework of responsible state behavior to enable international cyber stability.

This framework consists of three parts: one, the applicability of international law to state behavior in cyberspace; two, voluntary non-binding norms of state behavior applicable in peacetime; and three, the implementation of practical Confidence Building Measures, or CBMs. This framework is strong and sustainable because it is not tied to the current state of technology and, therefore, not prone to becoming obsolete. It is focused on real-world effects of actions taken by state actors in the cyberspace. Moreover, the General Assembly, by consensus, affirmed all three GGE reports. Broad international consensus and the General Assembly's strong and repeated support around this framework is the signature accomplishment of our collective cyber diplomacy over the past decade. These successes must be fully protected and observed.

In addition to the contributions of the UN GGE process, regional organizations, including the OAS, OSCE, and the ASEAN Regional Forum, have also reinforced and enhanced this framework. Those groups focused on improving regional security have made great strides in implementing practical confidence building measures in their regions to improve cyber stability. There's no doubt that such measures can contribute substantially to conflict prevention and stability, and we commend these organizations for their contributions to this effort. The United States, like many others in the international community, share a vision for maintaining peace, security, and stability in cyberspace. That is why in 2018, the United States reaffirmed its

commitment to this vision in our National Cyber Strategy, which commits the United States to preserve and build upon this framework. It is also why working with other nations to help strengthen their cyber capacity is an integral part of our approach.

Even though certain states appear willing to undermine this framework, universalizing it is in all member states' interests. We must work to ensure that states wanting to act responsibly in cyberspace have the means to do so, which includes protecting their networks from malicious state and non-state actors. In this regard, the United States pledges its continued support to likeminded partners in their efforts to enhance cybersecurity and counter malicious cyber actors, including combating cybercrime and strengthening public institutions' protection from malicious cyber actors.

These issues remain a top priority during the COVID-19 pandemic. We have witnessed malicious cyber activity that appears designed to undermine the United States and our international partners' efforts to protect, assist, and inform the public during this global pandemic. Malicious cyber activity that impairs the ability of hospitals and healthcare systems to deliver critical services, for instance, could have deadly results. As noted in the framework, states should refrain in peacetime from cyber activities that intentionally damage critical infrastructure – including healthcare and public health services and other important public services. When states do not abide by the framework of responsible state behavior, there will be consequences.

In closing, let me be clear, the United States will continue to uphold the stability of cyberspace and the framework, including through the Group of Governmental Experts and the Open-Ended Working Group.

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B. CONVENTIONAL WEAPONS

Lethal Autonomous Weapons Systems (“LAWS”)

On February 20, 2020, Attorney-Adviser in the State Department's Office of the Legal Adviser Amanda Wall addressed the Rio Seminar on Autonomous Weapon Systems on the subject of “LAWS and Human-Machine Interaction.” Her remarks are excerpted below and available at http://funag.gov.br/biblioteca/download/laws_digital.pdf.

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I am a member of the U.S. delegation to meetings of the High Contracting Parties to the CCW and the GGE on emerging technologies in the area of Lethal Autonomous Weapons Systems, and have participated in the last several meetings in that capacity.

I am going to focus my presentation today on the views of the United States on human-machine interaction in the area of LAWS. This has been a topic that has been discussed at some length at the GGE, with a wide diversity of views presented, but having observed those debates

personally, my own view is that there is actually a lot more common ground between the positions being expressed at the GGE, and the differences are not so vast as they might seem. In fact, I would posit that the states participating at the GGE actually have a lot more in common than they realize.

Let me also say, before I begin, that the United States remains fully supportive of the work of the GGE and hopes to help to accomplish a strong, substantive outcome by the end of its current two-year mandate in 2021.

In my time today, first, I am going to talk about how the United States understands human-machine interaction in the area of emerging technologies in LAWS. Second, I am going to spend a few minutes talking about why we think that the concept of “human control,” as some have characterized it, does not fully capture the range of considerations that need to be undertaken when developing policies and programs for responsible development and use of LAWS, and why we think it actually may be an oversimplification of some of the very complicated issues at stake. And, finally, I am going to say a few words about what, we would argue, should be the focus of the GGE in this regard over the next two years. My remarks today draw heavily from working papers and views that the U.S. delegation has presented to the GGE, and, in particular, a U.S. working paper on human-machine interaction.

But to begin, I want to make one point as a legal matter. As Ambassador Candeads noted in his introduction this morning, it is important to acknowledge first and foremost that IHL, including the fundamental principles and rules of distinction, proportionality, military necessity, and precautions in attack, continue to apply regardless of what type of weapon is used. This is reflected in the GGE’s Guiding Principle (a), as well as in the GGE’s conclusion in paragraph 17(a) of the GGE’s 2019 report.²

In addition to helping assess whether a new weapon falls under a legal prohibition or how IHL requirements apply, the fundamental principles of international humanitarian law may also serve as a guide in answering novel ethical or policy questions in human-machine interaction that are presented by these emerging technologies. For example, it may be appropriate to consider the following:

- Does military necessity justify developing or using this new technology?
- Under the principle of humanity, does the use of this new technology reduce unnecessary suffering?
- Are there ways that this new technology can enhance the ability to distinguish between civilians and combatants?
- And, under the principle of proportionality, has sufficient care been taken to avoid creating unreasonable or excessive incidental effects?

There has been broad consensus at the GGE that IHL is applicable to the use of force, including the use of force that is reliant on autonomy or autonomous features and functions. But how do we go about ensuring that the law, in particular IHL, is complied with in the use of these weapons, and how do we develop good practices for responsible development and use of these weapons?

Effectuating the intent of commanders and operators

A big part of the answer to this question rests in human-machine interaction, which is what I have been asked to discuss today. From the U.S. perspective, the key issue for human-machine interaction in emerging technologies in the area of LAWS is ensuring that machines

effectuate the intent of commanders and operators of the weapons systems. Weapons that do what commanders and operators intend them to do can give effect to their specific intentions to conduct operations in compliance with IHL and to minimize harm to civilians and civilian objects.

Much of the U.S. policy and practice in this area is laid out in a 2012 Policy Directive issued by our Department of Defense. It is DoD Directive 3000.09, titled “Autonomy in Weapon Systems.” ...

Let me elaborate upon the concept of good practices for effectuating the intent of commanders and operators. It is not necessarily about having a human executing or controlling every step of a weapon’s operation manually: this does not happen with many weapons systems that have been in operation for decades. Instead, it is about taking practical steps that, among other things, enable personnel to exercise judgment over the use of force in an armed conflict, and reduce the risk of unintended combat engagements. So, how do we develop and use weapons in a way that ensures that weapons give effect to human intent? What measures should we take?

Measures to ensure the use of autonomy in weapon systems effectuates human intentions

First, we need to think about how to minimize the probability and consequences of failures in weapon systems that could lead to engagements that the commander and operators did not intend. This could happen either because a weapon engaged a target that was not the intended target, or because it created unacceptable levels of collateral damage. I would note that even an attack against previously authorized targets could ultimately be “unintended” if there are significant changes in circumstances between the time of authorization and when the weapon engaged targets, such that the authorizing official no longer intended the targets to be engaged. So there is a temporal aspect to it, as well.

There are a number of ways that guidelines in the development and use of weapon systems can help minimize the probability and consequences of failures in weapon systems—failures that could lead to unintended engagements. One example is that an autonomous system might be programmed to operate only within specific geographic boundaries. If deployed and limited to an area that was a military objective, like an enemy military headquarters complex, then its use would be analogous to the use of other weapons, like artillery, that are often used to target areas of land that qualify as military objectives. Another example might be an autonomous weapon that is equipped with sensors that are designed to detect specific “signatures”—or unique, identifying characteristics that would be specific to a military objective, like frequencies of electromagnetic radiation that are generally not found in nature or among civilian objects. Many states have already used weapons that detect the specific electromagnetic signals emitted by enemy radar to help ensure that a target is a military objective. These are all examples of ways that weapons can be developed and used to help effectuate the intent of a commander or operator by minimizing the probability of unintended engagements and minimizing the consequences of such engagements if they occur.

Second, we need to think about how to help ensure that weapon systems function as anticipated. This includes engineering weapon systems to perform reliably. The DoD Directive that I mentioned before puts in place requirements for verification and validation, and for testing and evaluation of hardware and software to make sure that they function as anticipated. For example, before fielding weapon systems that would use autonomy in novel ways, those reviews must “assess system performance, capability, reliability, effectiveness, and suitability under realistic conditions.” The Directive also requires “safeties, anti-tamper mechanisms, and

information assurance” to ensure that the weapon functions as it was anticipated to function, namely by helping address and minimize the probability or consequence of failures that could lead to unintended engagements or to loss of control of the system, by adversaries or others.

Third, we need to think about how to help ensure that personnel properly understand the weapon systems. This includes training personnel, establishing clear human-machine interfaces, and developing clear doctrine and procedures for use. Studies of accidents involving human use of automation have shown that failures can often result from operator error, and that better training and adherence to established tactics, techniques, and procedures and doctrine could have prevented those mistakes. That is why the DoD Directive generally requires the establishment of such “[t]raining, doctrine, and tactics, techniques, and procedures”—what we call TTPs. And, before systems that employ autonomy in new ways are fielded, senior officials must determine that “[a]dequate training, TTPs, and doctrine are available, periodically reviewed, and used by system operators and commanders to understand the functioning, the capabilities, and the limitations of the system’s autonomy in realistic operational conditions.”

Further to this end, the interface between humans and machines should be clear “[i]n order for operators to make informed and appropriate decisions in engaging targets.” This is why the DoD Directive requires the interface between people and machines for autonomous and semi-autonomous weapon systems to:

- (a) Be readily understandable to trained operators;
- (b) Provide traceable feedback on system status; and
- (c) Provide clear procedures for trained operators to activate and deactivate system functions.

These are just some examples; there are a number of measures that can be taken to help ensure that weapon systems that use autonomy are developed and used to effectuate human intention in the use of force. These measures are outlined in greater detail in the working paper referenced above, which I have provided to this conference and is also available on the CCW’s website.

Why not “human control”?

One question you may be asking is, why not call this “human control”? After outlining the policies that our own Department of Defense has in place with regard to the use of autonomy in weapon systems, my hope is that people in the audience are thinking, well, that sounds a lot like the measures that would be useful to ensure meaningful human control—because, as I said at the outset, I think there is much common ground between the position that we have articulated and the position that has been articulated by those who say we need a norm of meaningful human control. But, I think there are some key reasons why the U.S. view is that “meaningful human control” simply is not an adequate way to describe what is needed for responsible use and development of LAWS, and we continue to think that the term “human control” risks obscuring some of the genuine challenges that these technologies present.

First, no one can really agree on what “human control” means. In discussing this issue at the GGE, there have been almost as many different ways of describing “human control” as there have been delegations in the room. So it has not proven to be a useful construct for building consensus among members of the GGE.

Second, it is also not a very useful umbrella term as a practical matter. How a weapon system is controlled is often very specific to the particularities of that weapon system, and control systems can vary greatly from system to system. This is part of the reason why past regulation of weapons systems under IHL has not included broadly applicable standards for

weapon control—the concept in practice does not work very well across different types of weapons.

Third, I believe the concept of human control mistakes the “means” for the “ends.” Existing IHL instruments, such as the CCW and its Protocols, do not seek to enhance “human control” as such. Instead, they seek to ensure that the use of those weapons is consistent with IHL. Although control over a weapon system can be a useful way in certain circumstances to ensure that a weapon system is used in compliance with IHL, it is not the only way or always the best way to do so; that is, “control” is not, and should not be, a means in and of itself—but rather one of many ways that states can consider in best effectuating human intent in the use of a weapon system.

Some may say that it is important to emphasize “human control” because they view developments in the use of automation or autonomy in weapons system as actually decreasing human control over the use of force. And I think we would say that this emphasis is not necessarily correct. Technical sophistication does not necessarily mean that there is any less human involvement in the decision-making regarding how a weapon is used. In fact, the whole point of some of this technology, for example, sensors and computers, is that it allows humans to have more options for when, where, and how force is used; that is, essentially to make judgments about using force and to have the operator’s intent and judgments effectuated by machines without the operator being required to control every step of that machine’s process manually. Automated or software control systems can also reduce the degree to which effectiveness in the execution of those important decisions depends on the perception and skill of an operator, which can be negatively impacted in combat by various factors, such as fatigue, fear, or deception. And the use of “smart” weaponry with autonomous functions has actually, I believe, in many ways increased the degree of control that states exercise over the use of force. For example, by increasing the precision of the execution of decision-making, the operator arguably is ensuring better control over the use of force, even though it is not through manual control of every step of a weapon’s deployment and use. Theoretically, another way to think about it is that, if an operator might be able to exercise control over every aspect of a weapon system, but the operator is only reflexively pushing a button that is recommended to him or her by the system, the human is not really exercising any judgment, even though the human operator is exercising control in pushing a particular button. What we are looking for here is human intention and human judgment, not necessarily control.

On the other hand, judgment can be implemented through the use of automation. For example, use of algorithms or even autonomous functions that take control away from human operators can better effectuate human intention and avoid accidents. One system that is a useful case study is the Automatic Ground Collision Avoidance System, which was developed by the U.S. Air Force in order to help prevent “controlled flight into terrain” accidents. The system essentially assumes control of the aircraft when an imminent collision with the ground is detected and then returns control back to the human pilot once the collision is averted. This can help avoid accidents through an automatic feature that actually removes control by the human operator briefly in certain circumstances. Another example would be certain defensive autonomous weapon systems, such as the AEGIS Weapon System and Patriot Air and Missile

Defense System, which have autonomous functions that assist in targeting incoming missiles. The machine can strike incoming projectiles with much greater speed or accuracy than a human gunner could achieve manually—so, although the human may not manually control the speed at which the machine is operating, the human is still exercising judgment over the use of

force. The machine is really just effectuating that intention and that judgment more efficiently than a human could do so himself or herself.

Finally, some might argue that it is important to emphasize control because of concerns that the use of autonomous weapons systems somehow removes individuals from responsibility for decisions to use force, which are some of the gravest and most serious decisions that a human being can make. But we do not believe this is true. Human actors are responsible for their decisions to use force regardless of the nature of weapon used. The lack of manual control over a weapon system does not remove this responsibility or create an accountability gap. This is, in fact, recognized in the GGE's second Guiding Principle. Machines may be able to synthesize data and apply algorithms faster than a person could, and they may be able to do so more accurately. But machines are not moral agents, and human beings do not escape responsibility for their decisions by using a weapon with autonomous functions to execute those decisions, in the same way that human beings do not escape responsibility for taking a life with a knife or a gun rather than with their bare human hands.

So, there is no need to stigmatize autonomy as either preventing humans from being held accountable for their decisions, or as inherently reducing control: autonomy does not necessarily do either one.

What next for human-machine interaction?

So, with all of this said, what should come next with regard to human-machine interaction? The reality is that technology is developing rapidly, and standards developed based on our understandings today could be obsolete by tomorrow. So, we need to focus on how to ensure that weapons incorporating those technologies are used in compliance with IHL, and used responsibly, tomorrow. How can we do that?

The U.S. view is that states should take a proactive approach in addressing human-machine interaction. States seeking to develop new uses for autonomy in weapon systems should be affirmatively trying to identify and address these issues in their respective processes for managing the life-cycle of the weapons. One way to do this is to emphasize the importance of weapons review policies and practices—if states are thoroughly and properly conducting reviews of their systems during development and prior to use, they can assess whether the specifics of that system can be used consistently with IHL rules and principles, and can be used in a responsible manner.

For example, the DoD Directive requires senior officials to review weapon systems that use autonomy in new ways. This review, which is additional to the normal weapons review processes, is required before a system enters formal development and, again, before fielding, to ensure that military, acquisition, legal, and policy expertise is brought to bear as these new types of weapons are being developed. You have heard me mention reviews several times during the course of my remarks today, but I will say it once more: robust review policies and procedures to ensure lawful and responsible use are one of the most effective ways we can think of to ensure that weapons that are developed tomorrow, and next week, and next year, are used lawfully and responsibly.

Another way to do this is by working to clarify how existing IHL applies to particular systems—the United States developed a paper for the GGE in March 2019 that worked through three general scenarios for the use of autonomous functions in weapon systems and how IHL would apply to those three scenarios. More work could be done on this if states are willing to

share their intended use scenarios and their interpretations of how IHL would apply in such cases.

But in our view, there is no better place to do this than in the GGE—and the United States continues to see real value in the conversations that are happening at the GGE, talking through these very difficult issues in a forum that includes technological, military, and legal experts from governments, as well as participation by those from outside of governments. The GGE is really a remarkable and unique venue: a standing body with a mandate to discuss this extremely complicated, politically fraught topic in a non-politicized way that is grounded in IHL. Where else do we have a body so well-suited to be working through these difficult issues? And, in that light, the United States looks forward in particular to continuing these conversations over the course of the next two years. And we look forward to contributing to a strong outcome before the end of the current two-year mandate of the GGE. Thank you.

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On September 11, 2020, the United States provided a statement at the group of government experts (“GGE”) in Geneva on “further consideration of the human element in the use of lethal force and aspects of human-machine interaction in the development, deployment and use of emerging technologies in the area of LAWS.” The statement is excerpted below and available at <https://geneva.usmission.gov/2020/09/30/group-of-governmental-experts-on-lethal-autonomous-weapons-systems-laws-agenda-item-5c/>.

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The United States recognizes the keen interest many GGE participants have expressed in discussing further the human element and aspects of human-machine interaction in the development and use of emerging technologies in the area of LAWS. We agree that these are topics upon which further common understandings can and should be built, given the range of views currently expressed by various States. We believe that Guiding Principle (c) is an excellent basis on which we can build these additional common understandings. This guiding principle recognizes that human-machine interaction should ensure IHL compliance, and also recognizes the need to consider human-machine interaction comprehensively, across the life cycle of the weapon system. Therefore, in our view, a positive next step for the GGE in this area would be to elaborate on good practices in human-machine interaction that can strengthen compliance with IHL.

In our commentary on Guiding Principle (c), the United States proposed a new conclusion on human-machine interaction for the GGE’s consideration, along these lines. It begins by stating that:

“Weapons systems based on emerging technologies in the area of LAWS should effectuate the intent of commanders and operators to comply with IHL, in particular, by avoiding unintended engagements and minimizing harm to civilians and civilian objects.”

This conclusion is drawn from real-world practice in human-machine interaction and also recognizes that IHL imposes requirements on human beings. Therefore, good practices in human-machine interaction to strengthen compliance with IHL should effectuate human beings’

intent to comply with IHL. Our commentary then goes on to elaborate three categories of measures to effectuate this objective:

a. Weapons systems based on emerging technologies in the area of LAWS should be engineered to perform as anticipated. This should include verification and validation and testing and evaluation before fielding systems.

b. Relevant personnel should properly understand weapons systems based on emerging technologies in the area of LAWS. Training, doctrine, and tactics, techniques, and procedures should be established for the weapon system. Operators should be certified by relevant authorities that they have been trained to operate the weapon system in accordance with applicable rules. And,

c. User interfaces for weapons systems based on emerging technologies in the area of LAWS should be clear in order for operators to make informed and appropriate decisions in engaging targets. In particular, interface between people and machines for autonomous and semi-autonomous weapon systems should: (i) be readily understandable to trained operators; (ii) provide traceable feedback on system status; and (iii) provide clear procedures for trained operators to activate and deactivate system functions.

We are interested in the views of GGE participants on these proposed new conclusions, which reflect good practices that can strengthen compliance with IHL. These proposed new conclusions provide the basis for more detailed discussion regarding good practices in engineering weapons systems, training personnel, and human-machine interfaces. We hope the GGE can productively articulate good practices that can strengthen compliance with IHL as a means of developing consensus recommendations on the issue of human-machine interaction.

Human responsibility is a critical dimension of the human element in the use of lethal force.

We also believe it would be productive for the GGE to address how well-established international legal principles of State and individual responsibility apply to States and persons who use weapon systems with autonomous functions. In its commentary on Guiding Principle (b), the United States has proposed eight new conclusions along these lines for the GGE's consideration.

1. Under principles of State responsibility, every internationally wrongful act of a State, including such acts involving the use of emerging technologies in the area of LAWS, entails the international responsibility of that State.

2. A State remains responsible for all acts committed by persons forming part of its armed forces, including any such use of emerging technologies in the area of LAWS, in accordance with applicable international law.

3. An individual, including a designer, developer, an official authorizing acquisition or deployment, a commander, or a system operator, is responsible for his or her decisions governed by IHL with regard to emerging technologies in the area of LAWS.

4. Under applicable international and domestic law, an individual remains responsible for his or her conduct in violation of IHL, including any such violations involving emerging technologies in the area of LAWS. The use of machines, including emerging technologies in the area of LAWS, does not provide a basis for excluding legal responsibility.

5. The responsibilities of any particular individual in implementing a State or a party to a conflict's obligations under IHL may depend on that person's role in the organization or military operations, including whether that individual has the authority to make the decisions and judgments necessary to the performance of that duty under IHL.

6. Under IHL, a decision, including decisions involving emerging technologies in the area of LAWS, must be judged based on the information available to the decision-maker at the time and not on the basis of information that subsequently becomes available.

7. Unintended harm to civilians and other persons protected by IHL from accidents or equipment malfunctions, including those involving emerging technologies in the area of LAWS, is not a violation of IHL as such. And,

8. States and parties to a conflict have affirmative obligations with respect to the protection of civilians and other classes of persons under IHL, which continue to apply when emerging technologies in the area of LAWS are used. These obligations are to be assessed in light of the general practice of States, including common standards of the military profession in conducting operations.

We look forward to discussing these and other proposals with other delegations.

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On September 19, 2020, the United States provided a statement at the GGE on “possible options for addressing the humanitarian and international security challenges posed by emerging technologies in the area of LAWS.” The statement is available at <https://geneva.usmission.gov/2020/09/30/group-of-governmental-experts-on-lethal-autonomous-weapons-systems-laws-agenda-item-5e/> and excerpted below.

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At the outset, the United States wishes to recognize that one of the principal humanitarian and international security challenges posed by emerging technologies in the area of LAWS, is how to use these emerging technologies to achieve humanitarian and security benefits. For example, guiding principle (h) recognizes that emerging technologies in the area of LAWS can be used to uphold compliance with IHL. Technology can present risks and opportunities, and taking advantages of those opportunities can be as important as minimizing risks.

One theme that we have emphasized, and that Ambassador Karklins also mentioned during his presentation, for the GGE to consider is that form must follow function. It would be counterproductive to determine what form the outcome our work should take before we work through the substantive issues. We have proposed in our national commentaries and in our remarks on the other agenda items substantive conclusions for the GGE to consider. While we continue to support the Chair’s proposal for substantive intercessional work, we fully understand the need for this work to be as inclusive as possible and are ready to engage on the substance of these issues with the appropriate modalities.

That said, in the discussions so far, we have not been persuaded that a new treaty is necessary because we believe existing IHL provides a robust and coherent framework for the regulation of emerging technologies in the area of LAWS. In addition, we must be cautious about predicting the course of technological developments, which are rapid and ongoing. It makes sense to explore formats that allowed for continued discussion, refinement, and iteration.

We would not want to codify conclusions that would be rendered obsolete in light of technological developments.

The GGE has done significant work in elaborating guiding principles, and we continue to believe that the Guiding Principles have offered parties to the CCW the best vehicle for clarifying and further developing the normative framework that is immediately available to parties as they navigate emerging technologies in the area of LAWS. We disagree that these principles' utility is limited to guiding the work of the GGE—the decision to endorse the Guiding Principles at last year's meeting of High Contracting Parties was intended to begin a broader process of providing parties to the CCW with meaningful outcomes. But we are glad that there continues to be consensus that the Guiding Principles serve as the foundation for the GGE's work. We should continue the very successful approach that we took last year of considering how we can elaborate on the guiding principles. To that end, we have proposed further work on guiding principle (a) by clarifying IHL requirements and by articulating how principles of State and individual responsibility apply. But we also think the GGE should be compiling and elaborating upon good practices under other Guiding Principles.

For example, Guiding Principle (d) recognizes that State and individual responsibility must be ensured through the effective implementation of accountability measures, including the military chain of command. In its commentary on Guiding Principle (d), the United States has proposed a number of general practices to help ensure accountability in military operations, including operations involving the use of emerging technologies in the area of LAWS. These include:

- a. Conducting operations under a clear operational chain of command; and
- b. Subjecting members of the armed forces to a system of military law and discipline.

The United States has also proposed practices with respect to the use of weapons systems, including those based on emerging technologies in the areas of LAWS, which can promote accountability. These are:

- a. Rigorous testing of and training on the weapon system, so commanders and operators understand the likely effects of employing the weapon system.
- b. Establishing procedures and doctrine applicable to the use of the weapon system, which provide standards for commanders and operators on responsible use and under which they can be held accountable under the State's domestic law.
- c. Using the weapon system in accordance with training, doctrine, and procedures and refraining from unauthorized uses or modifications of the weapons system.

Additionally, Guiding Principle (e) reaffirms the importance of a robust practice of conducting reviews of the legality of weapons. Such reviews are a good practice to facilitate the implementation of international law applicable to weapons and their use in armed conflict, and can also help ensure that their humanitarian and security benefits are realized, and any risks mitigated. To that end, the United States has proposed in its commentary on Guiding Principle (e) a number of good practices for the legal review of weapons systems.

I highlight a few in particular to this discussion:

1. Legal advisers should be consulted regularly in the development or acquisition process so that legal issues can be identified and more in-depth reviews can be conducted where necessary. A weapon system under modification should be reviewed to determine whether the modification poses any legal issues. New concepts for the employment of existing weapons should also be reviewed, when such concepts differ significantly from the intended uses that were considered when those systems were previously reviewed.

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5. The legal review should advise those developing or acquiring the weapon system or its concepts of employment to consider potential measures to reduce the likelihood that use of the weapon will cause harm to civilians or civilian objects. And,

6. Persons conducting the legal review should understand the likely effects of employing the weapon in different operational contexts. Such understandings should be produced through realistic system developmental and operational test and evaluation.

Bearing in mind national security considerations or commercial restrictions on proprietary information, we also believe the GGE should recommend that States share good practices on weapons reviews or legal reviews of particular weapons where appropriate.

Finally, both Guiding Principle (f) and Guiding Principle (g) provide an excellent starting point for addressing humanitarian and security challenges that may arise. Risk assessments, in particular, allow for a weighing of the benefits of the emerging technologies against potential risks and also allow for adjustments to be made as further research and development occurs. Risk assessments can also support the training of commanders and operators by helping them understand the function, capabilities, limitations, and likely effects of using a weapon system. The GGE should consider building on the work reflected in paragraphs 23(a) and 23(b) of its 2019 report by further cataloging potential risks and mitigation measures that should be considered in the design, development, testing, and deployment of weapons systems based on emerging technologies in the area of LAWS.

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On September 21, 2020, the United States provided a statement on the potential challenges to international humanitarian law (“IHL”) posed by emerging technologies in the area of LAWS. The statement is excerpted below and available at <https://geneva.usmission.gov/2020/09/30/group-of-governmental-experts-on-lethal-autonomous-weapons-systems-laws-agenda-item-5a/>.

* * * *

Thank you, Mr. Chair. The United States appreciates the focus of this agenda item on the application of IHL to emerging technologies in the area of lethal autonomous weapons systems (LAWS). Guiding Principle (a) reflects the foundational premise that IHL applies to these weapons, and the GGE’s 2019 report contains significant conclusions on IHL. Of course, much more work can be done on IHL. This work on understanding how IHL applies is critical to effectively implementing the other guiding principles, including guiding principles (b), (c), (d), (e), and (h).

Indeed, reaching common understanding on what existing IHL requires could also help us re-solve diverging perspectives on whether new law or norms are needed, as such an effort would help us to better understand our respective legal positions and determine whether these diverging perspectives are based on different understandings of the requirements imposed by existing law.

Mr. Chair, the GGE should build on its successful work on IHL by further clarifying IHL re-quirements applicable to the use of emerging technologies in the area of LAWS. In our

national commentary to Guiding Principle (a), we have proposed that this be done by considering how militaries have generally used autonomous functions in weapon systems and articulating conclusions about these general use scenarios.

In particular, we propose examining how the following uses of emerging technologies in the area of LAWS can be consistent with IHL:

1. Using autonomous functions to effectuate more accurately and reliably a commander or operator's intent to strike a specific target or target group;
2. Using emerging technologies in the area of LAWS to inform decision-making.
3. Using weapons systems that autonomously select and engage targets where the human operator has not expressly intended to strike a specific target or group of targets when activating the weapon system.

These use scenarios frame a number of questions that are worth further exploration, such as: when is it consistent with IHL for a decision-maker to rely on a machine assessment to consider a target to be a military objective? What factors should inform a proportionality assessment regarding the employment of weapons systems that autonomously select and engage targets?

We have proposed conclusions on these and other issues. For example, we propose that the GGE build on last year's report, which recognized the importance of precautions, by elaborating on the

types of precautions that States have employed in weapon systems with autonomous functions. On page 4 of our national commentary, we proposed the following:

Feasible precautions must be taken in use of weapon systems that autonomously select and engage targets to reduce the expected harm to civilians and civilian objects. Such precautions may include:

- i. Warnings (e.g., to potential civilian air traffic or notices to mariners);
- ii. Monitoring the operation of the weapon system; and
- iii. Activation or employment of self-destruct, self-deactivation, or self-neutralization mechanisms (e.g., use of rounds that self-destruct in flight or torpedoes that sink to the bottom if they miss their targets).

Reaching more granular understandings like this of IHL requirements would strengthen the normative and operational framework. For example, it would improve our ability to conduct legal review of weapons, to train personnel to comply with IHL requirements, and to apply principles of State and individual responsibility.

We plan to discuss the issue of human-machine interaction in greater detail during the appropriate agenda item later this week, but let me just note that in our view, IHL does not establish a requirement for "human control" as such. Rather, IHL seeks, *inter alia*, to ensure the use of weapons is consistent with the fundamental principles and requirements of distinction, proportionality, and precautions.

The application of IHL to emerging technologies in the area of LAWS is a critical topic, and we welcome today's discussion and continued discussions with other delegations regarding

the more technical legal conclusions that we've proposed in working papers and our national commentary regarding how IHL applies in these three use scenarios. In particular, we would welcome more focused discussions with legal experts on these issues as part of our ongoing work.

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On September 22, 2020, the United States provided a statement at the GGE on, "characterization of the systems under consideration in order to promote a common understanding on concepts and characteristics relevant to the objectives and purposes of the Convention." The statement is excerpted below and available at <https://geneva.usmission.gov/2020/09/30/group-of-governmental-experts-on-lethal-autonomous-weapons-systems-laws-agenda-item-5b/>

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The United States continues to support identifying general characteristics of systems that are under the GGE's consideration in order to facilitate the GGE's understanding of the relevant concepts and issues. The flexibility inherent in this approach of identifying characteristics is important given that scientists and engineers continue to develop new technological advancements and that our understanding continues to improve. This discussion could also help delegations understand better what we mean by the terms we are using. Some delegations may be using the same term to mean different things or some delegations may be using different terms to mean the same thing.

In identifying characteristics of LAWS, we must not prejudice future decisions regarding potential outcomes. For example, characteristics should be identified in order to promote common understandings, not with a view towards advancing a particular policy objective, like a ban. Similarly, we must be cautious not to make hasty judgments about the value or likely effects of emerging or future technologies. Frequently, we may change our views of technologies over time as we gain more experience with them.

In discussing the general characteristics of such systems, we must not lose sight of the fact that no matter their level of sophistication or how many autonomous features or functions they have, these weapons systems are tools for human use. Guiding Principle (i) reminds us of this, stating: "In crafting potential policy measures, emerging technologies in the area of lethal autonomous weapons systems should not be anthropomorphized."

In particular, anthropomorphizing emerging technologies in the area of LAWS can lead to legal and technical misunderstandings that could be detrimental to the efficacy of potential policy measures. From a technical perspective, anthropomorphizing emerging technologies in the area of LAWS can lead to mis-estimating machine capabilities. From a legal perspective, anthropomorphizing emerging technologies in the area of LAWS can obscure the important point that IHL imposes obligations on States, parties to a conflict, and individuals, rather than machines. "Smart" weapons cannot violate IHL any more than "dumb" weapons can. Similarly, machines are not intervening moral agents, and human beings do not escape responsibility for their decisions by using a weapon with autonomous functions. Anthropomorphizing emerging

technologies in the area of LAWS could incorrectly suggest a diminished responsibility of human beings simply by the use of emerging technologies in the area of LAWS.

The U.S. Department of Defense policy directive on the use of autonomy in weapon systems establishes definitions of an “autonomous weapon system” and “semi-autonomous weapon system” for the purposes of that policy directive. These definitions focus on what we believe to be the most important issues posed by the use of autonomy in weapon systems — i.e., people who employ these weapons can rely on the weapon systems to select and engage targets. We will not repeat the specific definitions today, but, for reference, those definitions are reproduced in the U.S. working paper from November 2017.

In discussing concerns about autonomous weapons, it may be important consider whether these concerns are fundamentally about the type of weapon system or whether the concerns are about how weapons systems are used. For example, consider a missile with automated target recognition capabilities that can select and engage enemy tanks. In one scenario, an operator identifies a specific target and fires the missile at this target. Under the definitions applied by the U.S. military, this is a semi-autonomous weapon system. That same weapon system and capability could, however, be classified as an autonomous system if it is used in a different way. If the operator does not identify a specific tank, but instead fires the weapon to loiter in an area and autonomously select and engage tanks, the weapon is classified as an autonomous weapon in U.S. military practice. The weapon system’s technical characteristics are the same, but how it is to be used changes whether it is classified as autonomous or semi-autonomous.

Some delegations this morning and yesterday have raised concerns about LAWS being inherently unpredictable and in the spirit of the interactive discussion that our Chair has invited, I would ask them to consider whether this concern is based on a characteristic of the weapon system or whether it is actually based on assumptions about how those weapon systems would be used. We believe that making progress in our discussions involves developing our common understanding of how emerging technologies in the area of LAWS can be used consistent with IHL, and the conclusions we have proposed in our national commentary on guiding principle (a) try to do that.

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C. DETAINEES

Al Qahtani v. Trump

Mohammed al Qahtani, a Guantanamo detainee, filed a motion in his habeas case asking the court to order the government to conduct a mixed medical commission (“MMC”) to determine his entitlement to repatriation due to his medical issues. Al Qahtani contended that he was eligible for an MMC under Army Regulation AR 190-8, which implements certain international legal obligations applicable in international armed conflicts. The district court ruled in al Qahtani's favor, finding that he is covered by AR 190-8 and ordering the Department of Defense to establish an MMC to evaluate him. *Al-Qahtani v. Trump*, 443 F.Supp.3d. 116 (D.D.C. 2020). The U.S. government appealed to the D.C. Circuit. The government also moved for a stay pending appeal. The

D.C. Circuit granted al Qahtani’s motion to dismiss the appeal on September 29, 2020. Excerpts from the U.S. government’s opposition to al Qahtani’s motion to dismiss are below.* The brief is available at <https://www.state.gov/digest-of-united-states-practice-in-international-law/>.

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1. a. The Third Geneva Convention establishes rules for the treatment of prisoners of war. The full protections of the Convention apply to international armed conflicts—that is, to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” Third Geneva Convention, art. 2. In such conflicts, the Convention applies even if “one of the Powers in conflict may not be a party to the Convention.” *Id.* “[T]he Powers who are parties [to the Convention]” shall “be bound by the Convention in relation to the said [non-party] Power, if the latter accepts and applies the provisions thereof.” *Id.* (emphasis added).

By contrast, the full protections of the Convention do not apply to non-international armed conflicts. “In the case of armed conflict not of an international character,” parties are only “bound to apply, at a minimum,” certain provisions enumerated in Article 3 of the Convention that relate to the humane treatment of detainees. *Id.*, art. 3; see generally *Hamdan v. Rumsfeld*, 548 U.S. 557, 629-31 (2006).

The United States’s conflict with al-Qaida is a non-international armed conflict. Al-Qaida is a terrorist organization, not a State that is a High Contracting Party to the Third Geneva Convention. Furthermore, “[n]on-state actors such as al-Qaida” are not “‘Power[s]’ that would be eligible under Article 2 . . . to secure protection by complying with the Convention’s requirements.” *Hamdan v. Rumsfeld*, 415 F.3d 33, 44 (D.C. Cir. 2005) (Williams, J., concurring), cited approvingly by *Hamdan*, 548 U.S. at 630. And in any event, al-Qaida neither accepts nor applies the Convention’s provisions. The full protections of the Convention thus do not apply to enemy combatants who are part of al-Qaida, as al-Qaida’s members are not entitled to prisoner-of-war status under the Convention. See White House Press Secretary Announcement of President Bush’s Determination Re Legal Status of Taliban and Al Qaeda Detainees (Feb. 7, 2002), <https://2009-2017.state.gov/s/1/38727.htm>. The Convention only obliges the United States to apply the provisions of Article 3.

b. The Third Geneva Convention requires the parties to an international armed conflict to repatriate “seriously wounded and seriously sick prisoners of war.” Third Geneva Convention, art. 109. The Convention’s repatriation provisions are not enumerated in Article 3.

To implement the Convention’s medical-repatriation provisions, the Convention calls for the appointment of mixed medical commissions to “examine sick and wounded prisoners of war, and to make all appropriate decisions regarding them.” *Id.* art. 112. The “appointment, duties, and functions of these Commissions” are set forth in Annex II to the Convention. *Id.* Annex II requires each mixed medical commission to have three members. Third Geneva Convention annex II, art. 1. One member must be appointed by the detaining power. *Id.* The two others “shall belong to a neutral country,” *id.*; “shall be appointed by the International

* Editor’s note: On January 11, 2021, the Secretary of the Army issued an “Exception Memorandum,” providing that AR 190-8 does not apply to any of the detainees presently at the Guantanamo Bay detention facility.

Committee of the Red Cross, *id.* annex II, art. 2; and “shall be approved by the Parties to the conflict,” *id.* annex II, art. 3. If the International Committee of the Red Cross cannot arrange for the appointment of neutral members, such appointment “shall be done by the Power protecting the interests of the prisoners of war to be examined.” *Id.* annex II, art. 5. The commission’s decisions “shall be made by a majority vote,” *id.* annex II, art. 10, and must be executed by the detaining power “within three months of the time when it receives due notification of such decisions,” *id.* annex II, art. 12.

c. The United States is a High Contracting Party to the Third Geneva Convention. To carry out the government’s treaty obligations, the Secretaries of the Army, Navy, and Air Force issued Army Regulation 190-8. This regulation “implements international law” relating to enemy prisoners of war and other categories of individuals detained by the U.S. armed forces. AR 190-8 § 1-1(b); see *id.* § 1-1(b)(4) (“In the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence.”). Section 3-12 of the regulation provides for the establishment of mixed medical commissions “to determine cases eligible for repatriation.” *Id.* § 3-12(a)(2). The procedures governing those commissions are based on those specified by Annex II of the Convention. *Id.*

Section 3-12 states that, to be eligible for examination and potential repatriation, an individual must fall into one of two categories: Enemy Prisoners of War or Retained Personnel. AR 190-8 § 3-12(h). The glossary to AR 190-8 defines “Enemy Prisoners of War” as “detained person[s] as defined in Articles 4 and 5 of the [Third] Geneva Convention,” and in particular, as individuals “who, while engaged in combat under orders of [their] government, [are] captured by the armed forces of the enemy.” *Id.*, glossary, sec. II. The glossary defines “Retained Personnel” as “medical personnel” meeting certain requirements; “[c]haplains”; and “[s]taff of National Red Cross societies and other voluntary aid societies duly recognized and authorized by their governments.” *Id.*; see *id.* § 3-15(b).

The glossary also addresses “Other Detainee[s].” AR 190-8, glossary, sec. II. “Other Detainees” are “[p]ersons in the custody of the U.S. Armed Forces who have not been classified as . . . [Enemy Prisoners of War] (article 4, [GC III]), [Retained Personnel] (article 33, [GC III]), or [Civilian Internees] (article 78, [Fourth Geneva Convention]).” *Id.*¹ Other Detainees “shall be treated as [Enemy Prisoners of War] until a legal status is ascertained by competent authority.” *Id.*²³

2. Petitioner Mohammed al Qahtani is a Saudi Arabian national detained at Guantanamo Bay. In 2005, petitioner filed a habeas petition alleging that his detention was unlawful. The government responded with a factual return explaining that petitioner—a member of al-Qaida who unsuccessfully attempted to enter the United States to participate in the September 11 attacks—is being detained pursuant to the 2001 Authorization for Use of Military Force as informed by the laws of war. Petitioner has not yet filed a traverse challenging the factual basis for his detention. Petitioner’s habeas case has been stayed at his request since 2010.

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²³ A civilian internee is a “civilian who is interned during armed conflict or occupation for security reasons or for protection or because he has committed an offense against the detaining power.” AR 190-8, glossary, sec. II. The regulation does not provide for the examination of civilian internees by a mixed medical commission. *Id.* § 3-12(h).

Cross References

International crime issues relating to cyberspace, **Ch. 3.B.6**

CSW resolution on Women and Children Hostages in Armed Conflicts, **Chapter 6.B.2.b**

Children in Armed Conflict, **Chapter 6.C**

Cyber activity sanctions, **Ch. 16.A.8 & 16.A.11**

Afghanistan, **Ch. 17.B.2**

U.S. export policy for unmanned aerial systems (“UAS”), **Ch. 19.C.2**

CHAPTER 19

Arms Control, Disarmament, and Nonproliferation

A. GENERAL

Compliance Report

The State Department announced in a June 23, 2020 media note, available at <https://2017-2021.state.gov/submission-to-congress-of-the-report-on-adherence-to-and-compliance-with-arms-control-nonproliferation-and-disarmament-agreements-and-commitments-compliance-report/>, that it had submitted to Congress the unclassified version of the 2020 Report on Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments (“the Compliance Report”). The report is submitted annually, pursuant to Section 403 of the Arms Control and Disarmament Act, as amended, 22 U.S.C. § 2593a. The State Department previously announced the submission of the executive summary of the report in an April 15, 2020 media note, available at <https://2017-2021.state.gov/submission-to-congress-of-the-executive-summary-of-the-report-on-adherence-to-and-compliance-with-arms-control-nonproliferation-and-disarmament-agreements-and-commitments-compliance-report/>. The report addresses U.S. compliance with and adherence to arms control, nonproliferation, and disarmament agreements and commitments, other States’ compliance with and adherence to arms control, nonproliferation, and disarmament agreements and commitments pertaining to nuclear issues, other States’ adherence to missile commitments and assurances, and other States’ compliance with and adherence to arms control, nonproliferation, and disarmament agreements and commitments pertaining to chemical issues, biological issues, and conventional issues. The 2020 report

primarily covers the period from January 1, 2019 through December 31, 2019. The report is available at <https://www.state.gov/2020-adherence-to-and-compliance-with-arms-control-nonproliferation-and-disarmament-agreements-and-commitments-compliance-report-2/>.

B. NONPROLIFERATION

1. Non-Proliferation Treaty

On February 26, 2020, Acting Deputy Permanent U.S. Representative to the UN Cherith Norman Chalet delivered remarks at a UN Security Council briefing on the Nuclear Non-Proliferation Treaty (“NPT”). Her remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-the-nuclear-non-proliferation-treaty/>. The remarks include references to the “IAEA,” the International Atomic Energy Agency, which plays a role in NPT implementation.

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The Security Council tackles some of the greatest challenges to international peace and security, and among them is the prevention of further proliferation of nuclear weapons. As we approach the 50th anniversary of the entry into force of the NPT, we look forward to celebrating this historic occasion together here at the UN on March 5th. Over nearly five decades, the NPT has proven to be critical to the maintenance of international peace and security. It has made us all the more secure by constraining the spread of nuclear weapons. And it has thereby both enabled global peaceful use of nuclear energy and helped to create conditions conducive to progress on nuclear disarmament.

Fifty years ago, few would have dared to predict that we would be here today, celebrating the success of this Treaty. Prior to the NPT, the United States expressed dire concerns over a possible “snowball effect” of cascading proliferation, which would increase the world’s nuclear weapons stockpiles and undermine confidence in the ability of nonproliferation policies to prevent such a dangerous sequence. Yet in a demonstration of remarkable diplomatic resolve, the international community joined together against this collective threat, reflecting a rare consensus during a time of Cold War polarization. Our efforts culminated in the successful negotiation of this vital treaty, and its subsequent entry into force.

There has been unwavering international consensus about the indispensable role of the Treaty to collective peace and security. The NPT has succeeded for half a century precisely because it serves the fundamental and widely recognized common interest of curbing the proliferation of the world’s most dangerous weapons. We have also seen enormous disarmament progress, in part because the NPT helped curtail the emergence of new nuclear powers. Thanks to the easing of the Cold War tensions, and the success of the NPT-based proliferation regime in impeding the spread of nuclear weapons, it has been possible to reduce the nuclear arsenals of both the United States and Russia to levels not seen since the 1950s. The U.S. stockpile today has been reduced to less than one eighth of its Cold War peak.

We must also recognize that advancing toward the ultimate goal of a world without nuclear weapons must take into account the global security environment. We cannot overlook the actions of those states that are expanding and modernizing their nuclear stockpiles, as well as developing exotic delivery systems, threatening their neighbors, and violating their arms control obligations. These states have caused a deterioration in global security conditions. To address the security challenges that impede disarmament progress, the United States, with more than 40 international partners, have launched a pathbreaking new initiative called, “Creating an Environment for Nuclear Disarmament,” or CEND. The CEND Working Group has met twice already and will meet again in April. The Working Group seeks to foster constructive dialogue on identifying these disarmament challenges, and on exploring ways to ameliorate underlying conditions in the global security environment, so as to pursue further progress toward—and indeed, ultimately—the achievement of nuclear disarmament. In this respect, as well as its emphasis on dialogue and diplomatic engagement with all relevant parties, the CEND initiative stands in stark contrast to the Treaty on the Prohibition of Nuclear Weapons or Ban Treaty. The Ban Treaty deliberately ignores the security challenges that continue to make nuclear deterrence necessary, and will not eliminate a single nuclear warhead, nor make any nation more secure. In fact, when reviewing the text of the Ban Treaty, it is difficult to avoid the conclusion that its drafters sought to give greater legal weight to their document at the expense of the NPT. This is unfortunate.

As we turn toward the 2020 NPT Review Conference, the United States seeks a positive outcome from that meeting that reflects consensus on as broad a basis as possible. We believe consensus is possible if the NPT Parties focus on the big picture, emphasize our common interests, and avoid insisting on divisive positions that cannot command consensus. To strengthen the NPT and the nonproliferation regime, states must support the universalization of the IAEA Additional Protocol, an important tool that gives the IAEA the ability to verify the peaceful use of all nuclear material in states with IAEA comprehensive safeguards agreements. These agreements, in combination with the Additional Protocol, have become the de facto international standard in nuclear safeguards. Moreover, nuclear supplier states should make the adoption of the Additional Protocol by recipient states a requirement for nuclear exports.

States must also be united in the goal of the final, fully verified denuclearization of North Korea. We must remain committed to a secure, peaceful, and bright future for North Korea if it fulfills its obligations. And we must remain united in our determination that Iran never acquire a path to nuclear weapons. The 2020 NPT Review Conference will provide us an opportunity to highlight how the NPT and the broader nuclear nonproliferation regime have made possible thriving international cooperation on peaceful uses of nuclear energy, science, and technology, and we aim to build on that success. We are optimistic that the NPT will remain at the vital center of international security, yet this outcome is far from guaranteed. We must continue to preserve and strengthen the NPT so that, 50 years from now, our successors may mark the hundredth anniversary of the Treaty as an enduring accomplishment that continues to promote international security and prosperity.

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On April 27, 2020, the State Department issued a media note expressing U.S. support for the decision to postpone the 2020 NPT Review Conference (“RevCon”) due to the COVID-19 pandemic. The media note is available at <https://2017-2021.state.gov/postponement-of-2020-treaty-on-the-non-proliferation-of-nuclear-weapons-npt-review-conference-revcon/> and excerpted below.

The United States fully supports Ambassador Zlauvinen in his role as President-designate of the NPT Review Conference and backs his proposal and the subsequent decision of NPT Parties to postpone the NPT RevCon in light of the ongoing COVID-19 pandemic.

The NPT remains the cornerstone of international efforts to prevent the spread of nuclear weapons and the foundation for international cooperation on peaceful uses of nuclear energy and for progress on nuclear disarmament. The United States continues to seek a positive NPT RevCon outcome in which states reaffirm their commitment to the NPT, recognize its enduring shared benefits, and recommit to preserving and strengthening the nuclear nonproliferation regime. The United States will continue to work constructively with other NPT Parties to maintain and strengthen the Treaty, including at the RevCon when conditions allow it to be held.

On March 10, 2020, the State Department released as a media note the joint statement by the foreign ministers of China, France, Russia, the United Kingdom, and the United States on the fiftieth anniversary of the Treaty on the Non-Proliferation of Nuclear Weapons. The media note is available at <https://2017-2021.state.gov/joint-statement-by-the-foreign-ministers-of-china-france-russia-the-united-kingdom-and-the-united-states-on-the-fiftieth-anniversary-of-the-treaty-on-the-non-proliferation-of-nuclear-weapons/>. The joint statement follows.

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On March 5, 1970, the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) entered into force. 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. We reaffirm our commitment to the NPT in all its aspects.

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.

We also celebrate the astonishingly diverse benefits of the peaceful uses of the atom, whether for electricity, medicine, agriculture, or industry. We reiterate our strong support for broadening access to the benefits of nuclear energy and its applications for peaceful purpose. 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.

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. 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.

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 May 11, 2020, the State Department spokesperson issued a statement on the 25th anniversary of the decision in 1995 by States Parties to the NPT to extend the treaty indefinitely, 25 years after its entry into force in 1970. The statement, available at <https://2017-2021.state.gov/25th-anniversary-of-the-extension-of-the-non-proliferation-treaty/>, includes the following:

The NPT entered into force in 1970 with an initial duration of 25 years. The 1995 NPT Review and Extension Conference therefore faced two choices: whether the Treaty should be extended, and if so whether it should be for a finite period or indefinitely.

Wisely, NPT Parties decided to extend the Treaty indefinitely, ensuring that the foundation for efforts to stem the spread of nuclear weapons would remain in place. Today, twenty-five years later, we celebrate the wisdom of that decision. Fifty years after it entered into force, the NPT continues to provide a reliable basis for verified nonproliferation assurances that enable international cooperation on peaceful uses of nuclear energy and on efforts towards nuclear arms control and disarmament.

2. Country-Specific Issues

a. *Iran*

In a statement at the March 11, 2020 IAEA Board of Governors meeting on the “NPT Safeguards Agreement in the Islamic Republic of Iran” agenda item, excerpted below and available at <https://vienna.usmission.gov/iaea-bog-u-s-on-implementation-of-npt-safeguards-in-iran/>, the United States addressed the IAEA’s efforts to clarify information relating to the correctness and completeness of Iran’s declarations under its NPT-required comprehensive safeguards agreement as well as its Additional Protocol, including Iran’s refusal to provide the Agency with required access under its Additional Protocol to two undeclared locations.

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We note with significant concern the Director General’s report before us on safeguards implementation in Iran. It is unfortunate that such a report, the first of its kind issued to the Board since 2015, is now once again necessary, but Iran’s refusal to address vital safeguards questions require such a response. We fully support the Secretariat’s pursuit of the critical safeguards questions noted in the report, consistent with the Agency’s longstanding safeguards practice. In the face of Iran’s refusal to cooperate, it is clear Iran has left the Director General no option but to bring these urgent issues to the Board’s attention. A core responsibility we have as members of the Board is to review and respond to information reported to the Secretariat commensurate with its significance. And the information in the report before us today is very significant. It should trouble all of us.

As we learned from the Deputy Director General’s technical briefing, the issues outlined in the safeguards report are in addition to the Agency’s unresolved effort, now well over a year long, to determine the origin of chemically processed uranium particles detected at an undeclared location in Iran. Altogether, these four issues paint a deeply worrying picture of Iran’s safeguards implementation. The nature of the safeguards issues reported to us, and Iran’s lack of response and cooperation with the Agency over many months now, raise very serious concerns regarding Iran’s compliance with its safeguards obligations.

Perhaps most disturbingly, Iran’s own official statements leave no question that it has chosen to directly reject the Agency’s requests for clarifications and access related to possible undeclared nuclear material and nuclear-related activities in Iran, which were made in accordance with the terms of Iran’s safeguards agreement and Additional Protocol. The Secretariat has explicitly invoked specific provisions of these agreements, making clear Iran’s obligations to provide such clarifications and access. Iran’s refusal to cooperate with the IAEA on these matters raises very serious concerns about its compliance with its safeguards obligations—and potentially also with Article III of the NPT.

Especially in circumstances such as those reported by the Director General, we must act to ensure the continued integrity of the global safeguards system, and the Board of Governors thus has a special responsibility to uphold and defend the Agency and its professional and

independent administration of safeguards. In light of the serious issues reported to us, the Board should state unequivocally today that Iran must resolve these concerns immediately.

...Let us examine the three very serious issues brought to the Board's attention in the Director General's safeguards report, which are in addition to the Agency's ongoing efforts – and Iran's apparently continuing refusal to provide adequate explanations – regarding the detection of uranium particles at an undeclared location. Compounding our deep and growing concerns, the Director General has reported that Iran has refused all substantive engagement with the Agency on the three issues noted in the safeguards report since they were first raised in letters to Iran in July and August of last year, almost eight months ago. The refusal of a Member State to provide any substantive engagement whatsoever with the IAEA on questions relating to the possible existence of undeclared nuclear material, while at the same time refusing repeated requests for access as it reportedly takes actions consistent with sanitization, is absolutely unprecedented. Even for Iran, which has a long and truly infamous history of obstructing the Agency, its total refusal to cooperate on these issues is a new low.

First, Iran has refused to address the Agency's questions regarding possible undeclared natural uranium at a location that has been heavily sanitized. In the Agency's assessment, the nuclear material in question may potentially be uranium metal. Any refusal to cooperate with the IAEA on questions of possible undeclared nuclear material would be of serious proliferation concern. But given the potential for use of uranium metal in nuclear weapons research and development activities, the presence of even small quantities of undeclared uranium metal in Iran today would raise even more worrying questions. Iran must immediately cooperate with the Agency to resolve the Agency's questions regarding the possible existence of such nuclear material in Iran today. And should such material exist, Iran must place it under Agency safeguards without further delay.

Second, Iran has refused the Agency access to a specified location for the purposes of assuring the absence of undeclared nuclear material and activities, specifically, activities potentially related to uranium conversion. And third, the Director General has reported that Iran has refused access to yet another specified location with a possible connection to undeclared nuclear material or activities. If Iran has nothing to hide, then it should have no concerns with providing such access. However, it seems clear from Iran's own statements that it has no intention of substantively addressing – much less resolving – the Agency's concerns. Alarming, from Iran's reported actions to apparently sanitize locations, it seems that Iran still has much to hide.

It is widely recognized that Iran had a nuclear weapons program until 2003. The matter now before us is whether there is undeclared nuclear material or activity in Iran today. Rather than respond in a timely way to the Agency's requests, Iran has belatedly released a public response that dismisses the Agency's basis for requesting access. Iran's failure to address the IAEA's concerns strikes at the heart of the Agency's essential verification role and Iran's safeguards obligations, and potentially also Iran's compliance with the NPT. The seriousness of Iran's refusal to clarify these matters cannot be overstated.

Iran's safeguards obligations relevant to these matters are clear – any such nuclear fuel cycle-related activities must be declared to the IAEA, and Iran must provide the IAEA with clarifications regarding its declarations upon request by the Agency. If Iran has any legitimate concerns regarding the Agency's request, it may make those known to the Agency. However, over the course of many months now, Iran has apparently conveyed no legitimate concerns, and

instead has taken issue with the IAEA's very authority to carry out such access. Iran's official statements in response to the Agency's requests are as disturbing as they are outrageous.

In an attempt to justify its lack of cooperation, Iran has questioned the adequacy of the information provided by the Agency in connection with its questions. The argument lacks all merit. The Secretariat has reported to us that this information was subject to an "extensive and rigorous corroboration process," consistent with the standard safeguards practices followed in all states with safeguards agreements in force. The Secretariat has made clear that in the matters before us such information includes open source information, commercial satellite imagery, and information provided to the Agency by Iran itself.

We have full faith and confidence that the Agency is undertaking this work with the care and professionalism that it requires, and we reject any attempt to call into question or undermine the Agency's integrity. Given the Secretariat's rigorous review process and the seriousness and commitment with which the Agency conducts its important work, we can all be sure of the adequacy of the information that it has presented. Iran has been caught in so many lies about its nuclear program over the years, its claim today that it has somehow been framed is ludicrous – and is firmly and uncontestably rebutted by this Board's long experience with and deep knowledge of the credibility, professionalism, and integrity of this Agency. The only way for Iran to resolve the Agency's concerns is to provide the Agency with the information and access that it seeks – and that Iran is obliged to provide.

In response to each of these matters, alarming in isolation but profoundly troubling in combination, Iran has argued that they are somehow off limits to the IAEA because they involve "past activities." The Secretariat has stated clearly that each issue pertains to questions relating to the possibility of undeclared nuclear material and activities in Iran today, and that nuclear material has no expiration date. The Secretariat has a responsibility to pursue such questions, as it does in all states under safeguards. However, the reason that Iran receives the level of attention that it does from the Agency is because Iran sits virtually alone in its past safeguards noncompliance and current noncooperation regarding potential undeclared nuclear material and activities.

The IAEA has the authority to access any location in Iran to resolve a question relating to the correctness and completeness of Iran's declarations or to resolve an inconsistency regarding the same. In light of the new information being reported to the Board, we should recall the IAEA's fundamental responsibility to pursue any concern regarding possible undeclared nuclear material or safeguards-relevant activities in all states under IAEA safeguards, and its responsibility to bring sufficiently serious concerns arising from these efforts to the attention of the Board. This is what now has occurred. We have full faith and confidence that the Agency and its highly skilled and professional inspectors will continue to do so appropriately.

Some in the Board have offered their judgment that the matters before us supposedly present little "proliferation risk" – and this in spite of Iran's refusal to cooperate, which prevents us from understanding the true scope of the matters. However, even small amounts of undeclared nuclear material raise serious questions about the correctness and completeness of Iran's declarations, and Iran's refusal to cooperate and its sanitization activities raise questions about whether larger amounts of nuclear material or additional nuclear-related activities may also still be unaccounted for. Moreover, the refusal of a state to cooperate with the IAEA to address questions related to possible undeclared nuclear material – in any quantity – risks undermining the international safeguards regime more broadly. The significance of the proliferation risk

before us can only be assessed once the facts become clear, but the significance of ignoring evidence of this sort would be unquestionably grave.

Iran has a long history of deception, and it is the role of the Board to ensure that Iran's actions do not distract from the Agency's vital verification efforts. Iran's past pursuit of nuclear weapons – and its well-documented efforts to preserve and conceal information from its prior nuclear weapons work – underscores the seriousness with which the international community must view these pressing matters. A country with a history of pursuing nuclear weapons cannot be allowed to evade the IAEA's legitimate questions regarding potential undeclared nuclear material. As a Board of Governors, we should speak with one voice today in underscoring that Iran must comply fully with its nuclear safeguards obligations without further delay, and it must immediately provide the IAEA nothing short of full cooperation. Any further delay, denial, or deception by Iran that inhibits the IAEA's essential safeguards verification work would require that the Board appropriately escalate this issue.

...Timely reporting on the pressing issues raised today is essential for the Board to accurately assess Iran's implementation of its safeguards obligations. We request that the Director General's report be made public, consistent with the Board's longstanding practice, so that the international community may understand the serious and urgent nature of the issues under discussion. The Board should continue following this closely and with serious concern. We request that the Board be kept fully apprised on this matter until the Director General can confirm that Iran has satisfactorily resolved the Agency's concerns regarding Iran's safeguards obligations.

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On June 19, 2020, the IAEA Board of Governors adopted a resolution calling on Iran to cooperate with the Agency's ongoing safeguards investigations. The United States issued an explanation of vote in Vienna on the resolution, available at <https://vienna.usmission.gov/u-s-on-the-iran-safeguards-resolution/>. The State Department's press statement on the resolution is available at <https://2017-2021.state.gov/iaea-board-of-governors-adopts-resolution-calls-on-iran-to-cooperate-without-further-delay/> and includes the following:

Iran's denial of access to IAEA inspectors and refusal to cooperate with the IAEA's investigation is deeply troubling and raises serious questions about what Iran is trying to hide. Over the past months, Iran has not only continued its nuclear escalation and extortion, but it has also stonewalled the IAEA. These actions are unacceptable and underscore the continued threat posed by Iran's nuclear program to international peace and security.

Iran has so far shown no intention of curtailing the ongoing expansion of its nuclear program and for months has refused to provide the answers and access required for the IAEA to conduct its critical verification work. As the IAEA Board made clear today, Iran must immediately comply with its IAEA safeguards obligations and provide the IAEA nothing short of full cooperation. If Iran fails to

cooperate, the international community must be prepared to take further action.

The U.S. statement at the June 18, 2020 IAEA Board of Governors meeting on the “NPT Safeguards Agreement in the Islamic Republic of Iran” agenda item is excerpted below and available at <https://vienna.usmission.gov/iaea-bog-u-s-on-npt-safeguards-agreement-in-iran/>.

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We thank the Director General, the Deputy DG for Safeguards, and their staff for this critical report on safeguards implementation in Iran. Continued timely and factual reporting such as this is essential for the Board to accurately assess Iran’s implementation of its safeguards obligations.

In March, Board members spoke clearly and firmly on this important issue. Compliance with international obligations to provide information and access to the IAEA is at the core of the global safeguards regime, and an overwhelming majority of us voiced strong support for the IAEA and called on Iran to cooperate fully and without further delay with its legally binding safeguards obligations, including by providing the access required under its Additional Protocol.

At the time of the March report, Iran had been refusing for over a month to allow the IAEA to carry out access that Iran is obligated to provide. Board members made clear this was unacceptable, but in the three months that have since passed, Iran has still not cooperated with the IAEA. To the contrary, Iran has raised unfounded questions about the legal basis for the Agency’s requests and suggested that matters of possible undeclared nuclear material and activities are somehow not urgent, significant, or compelling. Accepting such claims would undercut the entire global safeguards regime and the international assurances regarding non-diversion of nuclear material that it provides, assurances on which every one of us in this room relies.

It has now been nearly one year since the IAEA first sought clarifications from Iran about possible undeclared nuclear material and activities at these three locations, and Iran has denied the IAEA access for over four months to two of these locations. With this new report, we now better understand the IAEA’s questions related to each of these locations and the seriousness of the outstanding issues.

We now know the Agency is seeking clarification about the possible presence in Iran of a uranium metal disc with indications of drilling and hydriding. The Agency believes this disc was at one time present at a location that later underwent significant sanitization. This revelation is particularly concerning given the potential for use of uranium metal in nuclear weapons research and development activities, and we note with concern that some such R&D requires only small quantities of uranium metal.

We also know now that the Agency’s questions related to a second location involve indications of possible processing and conversion of uranium ore into oxide and fluoride compounds, a necessary step to produce the feed material for a gas centrifuge uranium enrichment plant of the type Iran built originally in secret at Natanz. If undeclared nuclear material was previously present at this facility, where is it today? Could it be the source of the

chemically processed uranium particles the IAEA found in samples taken at yet another location, as the IAEA reported last year?

Finally, related to the third location, past preparation for the use of neutron detection equipment at this locale has led the IAEA to raise questions about “the possible use and storage of nuclear material.” Such questions, in combination with past high explosives testing at the site, raise deeply troubling questions about possible nuclear weapons-related work at the location in the past and possible nuclear material that may remain undeclared to this day.

For all three locations, the Agency reports indications of sanitization or demolition. In one case, these sanitization activities occurred from July 2019 onward, immediately after the IAEA reportedly questioned Iran about the detection of particles of chemically processed uranium at the separate location reported earlier.

As we consider the unanswered questions and access denials detailed in the Director General’s report, it is important to note the significance of the Agency’s finding of uranium particles, the source of which the IAEA is still trying to discern. It has now been nearly a year since analysis of environmental samples revealed their presence, and seven months since this issue was brought to this Board’s attention in a special session in November. This finding of unexplained uranium means that inspectors are pursuing the previously mentioned additional access and questions regarding credible indications of possible hidden nuclear material in Iran in the context of having already found physical evidence that such nuclear material may exist today. Until resolved, therefore, this issue is a current and compelling safeguards concern. Iran’s claims dismissing the proliferation risk before us are as transparently false as they are self-interested.

Iran has posited that if it agrees to provide the IAEA with the required clarifications and access, such cooperation will only lead to further questions, even if nothing is found. First, as I have just underscored, something has already been found—the traces of still unexplained chemically-processed uranium. Second, Iran’s claim ignores the IAEA’s mandate to follow the facts where they lead in order to ensure all nuclear material is declared and in peaceful uses. Doing less would mean an end to the practical effectiveness of the global safeguards regime. The IAEA’s long record of effective professionalism in pursuing such cases is clear and there for all to see, which makes Iran’s attempts to imply that the Agency is acting somehow inappropriately all the more transparently misleading.

So, let me reiterate a few key facts that Iran cannot wish away: the Director General has reported to the Board that there are no less than four undeclared locations in Iran at which undeclared nuclear material has potentially been present and at which undeclared activities have possibly occurred. The IAEA has tirelessly sought Iran’s cooperation, but Tehran continues to stonewall the investigation. In the Director General’s own words, “this is adversely affecting the Agency’s ability to clarify and resolve the questions, and thereby to provide credible assurance of the absence of undeclared nuclear material and activities at these locations in Iran.”

...What was concerning and unprecedented in March has become a truly alarming threat to the integrity of the safeguards regime today. Iran’s refusal to cooperate cannot be allowed to stand unanswered. The Board must respond.

These issues are central to Iran’s current safeguards obligations and have direct relevance to potential undeclared nuclear materials and activities in Iran today. For the sake of the safeguards regime, the Board cannot simply look the other way and allow Iran or any other state to dictate whether and how it will comply with its safeguards obligations.

Without verified answers from Iran, the IAEA cannot determine whether nuclear material may remain undeclared and unaccounted for, and if so, how much, where the material may be today, and how it is being used. The IAEA's questions regarding possible undeclared uranium metal that has undergone processing, possible undeclared fuel cycle activities that could produce feed material for a uranium enrichment plant, and indications of possible use and storage of nuclear material at a high explosives test site are all clear proliferation concerns. Ignoring such critical safeguards-related questions in Iran would undermine the implementation of safeguards everywhere. For those who seek a comprehensive, stable, and enduring diplomatic solution to the Iran nuclear issue, resolving such questions and establishing continued IAEA confirmation that Iran is truly meeting its NPT and safeguards obligations is absolutely essential.

Iran has defended its intransigence by claiming the information on which the IAEA relies is insufficient. The Director General's report and the follow-on technical briefing leave no question the Agency has sufficient grounds to seek clarifications from Iran about the correctness and completeness of Iran's declaration and, where needed, access to specified locations.

The Secretariat has made every possible effort, even in a very challenging time, to allow Iran to make the right choice. Instead, Iran has refused to cooperate, and we now face the unprecedented scenario of a state denying access it is obligated to provide under its Additional Protocol. We firmly believe that the Secretariat's approach in this matter is above reproach, and that Director General Grossi and his team deserve the full support of this Board.

We shared our respective views in our national capacities in March, and Iran clearly feels it can continue to dismiss our individual voices. It is time now for us to speak formally and with one voice as the Board of Governors, making clear that making clear that Iran's refusal to comply with its safeguards obligations and decision to deny access to the Agency are unacceptable. The resolution tabled by France, Germany, and the United Kingdom is a balanced and fair reaction to Iran's alarming refusal to comply with its legal obligations under its Comprehensive Safeguards Agreement and its Additional Protocol. While we firmly believe the text could be strengthened to underscore the essential nature of the IAEA's outstanding requests, the United States accepts and fully supports this resolution and urges all other Board members to do the same.

We again thank the Director General and the Safeguards Department for their continued professionalism in undertaking their responsibilities in Iran. We request that the Secretariat continue to provide the Board timely reporting on this issue. In the interest of transparency and consistent with the Board's past practice, we ask that GOV/2020/30 and GOV/2020/15 be made public.

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The United States also delivered a statement related to Iran safeguards at the September 2020 IAEA Board meeting, which is available at <https://vienna.usmission.gov/iaea-bog-us-on-npt-safeguards-in-iran/>. The U.S. statement under the agenda item relating to the Joint Comprehensive Plan of Action with Iran ("JCPOA") at the November 2020 Board meeting also addressed safeguards-related issues and is available at <https://vienna.usmission.gov/iaea-bog-u-s-on-verification-and-monitoring-in-iran-2/>.

b. *United Kingdom*

In a June 17, 2020 State Department media note, the United States announced the conclusion of an agreement with the United Kingdom on technology safeguards associated with U.S. participation in space launches from the UK (“U.S.-UK Technology Safeguards Agreement” (“TSA”)). The media note, available at <https://2017-2021.state.gov/u-s-uk-technology-safeguards-agreement/>, also states:

This Agreement, upon entry into force, establishes the technical safeguards to support U.S. space launches from the UK while ensuring the proper handling of sensitive technology consistent with our long-standing partnership and roles as founding members of the Missile Technology Control Regime (MTCR).

On December 31, 2020, the Agreement 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, (“U.S.-UK 123 agreement”) signed at Washington, May 4, 2018, entered into force. The full text of the agreement is available at <https://www.state.gov/united-kingdom-20-1231>.

c. *Bulgaria*

On October 23, 2020, the United States and Bulgaria signed a Memorandum of Understanding Concerning Strategic Civil Nuclear Cooperation (“NCMOU”). See *Digest 2019* at 667 discussing previous NCMOUs, which are non-binding bilateral political arrangements, less formal than a 123 agreement. As explained in the October 23, 2020 State Department media note announcing the Bulgaria NCMOU, which is available at <https://2017-2021.state.gov/u-s-bulgaria-sign-nuclear-cooperation-memorandum-of-understanding/>:

Nuclear Cooperation MOUs are diplomatic mechanisms that strengthen and expand strategic ties between the United States and a partner country by providing a framework for cooperation on civil nuclear issues and for engagement between experts from government, industry, national laboratories, and academic institutions.

d. *Slovenia*

On December 8, 2020, the United States and Slovenia signed an NCMOU. See State Department media note, available at <https://2017-2021.state.gov/u-s-slovenia-sign-nuclear-cooperation-memorandum-of-understanding/>.

e. Poland

In October 2020, the United States and Poland signed the Agreement between the Government of the United States of America and the Government of the Republic of Poland on Cooperation Towards the Developments of a Civil Nuclear Power Program and the Civil Nuclear Power Sector in the Republic of Poland, signed at Upper Marlboro on October 19, 2020 and at Warsaw on October 22, 2020.* The agreement is available at <https://www.state.gov/wp-content/uploads/2021/05/21-224-Poland-Nuclear-Energy.pdf>.

f. Romania

In December 2020, the United States and Romania signed the Agreement between the Government of the United States of America and the Government of Romania on Cooperation Towards the Cernavoda Nuclear Power Projects and the Civil Nuclear Power Sector in Romania, signed at Upper Marlboro on December 4, 2020 and at Bucharest on December 9, 2020.

C. ARMS CONTROL AND DISARMAMENT**1. United Nations****a. Treaty banning nuclear weapons**

On November 12, 2020, [Assistant Secretary for International Security and Nonproliferation Christopher](#) Ford addressed a conference on nuclear weapons and international law, sponsored by the New York Bar Association. His remarks are excerpted below and available at <https://2017-2021.state.gov/disarmament-law-and-morality-a-critique/index.html>.

* * * *

I'd like to offer some thoughts, first on the Treaty on the Prohibition of Nuclear Weapons—a.k.a. the “Ban Treaty”—and then on International Humanitarian Law (IHL) issues related to the possession and use of nuclear weaponry.

The “Ban” Treaty

For the many countries that directly or indirectly rely upon nuclear weapons for security, the TPNW is a simple issue: we will not join it, we already consider it to be a failed treaty, and upon its entry into force, it will not bind us. These states have also repeatedly and consistently signaled their rejection of a potential ban on nuclear weapons, and of the idea that there is any hint of *opinio juris* in the non-use of such weapons since World War II—messages which should make clear that no customary international legal norm against nuclear weapons is emerging.

* Editor's note: The agreement with Poland entered into force February 24, 2021.

These many nuclear weapons-reliant states oppose the “Ban” not because we oppose disarmament, for we do not. Rather, we oppose the TPNW because it will not achieve its ends, it approaches its objectives in a counterproductive way, it could damage other institutions critical to international peace and security, and it might even be strategically destabilizing. I’ve addressed the TPNW in a couple of public speeches—once when [on the National Security Council staff](#) and [once as Assistant Secretary of State](#)—so I won’t go over all these points now.

What I would like to do, however, is stress two points about the “Ban” here today: (1) the moral implications of the likely selectivity of the Treaty’s impact; and (2) the crisis-instability and nuclear-use incentives that might persist, or worsen, in a world without nuclear weapons.

The TPNW is the result of a campaign of civil-society activism and grass roots pressure upon national legislatures and elected representatives, pushing them toward Treaty ratification or accession. Civil society activism is a well-established and entirely legitimate way to seek social change, of course, but in this context, the problem is obvious: [nuclear weapons possessors that lack a free press and use draconian tools of political oppression to suppress disfavored political activism in civil society are highly resistant – and arguably even immune – to such pressures.](#)

To the degree that it succeeds in influencing the legislators and politicians that it targets, the “Ban” approach thus has the potential to bring about nuclear disarmament only for those free, democratic societies that actually listen to their citizens’ concerns. Surely, however, it can hardly be a moral imperative to create a world in which dictators such as Vladimir Putin, Xi Jinping, and Kim Jong Un are the only leaders left with nuclear weapons.

But things get even worse. For the sake of argument, even if the TPNW were actually to persuade all current possessors to eliminate their nuclear weapons, the world it would thus create would still not obviously be a more desirable one. A world in which all nuclear weapons had been dismantled—but in which states still knew how to build them and still confronted conflicts, tensions, and rivalries in the international security environment—might well be a world more unstable and likely to see nuclear weapon use even than today’s world.

Such a world would give every technology-holder not merely a powerful incentive to engage in a “reconstitution race” to build nuclear weapons in any major military crisis with another technology-holder, but in fact also give an incentive for that country to use such weapons preemptively if it succeeded in reconstituting before its adversary. And that’s even without factoring in the ways in which eliminating nuclear deterrence might remove major powers’ disincentives to engage in conventional war in the first place, thus making more likely the conflicts that could trigger reconstitution racing.

So assuming that the objective is not to achieve “disarmament” at any cost but rather to strengthen international peace and security and prevent human suffering as effectively as possible, the situation is more complicated than TPNW advocacy would have one believe.

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On December 15, 2020, the North Atlantic Council issued a statement as the Treaty on the Prohibition of Nuclear Weapons entered into force. That statement, in which the United State joined, is available at https://www.nato.int/cps/en/natohq/news_180087.htm and includes the following:

We do not accept any argument that the ban treaty reflects or in any way contributes to the development of customary international law. The ban treaty

will not change the legal obligations of our countries with respect to nuclear weapons. We call on our partners and all other countries to reflect realistically on the ban treaty's impact on international peace and security, including on the NPT, and join us in working to improve collective security through tangible and verifiable measures that can reduce strategic risks and enable real progress on nuclear disarmament.

b. First Committee

On October 9, 2020, Ambassador Robert Wood, the U.S. Permanent Representative to the Conference on Disarmament, U.S. Special Representative for Biological and Toxin Weapons Convention ("BWC") Issues and U.S. Commissioner for the New START Treaty's Bilateral Consultative Commission ("BCC"), delivered the U.S. statement at the UN First Committee general debate. His statement follows.

* * * *

Regarding the First Committee's mandate to address disarmament and international security issues, China is undergoing a crash nuclear weapons build-up completely unconstrained by any arms control limits, with potentially deadlier consequences for the world than COVID-19 – all the while refusing to engage in constructive dialogue. For far too long, China has pretended to be a hero of multilateralism, supposedly deserving a "free pass" in the First Committee from international scrutiny of its irresponsible and aggressive nuclear arms build-up. Mr. Chairman, those days are over.

... Russia has long used the UN and other multilateral bodies to launder its bad international behavior. This is especially discouraging, given that the Soviet Union arguably suffered more than any other nation during the Second World War, the "Great Patriotic War", which gave rise to the UN Charter and this institution in the hope of preventing States from employing brute force as their policy choice of first resort. Not so with Russia, it seems. Ask Russia's neighbors for details. In outer space, Russia has twice in recent years tested space-based weapons while at the same time claiming it seeks to prevent the weaponization of space through both legally binding arms control and through its No First Placement resolution in this body. International security is put at risk by failing to challenge Russia's serial noncompliance with its arms control obligations and commitments.

In addition to developing and deploying nuclear weapons that are unconstrained by the New START Treaty, such as exotic nuclear delivery systems and new nonstrategic nuclear weapons, which runs counter to the goal of disarmament, Russia continues to undermine the international security frameworks to which it has agreed. It is a serial violator of its arms control, disarmament, nonproliferation, and European security obligations and commitments. As the United States has documented in our annual compliance reports, Russia has failed to comply with its obligations under not only the now-defunct Intermediate-Range Nuclear Forces Treaty, but also the Treaty on Open Skies, the Treaty on Conventional Armed Forces in Europe, and the Chemical Weapons Convention, in addition to undertaking activities that raise concerns about its compliance with the nuclear weapons Threshold Test Ban Treaty.

Secretary Pompeo has condemned Russia's aggressive and destabilizing behavior in Europe, the Middle East, and around the world. This week, Germany made public the Organization for the Prohibition of Chemical Weapons Technical Assistance Visit report confirming Aleksei Navalny was poisoned by a nerve agent of the Novichok group. The United States has full confidence in the OPCW's findings, which now have independently confirmed the chemical analysis from German, French and Swedish certified laboratories. The United States and our allies and partners have agreed that the Russian Government must provide a full accounting for the poisoning of Alexei Navalny; and reiterate that any use of chemical weapons, anywhere, at any time, by anyone, under any circumstances is unacceptable and contravenes the very international norms and standards that all responsible nations seek to uphold and defend.

Further, we call on Russia, who now has requested OPCW assistance to be completely transparent regarding such events; and cooperate fully with the Organization without delay, obfuscation and misinformation from the facts. The poisoning of Alexsei Navalny was a deliberate heinous act – tragically one we have seen before with the attempted assassination of Sergey and Yulia Skripal in Salisbury, UK, in March 2018. While Russia conveniently has requested assistance; it is nearly indefensible to argue that anyone else other than Russia could have taken this action against Mr. Navalny. We condemn such actions; and call on Russia to fulfill its obligations under the Chemical Weapons Convention by completely declaring and destroying its chemical weapons program under international verification.

There can be no impunity for the use of chemical weapons. This is critical not only for the viability of our arms control and nonproliferation framework but for international security more generally.

Regarding the New START Treaty, we continue to engage bi-laterally on the way forward on an agreement that addresses all nuclear warheads. While the New START Treaty limits strategic ranged warheads and delivery systems it does nothing to address the thousands of battlefield and theatre ranged systems where Russia continues to build, develop and field nuclear weapons. This dangerous and growing stockpile must be addressed by the members of this body.

While the United States has certified Russia's compliance with New START to the U.S. Congress every year since entry into force, Russia has during this same period invested heavily in novel nuclear delivery systems and nuclear weapons that are not constrained by New START. An arms control treaty that Russia complies with, but which allows it to work to gain competitive military advantage undercuts the fundamental purpose of the agreement. Such deficiencies need to be addressed.

... the United States has made concerted efforts over the years to reduce the role of nuclear weapons in international affairs and to negotiate reductions in the number of nuclear weapons. In this regard, we commemorate the 50th anniversary of the Nuclear Non-Proliferation Treaty's entry into force and we look forward to the Review Conference, unfortunately postponed by COVID-19. Negotiated during the height of the Cold War, the NPT remains the cornerstone of international efforts to prevent the spread of nuclear weapons. The Treaty also remains essential to promoting the peaceful uses of nuclear energy for human health and development. Moreover the NPT's Article VI makes clear that each NPT Party has an obligation "to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

The United States has for some time called for a new era of arms control. Why a new era? The reason is clear: The bilateral Cold-War approach to arms control that only constrains the United States and the Russian Federation, while important, is no longer sufficient to address current geopolitical security challenges. A new era must begin with cooperation among the three largest nuclear powers on earth, to build a strong foundation for a future treaty that addresses all nuclear weapons and is rigorously verifiable. Such a treaty is essential to that goal we seek of a world without nuclear weapons.

Without such a treaty, our generation is facing the menacing prospect of a new nuclear arms race among the three largest nuclear powers in the present era, triggered by the continuing actions of China and Russia. With Beijing's overall number of nuclear warheads in its current stockpile, its ever-larger and more sophisticated delivery systems, and its plans to more than double the number of warheads it possesses in this decade, China has indeed emerged as the third largest nuclear power on earth, completely unconstrained by any nuclear arms control agreement. And similar to China, the Russian Federation is engaged in a massive expansion of its nuclear capabilities and the introduction of new exotic delivery systems that also threaten to ignite a new – trilateral – nuclear arms race.

In stark contrast, while the United States has invested in life extension programs and other sustainment activities, we have yet to take the strategic decision to match ongoing Russian and Chinese nuclear build-ups. Instead, and because we value peace, predictability, and stability, we have continued to sound the alarm about this potentially destabilizing development for international security, and come before you today to seek your assistance in addressing it. If we do not get that assistance we will have to take, unilaterally or in concert with allies, whatever steps are necessary to protect our national security interests.

...preventing a trilateral nuclear arms race among the three largest nuclear powers represents a central war and peace issue of our time. Should such a race begin, its scale and intensity could very likely dwarf the bilateral arms race of the Cold War – with potentially dangerous consequences for the peace and security of the entire world. Fortunately, such a trilateral arms race is entirely avoidable.

Every UN Member State, every member of this Committee, has a right, a responsibility, and an existential interest to be heard on this issue. Our three nations should be openly called upon to engage one another on trilateral arms control and lead the way for the eventual elimination of all nuclear weapons. The United States, the Russian Federation, and China need only to embrace a responsible course and take nuclear arms control to the next level without further delay. For its part, the United States stands ready. We must prevent a new arms race and avoid conflict, which is in the interests of all nations. An historic negotiating table is waiting, and it has three chairs around it. It is time for Washington, Moscow, and Beijing to sit down with one another, engage in good faith, and reduce nuclear risks rather than heighten them.

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2. MTCR

On July 24, 2020, the State Department announced in a press statement, available at <https://2017-2021.state.gov/trump-administration-approves-updated-unmanned-aerial-system-uas-export-policy/>, that the Trump administration updated the U.S. export policy for unmanned aerial systems ("UAS"). Excerpts follow from the press statement.

...With this revision, the U.S. government will invoke its national discretion on the implementation of the Missile Technology Control Regime (MTCR)'s 'strong presumption of denial' for transfers of Category I systems to treat a carefully selected subset of MTCR Category I UAS with maximum airspeed less than 800 kilometers per hour as Category II.

All proposed transfers affected by this change will continue to be subject to the same rigorous review criteria outlined in the United States' UAS Export Policy, the Conventional Arms Transfer Policy, and the Arms Export Control Act, as well as the specific nonproliferation criteria identified in the MTCR Guidelines. This policy change modernizes our approach to implementing our MTCR commitments to reflect current technological realities and helps our allies and partners meet their urgent national security and commercial requirements.

As discussed in *Digest 2019* at 673-76, the United States has been pressing for reform of the Missile Technology Control Regime ("MTCR"). On July 24, 2020, Dr. Ford addressed the Hudson Institute regarding the new U.S. policy on unmanned aerial systems ("UAS") under the MTCR. His remarks are excerpted below and available at <https://2017-2021.state.gov/The-New-U.S.-Policy-on-UAS-Exports-Under-the-MTCR>.

* * * *

... [W]hat I'd like today is to let you know how [U.S. efforts to reform the MTCR] ha[ve] been developing since [February 2019].

The ...1980s-era technological benchmark built into the MTCR Guidelines—which urge a “strong presumption of denial” for exports of “Category I” systems, which are defined as unmanned craft capable of carrying a payload of at least 500 kilograms to a range of at least 300 kilometers — has not held up well. Advances in unmanned aerial systems (UAS), have led to a great explosion in the capabilities and beneficial uses of UAS that technically meet this Category I definition, but which *don't* present the kind of nuclear weapon delivery threat that the MTCR was established to help forestall. As applied to many UAS, in other words, the MTCR is in danger of becoming out of date.

With respect to *actual* missiles and rockets, or the sort of high performance cruise missile that one might actually use to deliver a nuclear weapon, of course, we had—and *have*—no quarrel with the MTCR standard. Quite to the contrary: we still believe that a strong presumption of denial for transfers of such systems makes eminent sense.

The difficulty came with less capable varieties of UAS, in connection with which the presumption of denial has had the effect of largely shutting MTCR partners out of an important and growing UAS market. Since *non*-MTCR partners remain free to sell whatever they wish, however, this was not only a net loss for those countries responsible enough to join the MTCR, but also a net loss for the cause of nonproliferation — as the market for such non-threatening UAS was effectively ceded to the *least* proliferation-responsible international players, who don't worry about things such as MTCR standards.

This is why, in March 2018, the United States proposed an adjustment to MTCR controls that would carve out a subset of Category I UAS, based on their maximum airspeed, for treatment *as if* they were Category II systems — thus making these slower, less-threatening systems no longer subject to the “strong presumption of denial.” This reform proposal would have protected what needed to be protected in that important regime, while yet allowing a degree of relaxation for transfers of lower-threat systems in order to permit all of humanity to take better advantage of the myriad ways in which UAS are increasingly used in both governmental and private sector applications.

For more than two years, therefore, we have been promoting this reform initiative in MTCR fora. We have also repeatedly made technical changes and various other adjustments to our reform proposal in response to issues raised and ideas suggested by other MTCR partners.

Nevertheless, the MTCR is a consensus-based organization, in which even a single country can hold things up indefinitely. We are pleased that many of our partners *have* supported our reform proposal, but thanks to foot-dragging by some, it is not yet possible to amend the MTCR controls by consensus.

We will still keep promoting this reform proposal, for we still feel it represents the right way to update the MTCR regime in the face of technological change and thus save it from obsolescence, while yet preserving what is most important in it and protecting nonproliferation equities.

... While we’ll still keep pushing MTCR reform, therefore, we are now announcing a modest adjustment to U.S. national policy as to when the “strong presumption of denial” can be overcome in exporting slower, and thus less threatening, UAS.

The key to the new U.S. policy lies in remembering that a presumption can sometimes be rebutted. A “presumption of denial” is *not* a prohibition, and it has always been permissible to make Category I transfers *when there is a compelling reason to overcome the presumption* and such a step is well justified in terms of the nonproliferation factors specified in the MTCR Guidelines.

We are all familiar with this idea in other contexts; presumptions are used in lots of policy areas. ...

“Rebuttability,” if you will, is thus inherent in the concept of a presumption. ...

...And so, with our new policy on Category I UAS exports, the United States is now setting forth a careful and balanced approach, *within the MTCR Guidelines*, that for the first time offers a clear explication of certain circumstances in which the “strong presumption of denial” can be overcome.

This new U.S. policy largely tracks the basic structure of the reform initiative we proposed for the MTCR a couple of years ago, except that we are implementing the MTCR’s “strong presumption of denial” within the national discretion permitted us in the MTCR Guidelines.

Under this new policy, the “strong presumption of denial” for MTCR Category I UAS transfers will be overcome for a subset of unmanned aerial systems with a maximum airspeed of less than 800 kilometers per hour. ...

Our new approach will merely mean that we will deal with lower-threat, lower-speed UAS more flexibly, as if they were Category II systems.

I should also emphasize that this new policy does *not* mean that we will subject transfers of these slower, lower-threat systems to a strong presumption of *approval*; all we are doing is

exempting them from the strong presumption of *denial*. There will be no presumption of approval, and all proposals will be evaluated on their own merits.

Nothing will change, moreover, in the strict U.S. standards that today go into deciding whether or not a transfer should occur. We will continue to approach each transfer on a case-by-case basis as a whole-of-government decision that takes into account all relevant factors and policies, including U.S. national security, nonproliferation, and foreign policy objectives, as well as the recipient country's capability and willingness to effectively and responsibly use and safeguard U.S.-origin technology.

We will continue our extensive assessments of the risk of controlled items falling into the hands of unauthorized end-users, irresponsible actors, state adversaries, and terrorists. We will continue to evaluate all transfers against the MTCR Guidelines, and to require appropriate end-use and end-user certifications and end-use monitoring. All military UAS transfers will continue to be subject to State Department-led assessments under the Conventional Arms Transfer Policy, as well as to Defense Department-led assessments of technology security, as applicable. And all *civil* UAS exports will continue to be subject to the Export Administration Regulations.

The United States will continue to abide by its MTCR commitments, including those related to pre-notifying Category I transfers. We will also continue to promote responsible standards of behavior in UAS export and use, such as in the "Joint Declaration for the Export and Subsequent Use of Armed or Strike-Enabled [Unmanned Aerial Vehicles]" and we'll seek to develop further international standards for the export and use of armed UAS.

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3. New START Treaty

No sessions of the Bilateral Consultative Commission under the New START Treaty were convened in 2020, due to the COVID-19 pandemic. Further information on the Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, also known as the New START Treaty, is available at <https://www.state.gov/new-start/>.

4. Open Skies Treaty

On May 21, 2020, the State Department announced, in a press statement from Secretary Pompeo, available at <https://2017-2021.state.gov/on-the-treaty-on-open-skies/index.html>, that the United States would submit notice of its decision to withdraw from the Treaty on Open Skies the next day. The press statement is excerpted below. See Chapter 4 for the notification to the treaty depositaries and other States Parties of the U.S. decision to withdraw.

* * * *

Tomorrow, the United States will submit notice of its decision to withdraw from the Treaty on Open Skies to the Treaty Depositaries and to all other States Parties to the Treaty. Effective six

months from tomorrow, the United States will no longer be a party to the Treaty. We may, however, reconsider our withdrawal should Russia return to full compliance with the Treaty.

...[T]he United States must take a clear-eyed look at any agreement through the prism of today's reality and assess whether such agreement remains in the U.S. interest. After careful consideration, including input from Allies and key partners, it has become abundantly clear that it is no longer in America's interest to remain a party to the Treaty on Open Skies.

At its core, the Treaty was designed to provide all signatories an increased level of transparency and mutual understanding and cooperation, regardless of their size. Russia's implementation and violation of Open Skies, however, has undermined this central confidence-building function of the Treaty—and has, in fact, fueled distrust and threats to our national security—making continued U.S. participation untenable.

While the United States along with our Allies and partners that are States Parties to the Treaty have lived up to our commitments and obligations under the Treaty, Russia has flagrantly and continuously violated the Treaty in various ways for years. This is not a story exclusive to just the Treaty on Open Skies, unfortunately, for Russia has been a serial violator of many of its arms control obligations and commitments. Despite the Open Skies Treaty's aspiration to build confidence and trust by demonstrating through unrestricted overflights that no party has anything to hide, Russia has consistently acted as if it were free to turn its obligations off and on at will, unlawfully denying or restricting Open Skies observation flights whenever it desires.

Russia has refused access to observation flights within a 10-kilometer corridor along its border with the Russian-occupied Georgian regions of Abkhazia and South Ossetia, thereby attempting to advance false Russian claims that these occupied territories are independent states. Russia's designation of an Open Skies refueling airfield in Crimea, Ukraine, is similarly an attempt to advance its claim of purported annexation of the peninsula, which the United States does not and will never accept. Russia has also illegally placed a restriction on flight distance over Kaliningrad, despite the fact that this enclave has become the location of a significant military build-up that Russian officials have suggested includes short-range nuclear-tipped missiles targeting NATO. In 2019, Russia unjustifiably denied a shared United States and Canada observation flight over a large Russian military exercise.

These problems, moreover, follow on years of *different* Russian violations of the Treaty at various points since the Treaty entered into force, such as Russia's violation, up until 2017, of improperly declaring *force majeure* to impose airspace restrictions related to VIP ground movements. These periodic and shifting violations highlight Russia's willingness for many years now, to restrict or deny overflights whenever it desires. This strikes at the heart of the Treaty's confidence-building purpose.

The problems raised by Russia's selective implementation of Open Skies, moreover, go beyond just violating the Treaty's provisions themselves. Its approach to Treaty implementation has fatally undermined the very intent of the Treaty as a confidence- and trust-building measure, for far from allowing Open Skies to contribute—as it was intended to do—to building regional trust and goodwill, Moscow has increasingly used Open Skies as a tool to facilitate military coercion. Moscow appears to use Open Skies imagery in support of an aggressive new Russian doctrine of targeting critical infrastructure in the United States and Europe with precision-guided conventional munitions. Rather than using the Open Skies Treaty as a mechanism for improving trust and confidence through military transparency, Russia has, therefore, *weaponized* the Treaty by making it into a tool of intimidation and threat.

To those who suggest the United States respond with reciprocal steps of our own analogous to Russia's own provocative actions and violations, we say: doing that would only further undermine the core purpose of the Treaty, and create further tension and distrust between the United States and Russia. We will not contribute to further weaponizing and poisoning with distrust a Treaty that was intended to build confidence. The Open Skies Treaty was meant to contribute to international security, but it has been twisted and perverted in its implementation and now serves Russian purposes inimical to that security.

We understand that many of our Allies and partners in Europe still find value in the Treaty, and we are grateful for the thoughtful feedback they have offered us during the course of our review of these questions. If not for the value they place on the OST, we would likely have exited long ago. We are not willing, however, to perpetuate the Treaty's current problems of Russian-engendered threat and distrust simply in order to maintain an empty façade of cooperation with Moscow.

Make no mistake: Russia alone bears responsibility for these developments, and for the continued erosion of the arms control architecture. We remain committed to effective arms control that advances U.S., Ally, and partner security, that is verifiable and enforceable, and that includes partners that comply responsibly with their obligations. But we cannot remain in arms control agreements that are violated by the other side, and that are actively being used not to support but rather to undermine international peace and security. As noted, we may be willing to reconsider this decision if Russia demonstrates a return to full compliance with this confidence-building Treaty, but without such a change of course from the Kremlin, our path will lead to withdrawal in six months' time.

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On May 21, 2020, Special Presidential Envoy for Arms Control Marshall Billingslea and Assistant Secretary Ford gave a telephonic briefing addressing the withdrawal. The transcript of their briefing is available at <https://2017-2021.state.gov/special-presidential-envoy-for-arms-control-marshall-billingslea-and-assistant-secretary-for-international-security-and-nonproliferation-dr-christopher-a-ford//index.html>.

On July 6, 2020, at the Open Skies Conference of the States Parties in Vienna, Austria, virtual remarks were given by Thomas DiNanno, Senior Bureau Official and Deputy Assistant Secretary for Defense Policy, Emerging Threats, and Outreach, Bureau of Arms Control, Verification, and Compliance. Mr. DiNanno's remarks are available at <https://2017-2021.state.gov/united-states-withdrawal-from-the-treaty-on-open-skies/index.html>.

On November 22, 2020, the State Department issued a press statement announcing that U.S. withdrawal had taken effect. The November press statement is available at <https://2017-2021.state.gov/treaty-on-open-skies//index.html>, and states:

On May 22, 2020, the United States exercised its right pursuant to paragraph 2 of Article XV of the Treaty on Open Skies by providing notice to the Treaty Depositaries and to all States Parties of its decision to withdraw from the Treaty,

effective six months from the notification date. Six months having elapsed, the U.S. withdrawal took effect on November 22, 2020, and the United States is no longer a State Party to the Treaty on Open Skies.

D. CHEMICAL AND BIOLOGICAL WEAPONS

1. Chemical Weapons in Syria

a. *OPCW Investigation and Identification Team report on incidents in Ltamenah*

On April 8, 2020, in a press statement by Secretary Pompeo, the United States announced its agreement with report of the Organization for the Prohibition of Chemical Weapons (“OPCW”) Investigation and Identification Team (“IIT”) attributing three instances of chemical weapons use to the Assad regime. The incidents involve the aerial bombs containing sarin dropped by the Syrian Arab Air Force in Ltamenah on March 24 and 30, 2017, and a cylinder containing chlorine dropped on the Ltamenah hospital on March 25, 2017. The press statement is excerpted below and available at <https://2017-2021.state.gov/report-of-the-opcw-investigation-and-identification-team-regarding-incidents-in-ltamenah-the-syrian-arab-republic-on-24-25-and-30-march-2017/>.

Despite Syria’s accession to the Chemical Weapons Convention in 2013, the Assad regime has repeatedly used chemical weapons attacks every year since then to retain its grip on power. The OPCW-UN Joint Investigative Mechanism previously confirmed that the Assad regime used chemical weapons on multiple occasions, and now, the IIT report is the latest in a large and growing body of evidence that the Assad regime uses chemical weapons attacks in Syria as part of a deliberate campaign of violence against the Syrian people.

The United States shares the OPCW’s conclusions and assesses that the Syrian regime retains sufficient chemicals—specifically sarin and chlorine—and expertise from its traditional chemical weapons (CW) program to use sarin, to produce and deploy chlorine munitions, and to develop new CW. The Syrian military also has a variety of chemical-capable munitions—including grenades, aerial bombs, and improvised munitions—that it can use with little to no warning. The United States condemns the use of chemical weapons as reported by the OPCW IIT and demands that the Syrian Arab Republic immediately cease all development, stockpiling, and use of chemical weapons.

b. *Accountability at the UN*

On June 2, 2020, U.S. Permanent Representative to the UN Ambassador Kelly Craft

delivered remarks at the UN Security Council briefing on Syria's use of chemical weapons. Ambassador Craft's remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-syria-chemical-weapons-via-vtc/>.

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Last month, when we gathered to discuss this issue, we were briefed by OPCW Director-General Fernando Arias and IIT Coordinator Santiago Onate. They provided the Council with an important overview of the IIT's first report, which explicitly attributed responsibility to the Assad regime for three chemical weapons attacks in Syria in March 2017. They did not come here to politicize the findings of the report, nor to take sides. They were here to provide the facts, and the facts are clear: the Assad regime dropped sarin and chlorine in Ltamenah, Syria, three times during that month, including once on a hospital.

The presentation from the briefers and the full report received by this Council give a detailed account of these events. Crucially, they reveal the integrity and impartiality of the OPCW in its efforts to get at the truth of how these attacks were carried out, and they rule out other possible explanations. The Council has what it needs to advance the discussion on addressing Syria's continued use of chemical weapons, and to hold the Assad regime to account.

Unfortunately, Russia and China—in an act of political theater—chose not to participate in last month's meeting. But they didn't just refrain from participating; they publicly attacked the credibility of the IIT in an attempt to undermine the technical and professional work of the OPCW. This choice made clear that neither country has a credible way to question the facts that are outlined in the report.

I've said it before, but today I'll say it again—no amount of disinformation from Assad or his enablers can hide or obstruct the facts that the Assad regime used chemical weapons in March 2017, and that it will revert to the use of chemical weapons if it believes these weapons can serve its strategic objectives. It is time for Russia to end its efforts to shield the Assad regime from accountability.

We call on the Council to speak with one voice to condemn the use of chemical weapons and work towards ensuring the Assad regime is held to account. Such continued defiance of Syria's obligations under Resolution 2118 cannot be ignored, as the use of chemical weapons by any state presents an unacceptable security threat to all states. The Members of this Council must not remain silent. The United States certainly will not.

This month, we begin the rollout of a number of accountability actions contained in the Caesar Syria Civilian Protection Act of 2019, which passed with significant bipartisan support in the U.S. Congress. The law gives the United States strong new sanctions authorities to disrupt transactions that benefit the Assad regime and support the regime's brutal atrocities, like those presented in the IIT report. We intend to use those authorities as part of our broader effort to hold the regime and its enablers accountable.

We ask other members of the Council to join us in the effort to deny the Assad regime the financial resources it uses to fuel its campaigns of violence and of destruction—campaigns that have resulted in hundreds of thousands of civilian deaths.

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c. *OPCW Executive Council decision condemning Syria's use of chemical weapons*

On July 9, 2020, the United States applauded the OPCW Executive Council's adoption of a decision condemning Syria's use of chemical weapons in a State Department media note, available at <https://2017-2021.state.gov/united-states-applauds-organization-for-the-prohibition-of-chemical-weapons-condemnation-of-syrian-regime-use-of-chemical-weapons/>. The media note further states:

Today's decision sets out clear measures for the Syrian government to take, among them: the declaration of facilities where chemical weapons used in the Ltamenah attacks were developed, produced, stockpiled, and stored for delivery; the declaration of its remaining chemical weapons stockpile and production facilities; and the resolution of the outstanding issues with its initial declaration. The Syrian regime's failure to fulfill these measures will result in a recommendation to the OPCW's full body, the Conference of States Parties, to take further action.

d. *Anniversary of Attack in Ghouta*

On August 21, 2020, the State Department issued a press statement on the anniversary of the Assad regime's chemical weapons attack in Ghouta. The press statement is available at <https://2017-2021.state.gov/anniversary-of-assads-brutal-chemical-weapons-attack-on-ghouta/> and excerpted below.

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...In the early morning hours of August 21, 2013, in the Damascus suburbs of Ghouta, the Assad regime killed more than 1,400 Syrians, many of them children, with the chemical agent sarin.

The United States estimates—conservatively—that the Assad regime has used chemical weapons on its own people at least 50 times since the conflict began. On this day we remember and honor all of the victims of Assad's chemical weapons attacks.

The United States remains determined to drive chemical weapons use to zero and hold the Assad regime accountable for the Ghouta attacks and the many other heinous acts it has perpetrated against the Syrian people, some of which rise to the level of war crimes and crimes against humanity.

The United States and other responsible nations took unprecedented action last month at the Organization for the Prohibition of Chemical Weapons (OPCW) by adopting a decision condemning Syria for its possession and use of chemical weapons and setting out measures Syria must take. Any failure by Syria to fulfill these measures by the deadline set will result in a

recommendation to the OPCW's full body, the Conference of States Parties, to take further action.

In addition, various authorities including Executive Order 13894 and the Caesar Syria Civilian Protection Act allow us to level travel restrictions and financial sanctions against those who enable the Assad regime to commit its litany of atrocities, including its use of chemical weapons. Yesterday, for example, we announced sanctions against six more of Assad's financial, political, and military advisors. These are just some of the steps the United States is taking to promote accountability for the Assad regime and its enablers.

On this sobering day, we urge the international community to advance efforts to hold the Assad regime accountable for its heinous acts and to rid the world of the scourge of chemical weapons once and for all.

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e. September 10 Security Council briefing

On September 10, 2020, Acting Deputy Permanent Representative to the UN Cherith Norman Chalet addressed the UN Security Council at a briefing on Syria's use of chemical weapons. Her remarks are excerpted below and available at <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-syria-chemical-weapons-via-vtc-2/>.

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In 2013, this Council adopted Resolution 2118 welcoming the Framework for Elimination of Syrian Chemical Weapons. That Framework expressed the U.S. and Russian determination to "ensure the destruction of the Syrian chemical weapons program in the soonest and safest manner." Further, the Framework set the first half of 2014 as the target date for completing elimination of all chemical weapons material and equipment.

Unfortunately, though, since the adoption of Resolution 2118, the Assad regime has used chemical weapons routinely and indiscriminately to instill fear and force any opposing populations to its knees. The regime's use of chemical weapons is well documented and confirmed by the former OPCW-UN Joint Investigative Mechanism and most recently the OPCW's Investigation and Identification Team. The regime's failure to comply with its international obligations related to the use of chemical weapons—including those obligations it undertook when it voluntarily became a party to the Chemical Weapons Convention and those obligations which are binding on Syria under Resolution 2118—poses a direct threat to the Syrian people and the prospect for a political resolution to the conflict in line with UN Security Resolution 2254.

As we have stated previously, the United States expresses its unequivocal condemnation of the use of chemical weapons, in Syria or anywhere else. This Council must act to enforce Resolution 2118—and step up to reinforce the norm against the use of chemical weapons to ensure that those who have used them are held to account.

This is the third opportunity for this Council to discuss the tragic and callous use of chemical weapons by the Assad regime since the OPCW adopted its decision to hold the regime accountable based on the damning findings of the Investigation and Identification Team.

We will continue to shine a light on these horrible events as the conflict in Syria has brought immeasurable suffering to the Syrian people. Over the past ten years, the Syrian people have experienced horrific atrocities, some of which rise to the level of war crimes and crimes against humanity, including the repeated use of chemical weapons. The United States condemns in the strongest possible terms the use of these weapons of mass destruction. This Council cannot tolerate the use of such weapons, and we must ensure that those responsible face serious consequences.

The Assad regime's failure to comply with its international obligations related to the use of chemical weapons poses a direct threat to the international community. Consistent with the OPCW's July decision, the Assad regime must cease its use of chemical weapons and fully cooperate with the OPCW, including its Investigation and Identification Team.

Let's ensure everyone is reminded of the seriousness in what we are discussing today. On August 21, 2013, the Syrian regime launched a horrific chemical attack with the nerve agent sarin on the opposition-controlled suburb of Ghouta in Damascus—leaving more than 1,400 Syrians dead, many of them children. Last month marked the seventh anniversary of this attack, and on that date the world remembered the many lives lost and the need to continue to stand against such cruel disregard for the international norms against the use of chemicals as weapons.

But again, let's remember that these are real people we're talking about. Real women, men, and children. Do you know what Sarin does to a human body? An article in the Atlantic from 2013 laid it out clearly. "The nose runs, the eyes cry, the mouth drools and vomits, and bowels and bladder evacuate themselves... Since sarin has no taste or smell, the person may very well have no idea what's going on. Their chest tightens, vision blurs. If the exposure was great enough, that can progress to convulsions, paralysis, and death within 1 to 10 minutes." A painful, quick, and undignified death. That's what Assad submitted his own people to in 2013.

Since 2013, the Syrian regime has continued to demonstrate blatant disregard for its international obligations by repeatedly carrying out chemical weapons attacks. The OPCW Investigation and Identification Team report, issued on April 8 of this year, concluded that the Syrian Arab Air Force was responsible for carrying out three chemical weapons attacks in late March 2017, two sarin attacks and one chlorine attack, affecting over 100 people. The attacks took place just days before the attack on the nearby Khan Shaykhun in April 2017 that killed dozens of people. The OPCW-UN Joint Investigative Mechanism found the Assad regime was also responsible for the Khan Shaykhun attack.

The United States remains committed to a sustained campaign of economic and political pressure to deny the Assad regime the revenue and support it uses to bypass a UN-facilitated political settlement to the conflict by committing mass atrocities against the Syrian people. We reject the Assad regime's efforts to use such atrocities to silence its people's calls for reform and change. Last week, we continued our sanctions campaign against Assad's corrupt and brutal regime. These new sanctions memorialize the victims of Assad's chemical weapons attack on Ghouta seven years ago. And we continue to reject any false claim that U.S. sanctions adversely affect humanitarian efforts. We will not stop pressing for accountability and an enduring political solution to the Syrian conflict as called for in Resolution 2254.

Further, we will not stop pressing for Iran to leave Syria. Iran supports the Assad regime as the regime continues to devastate and destroy the lives of hundreds of thousands of its own

citizens. Syria is one of many countries, like Lebanon, Yemen, and Saudi Arabia, where Iran sows chaos and devastation through its proliferation of weapons. Iran's destabilizing behavior is one of the reasons why we have chosen to trigger the re-imposition of UN sanctions on Iran. We call on our fellow Security Council members to join us in ensuring that Iran does not have access to even more potent weapons to cause even greater destruction.

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2. The Poisoning of Alexei Navalny

a. U.S. communication with Russian Ambassador

On September 4, 2020, Deputy Secretary of State Stephen Biegun met with Russian Ambassador Anatoliy Antonov in Washington, D.C. to express U.S. concern about the poisoning of Russian opposition leader Aleksey Navalny by a chemical nerve agent from the "Novichok" group. See State Department Office of the Spokesperson readout, available at <https://2017-2021.state.gov/deputy-secretary-bieguns-meeting-with-russian-ambassador-antonov/index.html>. As summarized in the readout:

[Deputy Secretary Biegun] noted further that the use of this chemical weapon by Russia would be a clear violation of its obligations under the Chemical Weapons Convention. The Deputy Secretary urged Russia to cooperate fully with the international community's investigation into this attack.

b. U.S. statement at the UN

In her September 10, 2020 remarks at the Security Council, excerpted *supra*, Ambassador Chalet also addressed the Navalny poisoning. The portion of her remarks addressing Russia is excerpted below (the remarks in full are available at <https://usun.usmission.gov/remarks-at-a-un-security-council-briefing-on-syria-chemical-weapons-via-vtc-2/>).

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Mr. President, I also want to say that we are deeply troubled by the findings released by the German government on September 2. Alexei Navalny's poisoning by a chemical weapon is completely reprehensible, and we condemn this action in the strongest possible terms. Any use of chemical weapons, anywhere, anytime, by anybody, under any circumstances whatsoever, is unacceptable and contravenes the international norms prohibiting the use of such weapons.

Russia has used chemical nerve agents from the "Novichok" group in the past. The Russian people have a right to express their views without fear of retribution of any kind. They should certainly not be subjected to chemical agents. Wherever the evidence leads, we will work

with allies and the international community to hold perpetrators accountable, including through restricting funds for malign activities.

We call on Russia to be fully transparent and to bring those responsible to justice. We urge Russia to cooperate fully with the international community's investigation into this latest attack. Those responsible—both those who committed this attack and those who ordered it—must be held accountable.

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c. G7 Foreign Ministers' Statement

The foreign ministers of Canada, France, Germany, Italy, Japan, the United Kingdom and the United States of America and the High Representative of the European Union (the G7) issued a joint statement on September 8, 2020 regarding the poisoning of Alexei Navalny. The G7 statement follows and is available as a State Department media note, at <https://2017-2021.state.gov/g7-foreign-ministers-statement-on-the-poisoning-of-alexei-navalny/>.

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We, the G7 foreign ministers of Canada, France, Germany, Italy, Japan, the United Kingdom and the United States of America and the High Representative of the European Union, are united in condemning, in the strongest possible terms, the confirmed poisoning of Alexei Navalny.

Germany has briefed G7 partners on the fact that clinical and toxicological findings by German medical experts and a specialized laboratory of the German armed forces have determined that Mr. Navalny is the victim of an attack with a chemical nerve-agent of the “Novichok” group, a substance developed by Russia. Mr. Navalny is in intensive care in a Berlin hospital and remains in a serious condition. Our heartfelt thoughts are with his family, and we hope for his full and speedy recovery.

Any use of chemical weapons, anywhere, anytime, by anybody, under any circumstances whatsoever, is unacceptable and contravenes the international norms prohibiting the use of such weapons. We, the G7 foreign ministers, call on Russia to urgently and fully establish transparency on who is responsible for this abhorrent poisoning attack and, bearing in mind Russia's commitments under the Chemical Weapons Convention, to bring the perpetrators to justice.

This attack against opposition leader Navalny is another grave blow against democracy and political plurality in Russia. It constitutes a serious threat to those men and women engaged in defending the political and civil freedoms that Russia herself has committed to guarantee. We call on Russia to fulfill its commitments under the International Covenant on Civil and Political Rights and to guarantee these rights, including the right to freedom of expression, to its citizens.

We will continue to monitor closely how Russia responds to international calls for an explanation of the hideous poisoning of Mr. Navalny. We remain strongly committed to our support for democracy, the rule of law and human rights in Russia and to bolster our support to the Russian civil society.

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Cross References

Withdrawal from Open Skies Treaty, **Ch. 4.B.3**

Weapons in Outer Space, **Ch. 12.B.4**

Iran sanctions, **Ch. 16.A.1**

DPRK sanctions, **Ch. 16.A.6**

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

Nonproliferation sanctions, **Ch. 16.A.9**

Conventional weapons, **Ch. 18.B**